

UK EMPLOYERS' LIABILITY - A STANDARD DOMESTIC COVER? MAYBE NOT...!

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Contents of today's talk

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- Transfer of Undertakings (Protection of Employment) Regulations (TUPE)
- Sole traders' exemption
- Conflict of interest clause



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...from where we left in September 2020: RTA 1988 or ELCI 1969?

Don't throw employees under the bus (Neil Beresford – Clyde & Co)

The Employers' Liability (Compulsory Insurance) Regulations 1998, SCHEDULE 2, Paragraph 14

- Any employer to the extent he is required to insure and maintain insurance by subsection (1) of section 1 of the 1969 Act against liability for bodily injury sustained by his employee when the employee is—
 - (i)carried in or upon a vehicle; or
 - (ii)entering or getting on to, or alighting from, a vehicle, in the circumstances specified in that subsection and where that bodily injury is caused by or, arises out of, the use by the employer of a vehicle on a road; and the expression “road”, “use” and “vehicle” have the same meanings as in Part VI of the Road Traffic Act 1988(1).



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Overseas in....Northern Ireland

Northern Ireland

The 1999 Regulations in Northern Ireland

- Any employer to the extent that he is required by paragraph (1) of Article 5 of the 1972 Order to insure and maintain insurance against liability for personal injury suffered by his employee when the employee is—
 - (i)carried in or upon a motor vehicle; or
 - (ii)entering or getting on to, or alighting from, a motor vehicle,

in the circumstances specified in that paragraph and where that **personal injury** is caused by, or arises out of, the use by the employer of a **motor vehicle** on a road; and the expressions “road” and “motor vehicle” have the same meanings as in Part I of the Road Traffic (Northern Ireland) Order 1995(10).



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Geographical Scope of ELCI 1969 and UK EL policies

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- ELCI 1969 applies to injury sustained in Great Britain; HSE has no jurisdiction outside of GB. Separate statutory instrument applies to Northern Ireland.
- No duty to insure injury sustained outside of United Kingdom
- UK EL policies extend cover to trips and short assignments overseas
- If cover is extended outside of UK, how does the motor exemption apply?
- “The green card is an international certificate of insurance proving visiting motorists have the minimum compulsory insurance cover required by the law of the country visited.”
- If UK registered and insured vehicle is driven in EEA cover provided cannot be narrower than the statutory requirements in the relevant jurisdiction, expanded to cover for example a Vnuk claim, hence the restrictions of RTA 1988 do not apply overseas, and the exemption 14(i) could apply also outside a road or public space.



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Geographical Scope of ELCI 1969 and UK EL policies

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- What if the opposite happens, i.e. a French insured vehicle is driven in the UK? If the French cover is broader than RTA 1988, e.g. also beyond a road or public space, the 14 (i) exclusion finds a difficult application: the claim from the employee could be insured by the French motor insurer also on private land, with the benefit of the French MIB if necessary, but is this the intention of the 1998 Regs Schedule 2 – 14(i), or is it to keep the matter within either RTA 1988 and ELCI 1969?
- French MIB is a safer source of indemnity for the Employee than the ELCI 1969
- What if cover is provided in UK under a UK motor policy with broader cover than required under RTA 1988, e.g. on private land?
 - Can the UK EL exemptions still apply, although the UK motor cover is not subject to the safeguards of RTA 1988?



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Geographical Scope of ELCI 1969 and UK EL policies

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Drafting example:

"The Company will not indemnify the Insured against liability for bodily injury sustained by his employee

1) when the employee is:

- a) carried in or upon a vehicle; or
- b) entering or getting on to, or alighting from, a vehicle,

and the bodily injury is caused by or, arises out of, the use by the employer of a vehicle, which is subject to the insurance requirements of the RTA 1988 and is registered under the Vehicle Excise and Registration Act 1994, on a road in the UK. The expression "road", "use" and "vehicle" have the same meanings as in part VI of the Road Traffic Act 1988; or

2) when the bodily injury arises out of the use of a vehicle outside the UK, provided that:

- a) such vehicle is not registered under the Vehicle Excise and Registration Act 1994 and
- b) the employer is legally required to insure such vehicle other than under the RTA 1988.



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Geographical Scope of ELCI 1969 and UK EL policies

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How safe is the system at international level?

Next steps

- Liaise with Motor Insurers
- Consider implications on the ABI Agreement as per Lister v Romford Ice & Cold Storage Company Ltd



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Foreign firm's employees in the UK

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- Foreign firm sends employees (not ordinarily resident in UK) to the UK for installation works. Foreign company is not registered in the UK. The works extend over the 14-day period, after which UK EL is required.
- Health and Safety Executive guidance on EL:
 - “employees [that] are normally based abroad but spend more than 14 days continuously in Great Britain, or more than seven days on an offshore installation, under the law in Great Britain you will need employers' liability insurance for them”. It does not clarify if these are working days.
- Employers' Liability (Compulsory Insurance) Act 1969 states that UK EL is required for “every employer carrying on any business in Great Britain”, however, “except as otherwise provided by regulations, an employer not having a place of business in Great Britain shall be deemed not to carry on business there”.



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Foreign firm's employees in the UK

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- Foreign company could be deemed to have a place of business in UK, as the site at which their employees are working becomes such.
- Colinvaux and Merkin's Insurance Contract Law:
 - “The EL(CI)A 1969 s.1(1) restricts compulsory insurance to every employer “carrying on any business in Great Britain”. The word “business” includes a trade or profession and any activity carried on by a body of persons whether incorporated or unincorporated, and an employer who does not have a place of business in Great Britain is deemed not to carry on business in Great Britain.”
- Modern Slavery Act:
 - “...whether such bodies can properly be regarded as carrying on a business or part of a business ‘in any part of the United Kingdom’ will again be answered by applying a common sense approach.”
 - “...we anticipate that applying a common sense approach will mean that organisations that do not have a demonstrable business presence in the United Kingdom will not be caught by the provision. Likewise, having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act completely independently of its parent or other group companies.”



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Foreign firm's employees in the UK

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Practical considerations:

- How can a foreign firm purchase UK EL insurance?
- How can employees bring a claim in the UK when they are neither employed nor resident in the UK and the firm is not registered in the UK?
- Quantum: as both parties would be foreign nationals, any award would be based on that foreign jurisdiction costs of living etc.
- What if the claim is brought against the employer in a foreign jurisdiction? What if they are also insured under their domestic EL/WCA? Contribution or subrogation? Subrogation of foreign WCA/Social Security against UK EL insured's policy might be complex.
- If the EL insurers are of the same Group, both in UK and overseas, pragmatic solution is to issue UK EL policy with "other insurance" clause making the foreign policy as primary if legally permissible.
- Taxes: EL exposure in the UK subject to UK IPT if exposure is in the UK, same as Public Liability (Brexit implications?)
- Need to be registered with ELTO, although exemption for ERN number applies. Meso Levy still due. If Foreign EL policy is triggered instead of UK EL, might imply UK EL is not applicable, hence no IPT/ELTO/Meso Levy.



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Distress claims under UK EL: DPA 2018 and GDPR

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- Is distress as per DPA 2018 / GDPR covered under UK EL ?
- English Courts: actionable psychiatric injury when set of psychological symptoms constitute a recognised diagnosis, Chadwick v British Railways Board [1967] 1 WLR 912;
- Two medical classification/diagnostic tools: DSM-IV-TR: Diagnostic and Statistical Manual of Mental Disorders, of the American Psychiatric Association or the International Classification of Diseases (ICD10) of the World Health Organization.
- Distress under the GDPR/DPA is not a recognised psychiatric disorder for the purposes of bodily injury: Distress goes beyond what the English courts would recognise as an injury for which a recovery is possible in law in tort. Distress losses arising from a data protection breach are not recoverable in tort, but are recoverable under the Data Protection Act 2018 (DPA) and General Data Protection Regulation (GDPR).



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Distress claims under UK EL: DPA 2018 and GDPR

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- Some UK EL policies include a DPA 2018/GDPR Extension. In other cases, cover is granted under the Public liability policy only, some excluding employees, some not.
- DPA 2018/GDPR distress claims covered under a UK EL Policies, rationale and challenges:
 - Change in law in future in respect of ELCI 1969 bodily injury definition, might expose UK EL full limit: extension with sublimit (e.g. GBP 1,000,000) must be coupled first with provision to limit it to statutory limit of GBP 5 M, then reimbursement agreement for the difference between the GBP 5 M statutory limit and the sublimit.
 - A very convolute structure, so often preferred to provide sub-limited cover under Public Liability policy, in the same way as property damages of employees are covered under Public Liability.



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Distress claims under UK EL: DPA 2018 and GDPR

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- Other sources of liability for distress-type of claims (not covered under PL/EL):
 - Equality Act. S.119(4): “an award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).” There is no duty in common law not to discriminate against protected characteristics (hence the provisions in statute).
 - Distress in common law recoverable in contract? enjoyment of peace of mind is a primary object of the contract: Jarvis v Swan Tours (holidays); Ruxley v Forsyth (property); Shaw v Leigh Day (solicitors).



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Contingent and excess Employers' Liability: the Extension

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- An Introductory Guide to Contingent Employers' Liability Insurance – IUA Paper – 6 January 2021
- Cover provided under Public Liability policies (not UK EL) in respect of foreign subsidiaries and their employees.
- *“EL cover as it is known in the UK is not universally provided in the rest of the world; indeed very few countries have similar regimes in place.”*
- *“Any employer (albeit there are some exceptions) carrying on business in the UK is subject to UK EL law. Even if that employee has a contract of employment in another country, UK law will still apply if said employee is in the UK for more than 14 days (7 days if working on an offshore installation).”*



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Contingent Employers' Liability: the Extension

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- Problematic UK EL exclusions:
 - “Liability to Employees not normally (or “ordinarily”, as per Article 1(2) (a) of the 1998 EL Regulations) resident in Great Britain is excluded under the extension.” It does not excluded employees on offshore installation for a more than 7 days or those present in Great Britain in the course of employment for more than 14 days.
 - Exclusion of coverage in respect of compulsory insurance under ELCI Act 1969, can be interpreted as providing cover in excess of the statutory limit of GBP 5,000,000.
 - RESULT: Excess UK EL cover is provided.



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Re T & N Ltd (n. 4) [2006] EWHC 1447 (Ch)

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Re T & N Ltd (n. 4) [2006] EWHC 1447 (Ch): Interpretation of the terms „Insure, and maintain insurance” and possible agreement between (insolvent) employer and insurer to limit the scope of employer’s liability insurance after the expiry of the insurance policy period.



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Nuclear exclusion

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The Employers' Liability (Compulsory Insurance) Regulations 1998 - SCHEDULE 2
EMPLOYERS EXEMPTED FROM INSURANCE

8. Any licensee within the meaning of the Nuclear Installations Act 1965(14), in respect of any liability to pay compensation under that Act to any of his employees in respect of a breach of duty imposed on him by virtue of section 7 of that Act(15).

Nuclear Exclusion

We will not cover any claims caused by or arising from any type of nuclear radiation, nuclear material, nuclear waste, nuclear reaction or radioactive contamination in respect of Radioactive contamination



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Nuclear exclusion

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Nuclear Exclusion clause

So far as concerns the liability of any principal or liability assumed by you under agreement and which would not have attached in the absence of such agreement this section excludes and does not cover liability of whatsoever nature directly or indirectly caused by or contributed to by or arising from:

- a) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel;*
- b) the radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof.*

EL contractual liability is the only way liability could attach, unless it was the operator itself that was being insured.



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Transfer of Undertakings (Protection of Employment) Regulations (TUPE)

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Transfer of Undertakings (Protection of Employment) Regulations (TUPE)

Privity of contract issues, with particular complications where expired contracts with non-conventional deductibles were involved. Not always clear as to whether retrospective cover is being provided, cover should not be present for incidents that occurred prior to the policy passing to a new insurer unless specific language to that effect is included in the policy. Different TUPE clauses in the market.



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Sole Traders UK EL exemption

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Exemption from UK EL for sole traders: The Employers' Liability (Compulsory Insurance) (Amendment) Regulations 2004 [SI 2004/2882]

<https://www.legislation.gov.uk/uksi/2004/2882/made>

In the Employers' Liability (Compulsory Insurance) Regulations 1998, Schedule 2 (employers exempted from insurance), after paragraph 14, there is inserted:—

“(15) Any employer which is a company that has only one employee and that employee also owns fifty per cent or more of the issued share capital in that company.”.



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Conflict of interest

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Conflict of Interest clauses under UK EL policies:

Conflict of Interest

In the event of a conflict of interest arising between the Insured and any Employee indemnified by this Policy, separate representation will be arranged for each party.



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Thank you

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