The case for compulsory public liability insurance

It is time to protect customers of public-facing businesses which both serve and profit from the public at large, argues **Ross Whalley**

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The Employers' Liability (Compulsory Insurance) Act 1969 makes employer's liability (EL) insurance mandatory in all but exceptional circumstances. As employers are responsible for the health and safety of their employees while they are at work, it follows that if an employee is injured, becomes ill, or is killed as a result of that work, they are able to make a claim for compensation, in the knowledge that an employer will be indemnified by an insurer that provides for at least £5m of cover. The employer is also obligated to display a certificate of insurance where their employees can see it.

The Health and Safety Executive (HSE) holds the power to fine those employers without such cover up to £2,500 for each day the company has traded without it and up to £1,000 for failing to display the certificate. The punishments may seem severe but their purpose is just. Employees can choose where to work but, for most, there is little choice but to work, and so they ought to be reasonably protected. For the employer, there is an obvious benefit in availing themselves of EL insurance: limiting their financial liability in the case of workplace injury, illness, or fatality.

Like EL insurance, there is a requirement for mandatory third-party motor insurance. It is a cliché to say that a motor vehicle in the wrong hands can become a weapon. Claims from third parties for property damage, injury, and fatality against an insured driver will benefit from this minimum indemnity, again required by statute: the Road Traffic Act 1988.

Even in circumstances where a motor insurer alleges that they were not provided with the correct information when the policy was first incepted, or when a term has not been adhered to, there remains the requirement to deal with a third-party claim.

Cover is also extended to those third parties with claims against unidentified drivers, typically in the case of hit-and-run accidents and uninsured drivers. This is granted by way of the Motor Insurers' Bureau (MIB), a failsafe unofficially known as the 'insurer of last resort'. The system is subject to strict eligibility rules and exceptions as to the recoverability as to certain heads of loss.

Protecting consumers

In short, both workers and road users can expect to avail themselves of financial indemnity by way of compulsory insurance in respect of a claim against an employer or motorist. Given the strict statutory obligations on both employers and motorists, it seems curious that the position is so different in respect of public liability (PL) insurance, which remains entirely voluntary.

Compulsory PL insurance was championed by Jonathan Wheeler when he took up presidency of the Association of Personal Injury Lawyers (APIL) in his inaugural speech on 23 April 2015. He believed that this was a must to protect customers of public-facing businesses and that making such insurance compulsory would increase standards of safety throughout those companies which both serve and profit from the public at large.

PL insurance covers the cost of claims made by members of the public for incidents that occur in connection with commercial activities. Again, this provides financial redress for injury, loss of or damage to property, and death. While policies vary from insurer to insurer, most will cover incidents that occur on business premises and incidents that take place off-site, at events or activities organised by a company.

Naturally, the Association of British Insurers (ABI) recommends that businesses consider PL insurance if a company owns commercial premises that members of the public, customers, or clients visit; if a company organises off-site events or activities that are attended by members of the public; or where a business is run from home and people visit for professional purposes. Considering the types of commercial entities, it is challenging to think of those which would not fall into the above categories. PL insurance covers all those persons with whom a business interacts as part of its operations: visitors, customers, clients, contractors, event participants, spectators – in short, anyone apart from employees.

Clearly, mandatory PL is unlikely to be opposed by the ABI. It would grant insurers a further mandatory market, similar to EL and third-party motor insurance. Such insurances are deemed to be mandatory given the potentially high level of injury, damage, and loss that employers or motorists can cause to a third party. In this context, it is questionable as to how, or why, PL insurance differs.

As a result of its non-compulsory nature, quite frequently many injured parties can be left without financial redress, regardless of the merits of their claim, because a negligent company does not hold such a policy. Common examples are tenants making a claim against their landlords and visitors on private land. Curiously, PL liability insurance is mandatory for horse riding establishments. It can only be assumed that this exception to the general rule is born out of the level of risk posed in equestrianism.

But viewing the level of risk posed to the public in horse riding establishments as greater to that in other industries is inaccurate. Cases arising out of botched beauty treatments, most notably hairdressing, have increased considerably over the last decade. Damage ranges from chemical burns to the scalp and face to loss of hair through misuse of products. The hairdressing industry is unregulated, which is concerning considering the chemicals used by hairdressers who potentially could be untrained and unqualified.

Previous attempts to regulate this industry have been made by way of the Hairdressers (Registration) Act 1964, introducing the Hairdressing Council, but registration remains discretionary. The Hairdressers Registration (Amendment) Bill was introduced into the House of Commons but was defeated in a vote in November 2011. The bill sought to promote better industry regulation and notably to include compulsory PL insurance. The Hairdressing Council continues to raise awareness and lobby the government to introduce regulation.

Tracing insurers

A Pyrrhic victory is, of course, possible for those who bring meritorious claims against any uninsured public company, but an order for payment of damages is entirely useless, not to mention expensive to obtain, unless it is capable of being honoured. In addition to enforcement issues, there are solvency issues to consider when seeking redress against any defendant who has no insurance backing.

From a practitioner's perspective, there is also an additional issue with those businesses which hold PL insurance but simply refuse to provide the insurer's identity or engage in communications in respect of a claim being made against them. Such a situation is not uncommon as a further means to attempt to avoid or frustrate a claim.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 introduced Lord Justice Jackson's reforms in 2013 to much controversy. But the introduction of the Employers' Liability Tracing Office (ELTO) facility was a systematic improvement. ELTO is a searchable register of an employer's liability insurers. It allows an injured party seeking redress to immediately trace their employer's insurer and submit a claim directly, bypassing the employer itself. In turn, that insurer is aware that a claim is being made and can commence immediate investigations with their policyholder.

Prior to its introduction, letters of claim could be sent to employers with an air of uncertainty and hope as to when, or if, an insurer would be identified and appointed. The ELTO facility is advantageous to both parties to a claim and furthers access to justice.

Playing catch up

In conjunction with mandatory PL insurance, my personal proposal is a live register which lists companies and their PL insurers. As proven by ELTO, such a facility is workable at sensible cost. PELTO (maybe not!) would provide direct insurer access.

With both compulsory PL insurance and a searchable register of PL insurers, the industry can only provide a better service for injured parties and policyholders alike. In turn, this would raise safety standards in industries which profit from the public where attempts at regulation have repeatedly failed.

There are many statutory duties of care in PL contexts. They are as clear and historical as the duty of care between an employer and employee and that between fellow road users.

Before bringing her claim for illness after drinking from the fateful bottle of ginger beer with a dead snail inside, it is doubtful that Mrs Donoghue concerned herself with whether Mr Stevenson held a policy of PL insurance (*Donoghue v Stevenson* [1932] UKHL 100) so as to recoup damages, regardless of duty of care considerations. Nowadays, this is a major consideration at the outset of many public liability claims.

It is high time the law caught up with the pace and protected these injured parties. Their loss is no less considerable than that of those employees injured in the workplace or road users in motoring incidents, similarly their need for financial redress. SJ

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