

The Brexit Papers



Traffic Accidents

Paper 13



Bar Council Brexit
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**THIRD
EDITION**



Brexit Paper 13: Traffic Accidents

Summary

Currently, EU citizens are able to pursue claims for personal injury in their home member state where the injury has occurred in another. Any claim an injured claimant makes in relation to a foreign accident is at present governed by the applicable choice of law rules in the Rome II Regulation 864/2007, with the effect that a judgment in one EU member state can be enforced in another.

The UK is consequently relieved of £100s of millions of expenditure on treatment costs, social care and benefits, and the victim is able to bring in the UK the claim which s/he would be entitled to bring in the EU State, but without the complication and expense of bringing a claim using a foreign lawyer, using a different language, in the courts of a foreign country. Without this simplified process, many UK victims of road accidents abroad are likely to reject the complex process of running a compensation claim in a foreign country from the UK. The result would be injustice to such victims and very considerable expense to UK public funds. A UK Great Repeal Bill will also not provide for the enforcement of UK judgments in EU member states.

- We therefore urge the Government to guarantee enforcement of UK judgments within the EU through the Lugano Convention (or a new updated convention)
- We also urge the Government to translate the provisions of the Sixth Motor Insurance Directive and the Rome II Regulation into domestic law, and
- Finally, we urge the Government to construct a legally binding instrument containing the system of inter-bureaux guarantees and cooperation between the Motor Insurers Bureau, acting in its capacity as the guarantee fund in respect of uninsured drivers and untraced vehicles and compensation body on the one hand, and the guarantee funds and compensation bodies of the EU member states on the other.

The Impact of Brexit on Road Traffic Accident Victims

Present system of protection

1. EU law provides for a detailed system of protection of the injured victim as the weaker party where that person has suffered personal injury caused by a vehicle. Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability operates in conjunction with the Brussels Regulation Recast 1215/2012 to permit injured victims to make claims in their home jurisdiction in relation to accidents that occurred abroad.

2. Underpinning the Directive is a sophisticated settlement process involving the reciprocal enforcement of rights and responsibilities of those bodies tasked with compensating victims who have suffered injury as a result of the actions of an uninsured driver or an unidentified vehicle. The protection provided by Directive 2009/103/EC (the Sixth Motor Insurance Directive) includes:

- Mandatory provision of insurance against civil liability
- Abolition of checks on green cards for vehicles normally based in a member state
- Minimum harmonisation of the conditions of insurance, including minimum levels of cover and the extent to which exclusions can apply
- Establishment of guarantee bodies for uninsured and unidentified drivers
- Establishment of a direct right of action against insurers
- Establishment of an offer and settlement procedure to be carried out in the home country of the injured victim
- Establishment of a system of claims representatives of insurers in the home country with authority to handle claims of victims injured abroad
- Establishment of information centres to provide information on the identity of the relevant insurer, and
- Establishment of compensation bodies in the state of the claimant in relation to claims involving uninsured or untraced vehicles and where claims representatives have not timeously responded to a claim made by an injured victim.

Beneficial settlement process

3. UK resident claimants involved in an accident in another EU State may make a claim in the UK. A foreign insurer must appoint a claims representative to handle such a claim including the making of offers to settle such a claim. Where claims do not settle, a claimant may sue the foreign insurer by way of direct right of action under the Brussels Regulation Recast in the courts of the place where the claimant is domiciled. In effect the whole process of claims handling, settlement and/or litigation is imported into the state of domicile of the claimant.

4. In addition, where the claim is in respect of an uninsured or untraced driver, the entitlement of the injured claimant to bring a claim against the compensation body of the State where the claimant is resident provides similar safety-net protection in the claimant's home state.

5. As a result, the UK benefits from the guaranteed provision of compensation by foreign motor insurers, thus relieving the UK State of £100s of millions of expenditures on treatment costs, social care and benefits.

6. Insurers and motorists benefit from the requirement that all motor policies must cover liabilities incurred in the EU. Insurers are relieved of the administrative burden of writing additional cover for foreign vehicle use, and the millions of UK citizens who drive abroad do not have to obtain separate cover in order to do so.

7. Unlike commercial claims involving contracting parties who are free to choose the law and the courts which apply to any commercial bargain, victims of torts, as the weaker party, are not in a position beforehand to choose where litigation may take place. Therefore, the extra protection provided by the Brussels Regulation Recast (Articles 11 and 13) in conjunction with the settlement systems prescribed by Directive 2009/103 allows injured claimants a significant and important degree of protection.

8. In summary, the victim is able to bring in the UK the claim which s/he would be entitled to bring in the EU State, but without the complication and expense of bringing a claim using a foreign lawyer, using a different language, in the courts of a foreign country.

9. Without the existence of that easy process, many UK victims of road accidents abroad are likely to reject the complex, lengthy and expensive process of running a compensation claim in a foreign country from the UK, go uncompensated, and then look to the NHS/Local Authorities/DWP to meet their sometimes very substantial needs. That would bring injustice to such victims and very considerable expense to UK public funds.

Security of judgments and financial benefits

10. Any claim an injured claimant makes in relation to a foreign accident are currently governed by the applicable choice of law rules to be found in the Rome II Regulation 864/2007 (normally the law of the place of the accident). Such law applies to the quantification and assessment of loss. Therefore, claims against foreign insurers normally apply foreign law to the calculation of future loss, including the important question as to whether future loss is compensable by reference to a lump-sum award of compensation or an award of compensation payable by reference to periodical payments or annuities.

11. Such a compensation system can only provide adequate security to an injured claimant should there be an adequate system for the enforcement of judgments, including awards of costs against a foreign domiciled insurer.

12. If there is a legislative lacuna post-Brexit in relation to the establishment of adequate procedures for jurisdiction and the recognition of judgments, injured claimants are likely to suffer a detriment by (1) not pursuing cases they would (and should) be compensated for; (2) incurring extra costs by issuing protective proceedings pre-Brexit in more than one member

state to protect against the need for enforcement post-Brexit; and/or (3) issuing proceedings in a court of second choice in the EU with any or several of the following disadvantages: delay, inconvenience of language, a less favourable costs regime and/or funding regime, and an unfamiliar choice of legal representation as compared with the prevailing position in relation to proceedings in the home jurisdiction of first choice.

13. The lack of certainty as to enforcement will not only affect future claims, but may also impact settlements now in relation to the risk as to the future enforceability of orders or settlement agreements in respect of the payment of future losses and costs. This will have a particular impact on those injured victims who have suffered catastrophic injury whose continuing care needs make them most at risk (and who would need State support in any event were adequate compensation not available).

Treatment as a third state

14. The free movement of persons (and vehicles) is particularly pertinent should there be no hard border between the Republic of Ireland and Northern Ireland, post-Brexit.

15. Under Directive 2009/103/EC there is provision for ensuring that all third state vehicles which enter the territory of the EU shall have insurance which meets with the requirements of EU law (see Article 7). Therefore, all UK registered vehicles which enter the EU post-Brexit will in any event need to comply with European requirements and UK insurers will be subject to the jurisdictional rules under the Brussels Regulation Recast when foreign claimants make claims against them in relation to accidents in the EU.

16. When the UK leaves the EU, a decision will have to be taken as to whether the Rome II Regulation is to be transposed into domestic law. If it is not, and the antecedent rule in *Harding v Wealands* is revived, such a position would put the UK at odds with our former partners in relation to how loss is quantified which is now considered as a substantive issue part of the proper law.

Recommendations

17. Whilst the assimilation of relevant EU law into UK law via a Repeal Bill can clearly replicate the obligations to which UK citizens and insurance companies are subject, that process cannot of itself preserve the system of mutual obligations between EU member states and the UK that facilitates claims to be brought, and judgments enforced, in relation to foreign accidents. In particular:

- A UK Repeal Bill cannot oblige insurers domiciled in EU states to maintain an accessible presence in the UK to which UK road accident victims can look for compensation.
- Nor can it oblige the MIB equivalents of EU states to co-operate with the MIB in the process of insurer identification, claims handling or claims settlement.
- A UK Repeal Bill cannot make UK judgments enforceable in EU member states once the UK is outside the scope of the Brussels II Regulation.

18. In order to preserve the substantial benefit to the UK public funds, and its citizens who are the victims of road accidents abroad, the following steps are recommended:

- The enforceability of UK judgments within the EU is guaranteed by accession to the 2007 Lugano Convention (or a new updated convention). This step is likely to be widely sought in the commercial world in any event as a key feature of any continuing and future trading relationship with the EU;
- The provisions of the Sixth Motor Insurance Directive and the Rome II Regulation be translated into domestic law;
- The system of inter-bureaux guarantees and cooperation between the Motor Insurers Bureau, acting in its capacity as the guarantee fund in respect of uninsured drivers and untraced vehicles and compensation body on the one hand, and the guarantee funds and compensation bodies of the EU Member States on the other, be contained in a legally binding instrument (whether between the funds/compensation bodies inter se, or by way of binding international agreement).

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