

CLYDE&CO



Welcome to:

Don't throw employees under the bus
Massimo Vascotto & Neil Beresford

The lecture will start soon !



Don't throw your employee under the bus

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Agenda

1. Employers' liability insurance: background and principal requirements
2. Employers' liability insurance and motor insurance: a comparison
3. The conundrum of double insurance
4. Resolving the double insurance conundrum: current and suggested clauses
5. Scenario analysis

Employers' liability: background to compulsory insurance

- Fire in an upholstery factory in Glasgow in 1968 killed 19 employees and Parliament had to address the issue.
- Requirement for compulsory insurance (existing for coal mines only) extended to all employers through Employers' Liability (Compulsory Insurance) Act 1969.
- EL 1998 Regulation 2(1)(c) introduced because of Glasgow fire as the insurers sought to repudiate liability for failure of the insured to comply Factories Acts, as required by the policy.





Employers' liability: the duty to insure

Employers' Liability (Compulsory Insurance) Act 1969, s.1(1):

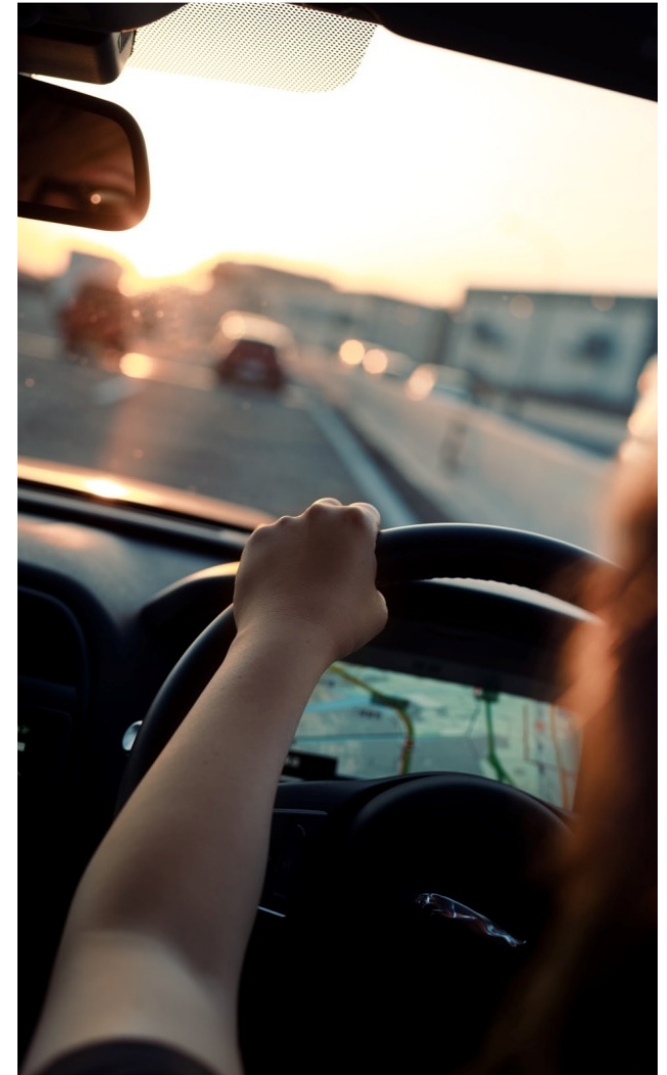
'every employer carrying on any business in Great Britain shall insure, and maintain insurance ... against liability for bodily injury or disease sustained by his employees, and arising out of and in the course of their employment in Great Britain in that business...'

Employers' liability and motor insurance: a comparison

Employers' liability	Motor
Required to cover 'bodily injury or disease'	Required to cover 'death or bodily injury'
Cover for employees driving vehicles	No cover for driver of vehicle
Limited liability (£5M minimum)	Unlimited liability for death or injury
Policy can be avoided for misrep/non-disclosure	Avoidance very difficult
Policy can be invalidated by employer	Insurer directly liable to victim
No safety net if employer fails to insure	Backed by MIB
Civil action for failure to insure lies only against employer	Civil action for failure to insure lies against vehicle owner

Prof. Rob Merkin & Prof. Chris Parsons

- Rob Merkin, the Law of Motor Insurance
- Chris Parsons, Employers' liability insurance – how secure is the system?
- Rob Merkin: RTA 1988 v ELCI 1969: “Most EL policies exclude the insurers liability for injured passengers employees, and this exclusion would seem not only to be consistent with the legislation but indeed all but demanded by it.”
- Chris Parsons: No requirement for an employers' liability policy to cover the liability of an employer towards an employee who is injured in the course of his employment whilst getting into, travelling in or alighting from a vehicle. If the injury occurs on a building site and not on the road there will be no recourse against the MIB. If an employer sends his employee out in a defective vehicle, with the result that he is injured, the MIB will not be liable.



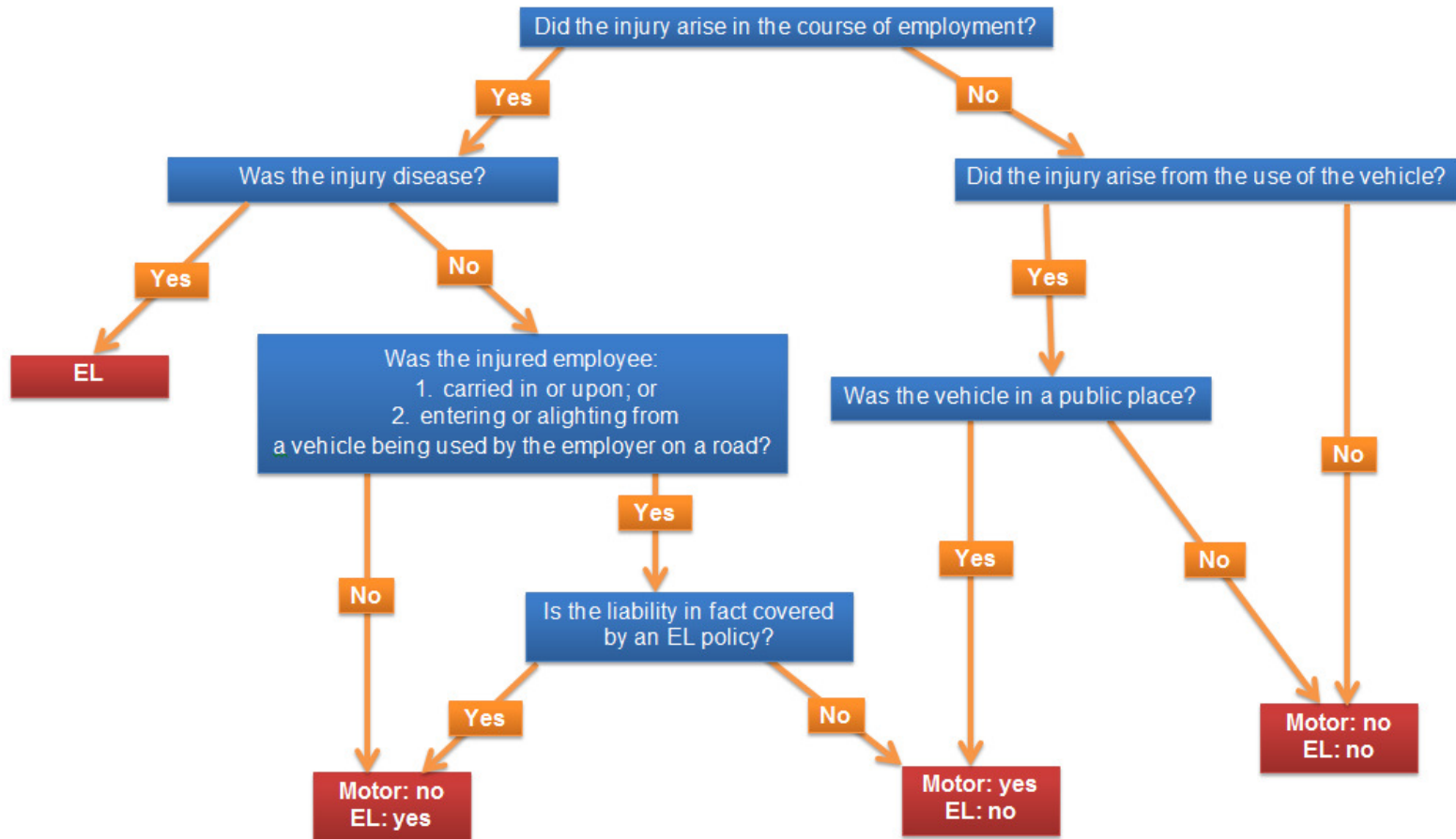
The conundrum of double insurance: policy provisions

	Cover	Exclusion
EL	We will indemnify you for all sums which you are legally liable to pay as damages and costs for injury sustained by any employee provided that the injury arises out of and in the course of their employment by you in connection with your business.	We will not cover legal liability for bodily injury to an employed person in circumstances where it is necessary to arrange compulsory motor insurance under any Road Traffic Legislation.
Motor	We will cover you against your legal liability resulting from any one accident involving your vehicle.	We will not pay for injury to any person arising out of or in the course of their employment, unless required by the Road Traffic Acts.

The conundrum of double insurance: statutory provisions

	Duty to insure	Exemption
RTA	Driver's liability for injury to any person [RTA, s.145(3)]	Employees except those being carried in, or entering or exiting a vehicle if ' <i>cover is in fact provided pursuant to a requirement of ELA 1969</i> ' [RTA, s.145(4), (4A)]
EL	Employer's liability for injury to employees [ELA 1969, s.1(1)]	Employees being carried in, or entering or exiting a vehicle on a road [1998/2573, Sch.2, para.14]

A roadmap of the statutory provisions



NOTE: If the injured employee is a driver, no claim will lie against the motor policy as the driver cannot sue himself but a claim may lie against the EL.

Proposed exclusion for EL wordings

Wording

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

a) carried in or upon a vehicle; or

b) entering or getting on to, or alighting from, a vehicle,

where such bodily injury is caused by or, arises out of, the use by the employer of a vehicle on a road.

Intended effect

- Exclusion uses language of EL Regulations, not the RTA
- Broadest permissible exclusion under EL policy
- Ensures that cover is not 'in fact' provided: avoids confusion in application of RTA
- Transfers risk from EL to motor in the interests of the victim

Case Studies

Scenario 1

Two employees are running a delivery in a vehicle. The driver crashes through his own negligence and injures the passenger.

Solution

Passenger could be covered under motor policy (driver's liability) or EL policy (employer's vicarious liability for driver).

Standard policy exclusions lead to circularity: EL does not apply if insurance is required by RTA; RTA does not apply if risk is in fact covered by EL.

Suggested exclusion would put the risk decisively to motor.

Case Studies

Scenario 2

Two vehicles of the same employer, driven by employees and carrying employees as passengers, collide on a public road due to the negligence of the driver of Vehicle A.

All drivers and passengers are injured.

Solution

Driver of Vehicle A not liable to himself: neither policy responds.

Driver of Vehicle B can only be covered under motor policy: employee exemption applies only to passengers.

Passengers of Vehicle B could be covered under motor policy (driver's liability) or EL policy (employer's vicarious liability for driver).

Suggested exclusion would put all claims decisively to motor.

Case Studies

Scenario 3

A vehicle driven by an employee and carrying employees as passengers crashes while on company premises due to the negligence of the driver. All occupants are injured.

Solution

Driver not liable to himself: neither policy responds.

Passengers could be covered under motor policy (driver's liability) or EL policy (employer's vicarious liability for driver).

The accident takes place other than on a road. The EL exemption does not apply and the RTA does not require insurance. Therefore the loss falls to EL.

Suggested exclusion would reinforce the outcome.



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