Passenger claims and seat belts

1 Introduction

a. Vulnerability

Unlike pedestrians, vehicle passengers, with the exception of motorcycle pillion riders, are generally much less vulnerable in a road accident. This is because, to a large extent, they are protected inside a metal structure and in cars, they will usually have the added protection of seat belts, head restraints and airbags.

b. Casualty statistics

The table below shows the casualty figures for passengers in cars, goods vehicles and buses and coaches (motorcycle passengers are omitted) from 2002 to 2006 [Source: Department for Transport – Road Accidents Great Britain 2007.]

<table>
<thead>
<tr>
<th>Year</th>
<th>Killed</th>
<th>Killed or seriously injured</th>
<th>All severities</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>347</td>
<td>3550</td>
<td>31,499</td>
</tr>
<tr>
<td>2003</td>
<td>373</td>
<td>3344</td>
<td>30,167</td>
</tr>
<tr>
<td>2004</td>
<td>348</td>
<td>3138</td>
<td>28,895</td>
</tr>
<tr>
<td>2005</td>
<td>337</td>
<td>2655</td>
<td>27,323</td>
</tr>
<tr>
<td>2006</td>
<td>321</td>
<td>2700</td>
<td>26,464</td>
</tr>
</tbody>
</table>

c. Seat belt statistics

Statistics about whether or not a casualty was wearing a seat belt at the time of an accident are no longer collected by the Department for Transport. The current form used by the police for compiling accident statistics about casualties [MG NSRF/C] indicates where a casualty was sitting but there is no provision on this form for seat belt information, although the police officer might comment in other parts of the road accident report.

It is understood that these statistics were not regarded as reliable. The first thing that happens after a crash is that occupants undo their seat belts and try to get out of the vehicle. By the time the emergency services arrive, casualties may not remember anything or if they do, they are unlikely to admit not wearing a seat belt.

2 The driver’s duty of care

a. The general duty of care

Basically, there is no difference between the duty of care owed to passengers from that owed to pedestrians. The ‘neighbour’ principle applies equally to all road users.

b. The Highway Code

There are some additional rules for drivers in respect of child passengers:
The driver must ensure that all children under 14 in cars, vans and other goods vehicles wear seat belts or sit in approved seat restraints [100].

Drivers carrying children in the above vehicles must ensure that [102]:
- children should get into the vehicle at the door nearest the kerb;
- child restraints are properly fitted;
- children do not sit behind the rear seats in an estate car or hatchback unless a special child seat is fitted;
- child safety locks are used when children are in the vehicle; and
- children are kept under control

c. Drunken passengers

In Griffiths v Brown (1998), The Times, 23 October, the claimant, who was inebriated, was hit by another car when crossing the road after alighting from a taxi. The High Court judge said that once the passenger has alighted, the contract was at an end and the taxi driver was under no obligation. There was no duty on a taxi driver to assess the sobriety of a passenger before setting him down.

d. Ex turpi causa non oritur actio

This maxim, literally translated, means that no action can be brought where the parties are guilty of illegal or immoral conduct. In Thackwell v Barclays Bank plc [1986] 1 All ER 676, it was said that the test involves two questions:

- Whether there has been illegality of which the court should take notice; and
- Whether it would be an affront to public conscience if the court was seen to be assisting or encouraging the claimant in his criminal act.

The application of this maxim arose in Pitts v Hunt [1990] 3 All ER 344, where the claimant pillion passenger encouraged the rider to drive in a reckless and dangerous manner after they had been drinking together. The Court of Appeal upheld the trial judge’s decision that the motor cycle rider owed no duty of care to the claimant, since both were jointly engaged in committing a criminal offence. A similar view was taken in Ashton v Turner [1980] 3 All ER 870, where the injured person was escaping after committing a crime.

It should be stressed that courts may be reluctant to deprive a claimant of damages in this way unless both driver and passenger were jointly engaged in a criminal act of a serious nature. The maxim is unlikely to be of assistance where, for example, a passenger condones the driver exceeding the speed limit. However, there may be contributory negligence where a passenger knowingly consents to travel with a drunken driver.
3 The law on seat belts and child restraints

a. ‘Wearing a seat belt saves lives’

This is the message from the Department for Transport (www.dft.gov.uk/think). The supporting information for this message is (www.roadsafe.com):

- Seatbelts have prevented an estimated 60,000 deaths and 670,000 serious injuries since they were made mandatory for front seat occupants in 1983
- 9 out of 10 people agree it is dangerous to travel in the back of car without a seat belt but only 7 in 10 adults actually wear them
- Young men, rear seat passengers, company drivers and goods vehicle drivers have low seat belt wearing rates
- 75% of passengers thrown from a car die and unbelted occupants are 30 times more likely to be thrown from a car
- In a crash at 30 mph, if unrestrained, an occupant will be thrown forward with a force of up to 60 times their own bodyweight

The Department for Transport (DfT) has provided some statistics taken from observational surveys of seat belt use. The figures for October 2006 are:

<table>
<thead>
<tr>
<th>Type of occupant</th>
<th>Seat belt wearing rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Car drivers</td>
<td>93</td>
</tr>
<tr>
<td>Front seat car passengers</td>
<td>95</td>
</tr>
<tr>
<td>Rear seat car adults (14+)</td>
<td>65</td>
</tr>
<tr>
<td>Rear seat car children</td>
<td>94</td>
</tr>
<tr>
<td>Van drivers</td>
<td>69</td>
</tr>
<tr>
<td>Van front seat passengers</td>
<td>58</td>
</tr>
</tbody>
</table>

A survey by TRL Ltd for Transport for London on seat belt usage in (March 2006) showed the same general pattern but overall usage rates in the London Boroughs were considerably lower than the DfT surveys.

b. The law on seat belts and child restraints

The first mandatory wearing of seat belts was by s.27 of the Transport Act 1981, which inserted a new s.33A into the Road Traffic Act 1972, making it an offence to drive a motor vehicle without wearing one. Section 28 of the 1981 Act inserted a new s.33B, making it an offence to drive the vehicle where a child under 14 was in the front seat and not wearing a belt.

These provisions came into force on 1 January 1983. These measures in the 1972 Act have now been incorporated as ss. 14 and 15 in the Road Traffic Act 1988.
The main current legal requirements in respect of cars, vans and other goods vehicles are summarized in the following table:

<table>
<thead>
<tr>
<th>Vehicle occupant</th>
<th>Front seat</th>
<th>Rear seat</th>
<th>Who is responsible?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Driver</td>
<td>Seat belt must be worn if fitted.</td>
<td>N/A</td>
<td>Driver</td>
</tr>
<tr>
<td>Child under 3</td>
<td>Correct child restraint must be used.</td>
<td>Correct child restraint must be used.</td>
<td>Driver</td>
</tr>
<tr>
<td>Child 3 and over up to 1.35m (approx. 4ft 5 ins) in height or up to 12 years, whichever is first.</td>
<td>Correct child restraint must be used.</td>
<td>Correct child restraint must be used where seat belts fitted. Must use adult belt if child restraint not available in taxi or for certain specified reasons.</td>
<td>Driver</td>
</tr>
<tr>
<td>Child over 1.35m in height or 12 or 13 years.</td>
<td>Adult seat belt must be worn if available.</td>
<td>Adult seat belt must be worn if available.</td>
<td>Driver</td>
</tr>
<tr>
<td>Adult passengers (aged 14 and over)</td>
<td>Seat belt must be worn if available.</td>
<td>Seat belt must be worn if available.</td>
<td>Passenger</td>
</tr>
</tbody>
</table>

These requirements are contained in various regulations made under the 1988 Act and, where applicable, to implement the requirements of EU Directive 2003/20/EC (OJ No. L115). The relevant regulations are:

- The Motor Vehicles (Wearing of Seat Belts) Regulations 1993 [SI 1993/176];
- The Motor Vehicles (Wearing of Seat Belts by Children in Front Seats) Regulations 1993 [SI 1993/31]; and
- The Motor Vehicles (Wearing of Seat Belts)(Amendment) Regulations 2006 [SI 2006/1892]

It should be noted that for children under 14, it is the statutory responsibility of the driver to ensure that the seat belt worn or the child restraint is used. It is only from age 14 upwards that this responsibility passes to the passenger.

c. Increased fixed penalties?

The Home Office has recently published a consultation document (www.homeoffice.gov.uk) about its proposals to increase the fixed penalty for failing to comply with ss.14 and 15 of the 1988 Act from the present £30 to £60. This is not an endorseable offence and the Government considers the present penalty to be inadequate.
4 Seat belts and contributory negligence

a. General principles of contributory negligence

The text of s.1(1) of the Law Reform(Contributory Negligence) Act 1945 is quoted in 4 a. of these notes. It is important to appreciate that damages may be reduced having regard to the claimant’s share of blame for the damage.

As Lord Denning so succinctly observed in Froom v Butcher [1976] 3 All ER 520:

‘Negligence depends on a breach of duty, whereas contributory negligence does not. Negligence is a man’s carelessness in breach of duty to others. Contributory negligence is a man’s carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent man, he might hurt himself . . .’

b. The decision in Froom v Butcher

In this case, the claimant was driving his car when it collided with the defendant’s vehicle. The defendant was wholly responsible for the accident. The claimant was not wearing his seat belt and the injuries to his head and chest would have been avoided had he done so. He also suffered a broken finger, which would not have been avoided. The appeal was concerned solely with the issue of contributory negligence.

Until the Court of Appeal heard this case in July 1975, there had been conflicting decisions in the lower courts as to whether the failure to wear a seat belt was tantamount to contributory negligence. One view was that insurers should not be relieved of paying proper compensation where a driver has been negligent. But Lord Denning said that this was not the correct approach. He said:

‘The accident is caused by bad driving. The damage is caused in part by bad driving of the defendant, and in part by the failure of the claimant to wear a seat belt.’

At that time it was compulsory for seat belts to be fitted to all cars first registered since 1965, but it was not compulsory to wear them. However, the Highway Code had, since 1968, advised motorists to make sure seat belts were used and the claimant should have known this. The Government had also spent £2.5m in advertising telling people to wear them. The Government had also introduced a Bill into Parliament to make wearing of seat belts compulsory, but it had been delayed.

Lord Denning said that meanwhile judges should say plainly that it is the sensible practice for all front seat occupants to wear seat belt at all times. He said this about the situation at the time:

‘Seeing that it is compulsory to fit seat belts, Parliament must have thought it sensible to wear them. But it did not make it compulsory for anyone to wear a seat belt. Everyone is free to wear it as he pleases. Free in the sense that if he does not wear it, he is free from any penalty from the magistrates. Free in the sense that everyone is free to run his head against a brick wall if he pleases. He can do it if he likes without being punished by the law. But it is not a sensible thing to do. If he does it, it is his own fault; and he has only himself to thank for the consequences.’
As to the share of responsibility, Lord Denning repeated his comments made in *Davies v Swan Motor Co* and added:

‘This question should not be prolonged by an expensive enquiry into the degree of blameworthiness on either side, which would be hotly disputed. Suffice it to assess a share of responsibility which will be **just and equitable in the great majority of cases.**’

‘Sometimes the evidence will show that the failure made **no difference.** The damage would have been the same, even if the seat belt had been worn. In such cases, the damages **should not be reduced at all.**’

‘At other times the evidence will show that the failure made **all the difference.** In such cases I would **suggest** that the damages **should be reduced by 25%**.’

‘But often enough the evidence will only show that the failure made a **considerable difference.** Some injuries to the head, for instance, would have been a good deal less severe if a seat belt had been worn, but there would have still been some injury to the head. I would **suggest** that the damages attributable to the failure to wear a seat belt **should be reduced by 15%.**’

The trial judge in this case had made a 20% reduction and, bearing in mind that the finger would have been broken anyway, the Court of Appeal decided not to interfere with this.

c. Discussion

It is now more than 30 years since the judgment in *Froom v Butcher* and it is understood that no court has so far gone through the ‘glass ceiling’ of 25% in seat belt cases. The lower courts seem to have interpreted Lord Denning’s words as a binding authority. But are they? The use of the words ‘I suggest’ in relation to the 15% and 25% reduction seems to infer guidance, rather than strict compliance. In the preceding paragraph, a reference to ‘the great majority of cases’ may infer that some departure from the norm may be justified in order to ensure a ‘just and equitable share of responsibility’ (as required by s.1(1) of the 1945 Act).

Notwithstanding these question marks, the glass ceiling seems to be impervious to several attempts to breach it by insurers who are keen to reduce their share of damages, especially in multi-million pound compensation cases. Some of the more notable challenges are discussed below.

d. Subsequent challenges

In *Eastman v South West Thames Regional Health Authority*, CA, [1991] RTR 389, the claimant was travelling in an ambulance with her mother-in-law, a patient. She was sitting on a crew seat which was not equipped with a seat belt, although other seats were equipped and a notice in the ambulance advised passengers to wear the belts provided. The attendant, who was also in the back of the ambulance, neither suggested that she should wear a seat belt nor drew attention to the notice. The ambulance driver had to brake suddenly due to an incident that was not his fault, and the claimant was thrown from her seat and suffered serious injury.

The Court of Appeal said that the defendants had provided seats with belts and she chose not to use them. There was no general duty of exhortation in regard to the wearing of seat belts and the defendants were not liable.
In *J (a child) v Wilkins* [2001] PIQR P12, the claimant was a very young child, under three years of age, travelling on her mother’s knee in the front passenger seat. The lap belt was secured around the mother and child but the diagonal strap passed across the mother only. A single joint expert concluded that if the claimant had been wearing an approved seat restraint (as required by the 1993 regulations), the risk of serious injury would have been almost entirely eliminated. The car was in a head-on collision and the child suffered catastrophic injuries. The defendant in the other vehicle admitted negligence but alleged negligence by the mother and her aunt (who was driving the car) for failing to secure the child in a suitable seat restraint. The child’s mother and aunt were joined by the defendant in Part 20 proceedings, seeking a contribution from them.

In the Court of Appeal, Keene LJ said that the same approach was appropriate between Part 20 defendants as between claimant and defendant. He also said that at the time of *Froom v Butcher*, it was not compulsory to wear seat belts but the court was aware of the contemplated legislation. He said that a reading of the judgment shows that the 25% was not put forward as an absolute and immutable ceiling in every case, but the court clearly wished to give guidance for the vast majority of cases. It follows that there could be exceptional cases but one would expect them to be rare.

An exceptional situation might exist where a contribution claim is made because an adult deliberately carried someone on their lap with no seat belt or other restraint applied. In this case, the mother did not leave the child wholly unrestrained. In fact what she had done actually made the situation worse, but neither the mother nor the aunt was aware of this. The blame attached to them must be limited by their lack of understanding of the risk – a lack they shared with much of the public. In the circumstances the appeal court upheld the trial judge’s apportionment of 75% to the defendant driver of the oncoming car and 25% to the Part 20 defendants.

*Hitchens v Berkshire County Council*, 13 October 1999, QBD (Winchester) (judgment available on Lawtel) was a Fatal Accidents Act claim where the deceased, a taxi driver, was killed in an accident on the A4. There were no other vehicles involved and it seems that he lost control of the car, which hit a tree. He was not wearing a seat belt and was thrown out of the car. This section of the road was icy and had not been adequately gritted by the defendant authority, nor had any warning about the slippery surface been given. The agreed expert evidence was that if the deceased had been restrained, he would have suffered only minor injuries. There was no suggestion that the deceased had been negligent in any respect other than his failure to wear a seat belt.

In his judgment, HH Anthony Thompson QC held that the defendants were liable for failing to properly carry out their winter maintenance plan. At that time, taxi drivers were allowed certain dispensations from having to wear a seat belt when on business, but the deceased had been returning home from work so he should have been wearing his seat belt. The judge said that if he had been free to approach this case without regard to the authority in *Froom v Butcher*, he would have applied a very substantial discount for contributory negligence, certainly no less than 50%. But he was bound by the authority and reduced the damages by 15%. The judge suggested that perhaps it was time for the Court of Appeal to look afresh at this issue as times had changed: failing to wear a seat belt was now a criminal offence and attitudes had changed towards the wearing of them.

Leave to appeal was granted but the parties agreed a settlement on terms which amounted to a 50% reduction for contributory negligence. (See further comments on this settlement in Gawler below.)

The latest attempted challenge was in *Gawler v Raettig* [2007] EWHC 373 (QB), 1 March 2007, Mr Justice Gray. The 24-year-old claimant was a front seat passenger in a car driven by the
defendant, which ran off the road. Primary liability was admitted and the sole issue was the claimant’s share of responsibility. The claimant was not wearing his seat belt and was thrown out of the car, sustaining catastrophic injuries. The experts agreed that had he been wearing his seat belt, he would have emerged from the accident with, at most, minor and easily reversible injuries.

The defendants claimed a 50% reduction, arguing that this was a rare and exceptional case because:

- The claimant was older and a more experienced driver than his friend who was driving;
- The claimant had deliberately left off his seat belt, probably for some time;
- The driving of the defendant was no worse than careless and this was a case of momentary inattention; and
- The claimant would have sustained little or no injuries if he had worn his seat belt

[Counsel for the defendant, William Norris QC, was also involved in *Hitchens* and it was accepted that the agreed 50% settlement was not binding and was probably influenced by (undisclosed) extraneous considerations.]

The trial judge did not accept that the factors put forward by Mr Norris brought the case into the exceptional or rare category. There was no clear evidence that the claimant had deliberately left off his seat belt. On the other hand, the defendant had been driving much too fast, and the fact that he pleaded guilty to careless driving and was fined £450 with a 7 point endorsement suggests that the magistrates thought it a relatively serious case, not mere inattention. The judge was not persuaded that he should depart from the 25% deduction indicated in *Froom*.

But the defendants tried to take this further. There was a lot of money at stake. Damages on a full liability basis were agreed at £2.7m. With a 50% reduction, the insurers would pay just over £2m. With a 50% reduction it would be £1.35m. The insurance industry at large would save substantial sums if they could penetrate the glass ceiling.

The defendants decided to invoke what is called a ‘leap-frog’ procedure to appeal directly to the House of Lords, by-passing the Court of Appeal [s.12 of the Administration of Justice Act 1969]. In order to succeed they have to show that:

- A point of law of general public importance is involved; and
- The decision is one where the judge was bound by a decision of the Court of Appeal

[For the defendants to succeed would be strange because it was their case that Lord Denning’s comments in *Froom* were *obiter* and not binding.] In June 2007, a petition was considered by the House of Lords but it was rejected because it did not raise an arguable point of law of general importance.

Despite this setback, the defendant’s next step was to come to terms with the claimant and pay him 75% of £2.7m. They agreed not to seek any further money from him if their appeal was successful and they would give the claimant an indemnity as to any further costs of an appeal. In other words, any further appeal was ‘academic’ in the sense that it would have no further effect on the parties.
In December 2007, the Court of Appeal considered an application for permission to bring the appeal to them ([2007] EWCA Civ 1560). It is clear from the judgment of Sir Anthony Clarke MR that they were not impressed by what was an academic exercise. The claimant would get his costs, win or lose, and neither of the actual parties had any real interest in the outcome. The appeal was really brought on behalf of the defendant’s liability insurers, and perhaps the interests of insurers in general. He said it would be preferable for any issues of principle to be determined between parties with a real interest in the outcome and a real interest in putting relevant evidence before the court. He concluded that:

- There is no pressing need for an academic appeal to be heard in the absence of real parties with a real interest in the outcome; and
- The public interest does not require permission to be granted, even if there was some potential merit in the appeal

So what will happen next? Will any insurer or corporate defendant eventually find a case that is truly so rare and exceptional that it will persuade a superior court to break through the 25% ceiling?

5 Travelling with a drunken driver

a. The general principle

In *Owens v Brimmell* [1977] 2 WLR 94 (QBD), the general principle was stated that:

- A passenger may be guilty of contributory negligence if he travels in a vehicle with a driver –
  - whom he *knows* has consumed a quantity of alcohol
  - Is likely to impair his ability to drive safely

This principle follows from Lord Denning’s comments in *Froom v Butcher* that contributory negligence is a man’s carelessness in looking after his own safety.

The facts in this case were that the claimant and defendant went on a pub-crawl together and the defendant volunteered to drive. They each drank about nine pints of beer and on the journey home, the car left the road and hit a lamp post. The claimant was thrown out of the car and sustained extensive injuries.

Wilkins J, having stated the above principle, added:

- A passenger may also be guilty of contributory negligence if, knowing that he is going to be driven in a car by his companion later,
- He accompanies him on a bout of drinking
- Which has the effect, eventually, of robbing the passenger of clear thought and perception,
- And diminishes the driver’s capacity to drive properly and carefully
The judge said that whether this principle can be relied upon successfully is a question of fact and degree in the circumstances of each case.

As to the share of responsibility he said: ‘... the degree of blameworthiness is not, in my opinion, equal. The driver, who alone controls the car and has it in him, therefore, to do whilst in drink, great damage, must bear by far the greater responsibility.’ He decided that in this case, the claimant’s contribution should be 20%.

The burden of proving contributory negligence rests on the defendant (see Malone v Rowan [1984] 3 All ER 402).

b. Booth v White [2003] EWCA Civ 1708

The issue of 'knowledge' established in Owens v Brimmell requires some kind of assessment by the passenger of whether or not he thinks it safe to travel with the driver. What is the extent of the enquiries that are reasonably to be expected of the claimant?

The facts in Booth were that the claimant and defendant went for a lunchtime drink in a pub, where the defendant drank one pint of lager and after this he went to play football. The claimant stayed in the pub where he drank many more pints during the afternoon. At about 5pm the defendant returned to the pub and later got into his car to take the claimant home. The claimant passenger, Mr Booth, sat in the front seat with his seat belt fastened. On the way home, the defendant driver, Mr White, lost control of the car, which went off the road, seriously injuring the claimant. The defendant was found to have consumed nearly twice the legal limit for alcohol.

The defendant contended that the claimant should have known (or would have known if he had not been so drunk) that there was a significant risk that Mr White had drunk excess alcohol. He should have asked him how much he had drunk before getting into the car. The trial judge had relied on the evidence of Mrs Booth, who had been to the pub and had seen her husband in a drunken state but she said that Mr White appeared fit to drive. The defendant chose not to give evidence.

The Court of Appeal held that there was no contributory negligence on the part of the claimant. Brooke LJ said: 'In my judgment, the law would take a wrong turning if we were to require an interrogation in this type of case of the type that [defendant’s counsel] has suggested.'
6 The tired driver who blames his employer

_Eyres v Atkinsons Kitchens and Bedrooms Ltd_ [2007] EWCA Civ 365

The claimant had not been wearing a seatbelt (a factor which contributed substantially to his injuries) and had been driving while tired which resulted in him falling into a micro sleep. His employer was in the vehicle at the time and whose philosophy was variously ‘eating is cheating’ and ‘you can sleep when you’re dead’. Nevertheless, despite the most vigorous arguments for 75% contributory negligence, it was awarded at 33% which utilised the ‘conventional’ figure of 25% for the seatbelt and a further 8% for driving while tired.

7 Compulsory insurance restrictions

a. Road Traffic Act 1988

The liability of a defendant motorist at common law to his passengers may, in some instances, be modified by the legislation relating to compulsory motor insurance or, if the driver had no insurance, by the Motor Insurance Bureau (MIB) Uninsured Drivers Agreement 1999 (UDA).

In a situation where the defendant has third party motor insurance that was in force at the time of the accident; and covered the vehicle, the driver and the use of the vehicle at the time, the above liability restrictions do not apply. The ‘contractual insurer’ should deal with the claim under the terms of the policy. But if the insurer has issued a certificate of insurance and certain conditions have not been observed (e.g. the vehicle was being driven by someone not permitted to do so), the insurer is still obliged to satisfy a judgment under s.148 of the 1999 Act. In these circumstances, the insurer is referred to as _RTA insurer_ and certain passenger claims are excluded.

In some limited circumstances, where a certificate of insurance has been issued but s.148 does not apply, the insurer may still be required to satisfy a judgment because of an internal arrangement with the Bureau, known as _Article 75_. The effect of this is that the ‘Article 75 insurer’ stands in the shoes of MIB and operates the UDA. If there is no insurance at all, the MIB has an obligation, as a body of last resort, to satisfy a judgment, subject to the strict conditions precedent to liability contained in the UDA.

The difference between the obligations of an RTA insurer and an Article 75 insurer or MIB is important because the exclusions of passenger liability in the latter situations are more extensive than under the RTA. But in any event there is an overriding requirement that there should be what is called _relevant liability_. This means that the obligation to satisfy a judgment applies only where there is a requirement to have third party motor insurance under s.143(1)(a) of the 1988 Act. This requirement arises out of the use of _a motor vehicle_ on a _road_ or other _public place_. For example, the obligation would not apply if the accident had occurred in a car park which was not for the use of the public at large.

b. Attempts to avoid certain liability to passengers

Section 149(2) of the 1988 Act makes any agreement to restrict or negative passenger liability of _no effect_. This would apply, for example, to any contract terms or notices which purport to claim that passengers travel at their own risk. It also negatives conditions on liability (e.g. that bus passengers must retain a valid ticket).
Section 149(3) does not allow the fact that a person has willingly accepted the risk as removing liability. This effectively rules out the defence of *volenti non fit injuria* in passenger claims where the RTA applies, although it does not rule out the defence of *ex turpi causa*.

c. The duty of an insurer to satisfy a judgment under the 1988 Act

The duty of an insurer under s.151(2) of the Act is subject to what is called an *excluded liability*. Section 151(4) says that ‘excluded liability’ means liability to passengers for injury or damage whilst:

- At the time of the relevant event –
- They allow themselves to be carried in or on the vehicle –
- And knew or had reason to believe –
- That the vehicle had been *stolen or unlawfully taken*

But this exclusion will not apply if the passenger:

- Did not know of, or had no reason to believe this until after they started the journey; and
- Could not reasonably have been expected to alight from the vehicle.

In *McMinn v McMinn and anr.* [2005] EWHC 827 (QB), the insurers had issued a fleet policy which restricted driving to those aged 25 or over and who were licensed or permitted to drive. The claimant was seriously injured in a van being driven by the first defendant, who satisfied none of the above conditions. The court held that the claimant knew that the van belonged to the driver’s employers and that they would not have allowed the first defendant to drive it. Therefore it had been unlawfully taken within the meaning of s.151(4) and the insurers were not required to satisfy the judgment.

d. Excluded passenger liability under the UDA 1999

Claims by certain passengers are excluded [Clause 6.1(e)] if they knew or ought to have known that the vehicle:

- Had been unlawfully taken;
- Was uninsured;
- Was being used to commit a crime; or
- Was being used to escape from the police

The burden of proving knowledge rests with MIB [Clauses 6.3 and 6.4]. This has always been a contentious provision which goes much further than the ‘excluded liability’ where an RTA insurer is involved. Some of the relevant case law is summarised below.

In *Akers v Motor Insurers Bureau* [2003] EWCA Civ 18, a passenger was killed in a motor accident when the 19 year-old driver lost control of the car at speed. There were two other passengers in the car and the court ruled that the deceased was present when the driver
indicated that he was uninsured. Clause 6(1)(e) applied and the MIB were not liable to satisfy
the judgment.

This Court of Appeal decision follows an earlier ruling by the House of Lords in *White v White* [2001] UKHL 9 where reference was made to the words in the Second EC Directive on Motor
Insurance (84/5/EEC) where the derogation allowed refers only to ‘knew’ rather than ‘knew or
ought to have known’ used in the agreement. In that case it was held that a person is only
precluded from making a claim where he actually knew of the lack of insurance or deliberately
disregarded plain indications of that fact.

In *Akers*, Keene, LJ said: ‘A mere failure to make enquiries as to insurance, however negligent
in the circumstances, is not enough by itself to bring the exception into play. It certainly will
apply, however, either if the passenger had actual knowledge of the lack of insurance, or if he
had information from which he realised that the driver might well not be insured but he
deliberately refrained from asking questions lest his suspicions be confirmed.’

In *Phillips v Rafiq and MIB* [2006] EWHC 1461, the claimant was the widow of a front seat
passenger who was killed in an accident on the M25. Mr Phillips, the deceased owned the car
involved but at the time it was being driven by Mr Rafiq, who was not insured. MIB refused to
satisfy the claim, relying on clause 6(1)(e) and the fact that the deceased knew, or ought to
have known that the vehicle was uninsured. However Seymour J said that the clause actually
referred to the claimant. The claimant in this case was Mrs Phillips, who was not a passenger in
the car so the exception did not apply to her.

MIB has since appealed this decision [2007] EWCA Civ 74. In upholding the first instance
decision, the Court of Appeal said that the words in clause 6(1)(e) should be given their plain
and literal meaning.

Clause 6(1)(c) contains a proviso that at the relevant time, either before the journey started or
after the person could reasonably have been expected to alight from the vehicle, that person
knew that the vehicle was uninsured etc. (This is sometimes called the ‘petrol station’ defence.)
In *Pickett v MIB* [2004] EWCA Civ 06, the claimant was a passenger in her own car, being
driven by her boyfriend who, as she well knew, was uninsured. She claimed that she had
withdrawn her consent to be carried in the vehicle but, by a two to one majority, the Court of
Appeal held that she had not unequivocally asked to get out of the car. The driver had started
to make handbrake turns and she told him to stop doing this. She asked him to stop so that she
could let her dog out (not herself) but the driver did another handbrake turn, the car overturned
and she was seriously injured. The court held that MIB were entitled to rely on the exception in
this case.