# European Commission

# Inception Impact Assessment: Adaptation of the scope of Directive 2009/103/EC on motor insurance

## A response by the Association of Personal Injury Lawyers

## September 2016

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have over 3,500 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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## Introduction

APIL strongly recommends that the Motor Insurance Directive should not be amended to limit its scope only to the use of vehicles in the context of traffic. The wider interpretation of the Motor Insurance Directive following the ruling in *Vnuk*[1] is vital in ensuring that injured people are able to obtain the compensation that they need and are entitled to in a wide range of circumstances that prior to *Vnuk,* would have been unlawfully denied.

## General comments

There is a real danger that amending the directive to take account of the "unintended consequences" of Vnuk will mean that the directive will then be too narrow. There will be situations where people injured by vehicles will be unable to recover the compensation that the directives entitle them to because there is no insurance in place and the Motor Insurance Bureau will not have any obligation to compensate in the absence of insurance. To restrict the Directive to use in "traffic" is inappropriate. It would remove from scope many situations where mechanically propelled vehicles which currently are not required to have compulsory insurance in domestic law are being used. A simple example is a mobility scooter in a shopping centre being driven recklessly or negligently, harming an innocent passer-by. With no requirement for the scooter to be insured, the injured person would – pre-*Vnuk*- have been denied access to compensation, which is clearly unjust.

There is no justification for a person in the circumstances of *Vnuk* not being entitled to damages. The case was decided correctly. Mr Vnuk was knocked off a ladder by a trailer attached to a tractor which was crossing a farmyard. The fact that this was on private land, or that the court held that the tractor was being used as a "machine or propulsion" device rather than a means of transport does not mean that Mr Vnuk was any less injured or any less entitled to compensation for his injuries. The outcome of *Vnuk* was fair, and the decision ensures that the directive is interpreted to provide a route to redress for a wider range of injured people who despite being deserving of compensation, may previously have been denied a claim due to the circumstances in which they were injured.

The effect of the *Vnuk* ruling is that the "use of vehicles" in the directive covers any use of a motor vehicle that is consistent with the normal function of that vehicle. The ruling that there is no difference between private and public properties in terms of the obligation for insurance cover is very important for many injured people. It also means that a broader range of vehicles must be covered by compulsory insurance, so that innocent victims can claim compensation. There is no justification for vehicles that can cause very significant harm to be driven without insurance. In the event that there is no insurance, the Member State's guarantee fund (in the case of the UK the Motor Insurers Bureau) must compensate. If compulsory insurance requirements are properly enforced, there should be no more call on the MIB for indemnity than at present.

The wider reading of the Motor Insurance Directive has not been transposed into domestic law in the UK. The Road Traffic Act 1988 still only extends the requirement for compulsory motor insurance to the use of motor vehicles on a road or other public place. This needs to be amended to delete references to "road or other public place". The decision in *Vnuk* plays an important role in ensuring that those who are injured through no fault of their own and are

[1] C-162/13

entitled to compensation can access this compensation, in situations where pre-*Vnuk* they would have been unable to do so. If there is no insurance in place, the wider definition of vehicle set out in *Vnuk* means that the Motor Insurers Bureau is required to indemnify. This is recognised by the MIB, as claimants have been successful in raising *Vnuk* in cases against the Motor Insurers Bureau.

If a claim to the MIB is unsuccessful, because UK law has failed to implement the Motor Insurance Directives fully, the claimant may bring a *Francovich*[2] damages claim against the state because of the Government's failure. This is because the injured claimant would otherwise be deprived of damages. This could be for example because the accident happened on private land or the vehicle in question was not intended or adapted for use on the road. The simple remedy to this is to widen the requirement for compulsory insurance. Doing so is likely to cost very little but would achieve the objectives of the Directives to protect the innocent against the actions of the negligent.

Fears that *Vnuk* means that the Motor Insurance Directive is now interpreted too broadly are unfounded. In situations where there is already other insurance in place – for example employers' liability insurance to cover those injured at work on a construction site, we accept that there is no need for the Motor Insurance Directive to be interpreted to allow a claim in these circumstances. We are extremely concerned, however, that the preferred option of the European Commission, i.e. to limit the scope of the Motor Insurance Directive to the use of vehicles in the context of traffic, would lead to many innocent injured people being denied compensation due to a lack of insurance cover. This would be highly unjust. A remedy which allows the negligent party to legitimately use the vehicle without insurance would defeat the entire purpose of the Motor Insurance Directive.

**Case studies demonstrating the usefulness of *Vnuk***

As above, there are a large variety of circumstances where the Vnuk decision will help to provide damages for claimants in situations where they would previously have been denied the compensation that they need and deserve.

***Horse rider knocked down by off-road motor bike***

One example is a horse rider who was thrown from a horse when a motorcyclist rode too close to her on a bridleway. The horse bolted and the claimant fell, sustaining a broken ankle. The MIB rejected the application as they did not consider that the accident had been caused by the use of a motor vehicle on a public road, as the motor bike was being ridden off road it was not likely to be a road bike that would otherwise require a policy of Road Traffic Act insurance to be in place. The solicitors in the case submitted that the *Vnuk* judgment extends the MIB's liability to victims of incidents involving all vehicles, provided that they are being used in a manner consistent with their normal function and as a means of travel. The bike was a vehicle for the purposes of Directive 72/166 1(1), and it should be covered by a policy of compulsory motor insurance. As such, the MIB should be liable to pay the applicant compensation. The case was accepted by the MIB prior to referral to the arbitrator. It was unclear how much emphasis was applied to the *Vnuk* judgment in the final decision, but it was encouraging that the appeal was successful when referencing the

[2] *C-6/90*

judgment. The claimant received £12,000 in damages for pain, suffering and loss of amenity which, in the absence of the *Vnuk* decision, they would have been denied.

***Off Road fatal accident***

*Case study provided by Gordon Dalyell, Partner at Digby Brown LLP, Edinburgh*

Digby Brown represented the family of a deceased young man killed in a Road Traffic Accident on the grounds of a large estate in the North West of Scotland.

The circumstances of the accident were well established, indeed a Fatal Accident Inquiry had been held and a determination issued before Digby Brown were instructed, and liability established as being on the driver of the vehicle in which the deceased had been travelling as a passenger.

While driving at excess speed, the driver of the car collided with an electrical pole. The collision caused the pole to fall onto the car, electrocuting the client. He was in his mid-twenties and had a promising career as both a semi-professional footballer and as an accountant.

This was far from the whole matter. The first defender was not insured. He and the deceased had been participating in off-road driving which was hosted by the estate once a month. With the driver not insured and not in a position to pay any award of damages himself, the case was dependent upon whether or not the Motor Insurers Bureau (MIB) and Insured Drivers Agreement would apply in the circumstances and allow the family of the deceased to make a claim for damages.

It was dependent upon whether or not the vehicle driven by the first defender at the time could be considered a motor vehicle within the terms of the Road Traffic Act 1988. It also depended on whether the locus of the accident could be considered a “road” within the terms of the Act.

Interviews were carried out with Police Officers, crash scene investigators, witnesses, local residents and the owners and managers of the estate where the incident occurred. The principal aim was to establish whether the road where the crash occurred was one accessible by the public and whether the car the first defender was driving was one which should have been insured under the relevant legislation (it was argued by the MIB that as a modified vehicle used for off road driving it was not).

At the centre of this case were a family who having lost a much loved family member were having to pursue damages some years after the event.

Senior and Junior Counsel were instructed to research and prepare detailed arguments that the MIB was liable to pay damages as the road was one with public access, was one that was used and accessed by vehicles and pedestrians. As such, cars being driven on it were required to be insured. The first defender having no insurance at the time of the accident, the Insured Drivers Agreement applied and the MIB were liable. The *Vnuk* decision was instrumental in constructing this argument.

Crucially, Digby Brown was able to persuade the MIB that the road and vehicle both met the conditions for them to be liable to pay damages. Quantum was agreed at a total of £500,000

across the respective claims with the case being settled without the need for the pursuers to go through a court hearing.

- Ends -


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