

Department for Transport

Technical consultation on motor insurance: Consideration of the European Court of Justice ruling in the case of Damijan Vnuk v Zavarovalnica Triglav d.d (C-162/13)



A response by the Association of Personal Injury Lawyers

March 2017

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:

Alice Warren, Legal Policy Officer

APIL

Unit 3, Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX

Tel: 0115 9435428; Fax: 0115 958 0885

e-mail: alice.warren@apil.org.uk

Introduction

We welcome the opportunity to respond to the Department for Transport's consultation on amending the Road Traffic Act following the case of *Vnuk*¹. In particular, we welcome the Government's recognition (however reluctant) that the Road Traffic Act cannot be maintained as it stands. It is imperative that the Road Traffic Act is amended to bring it fully in line with the requirements of the Motor Insurance Directive, to ensure that victims of road traffic accidents are properly compensated. While this consultation does not address all the short-comings of the Act, it is a step in the right direction.

Misconceptions

There are a number of misconceptions in this consultation, which must be addressed. Firstly, the reference to "newly in scope" vehicles is misleading. The vehicles listed at Annex A of the consultation are already potentially within the scope of Article 3 of the Motor Insurance Directive – the Motor Insurance Directive has never restricted the requirement for compulsory insurance to only those vehicles "intended or adapted for use on roads" as UK law has. The Government has had the power, since Article 4 of the First Motor Insurance Directive in 1972, to exempt the vehicles within Annex A from the compulsory third party insurance obligation. This is demonstrated by the list of vehicles that other EU countries have exempted from the Article 3 requirement – for example, Cyprus explicitly includes lawn mowers in their list of derogations.

Within the tables at paragraphs 2.4, 3.4 and 4.8 of the consultation, it is stated that the Motor Insurers Bureau's compensatory role is triggered where insurance is in place but it is "inadequate to meet the claim". This is incorrect and makes the MIB's obligations appear more onerous than they actually are. The MIB only has obligations as a fund of last resort where there is no insurance in place, or where the driver is untraced. Nothing in the Motor Insurance Directive or the *Vnuk* judgment changes this.

Q1) Due to the uncertainty, do you think that the Government should add either a sunset clause or a review clause in any new Regulations stemming from this consultation?

Q2) Leaving the EU allows us to look afresh at our overall policy aims on motor insurance. What are your views on the approach the UK should seek to take once we leave the EU?

We believe that firstly, the Government should fully implement the Motor Insurance Directive. If it does so, there will be no need to have a review clause in the regulations.

On leaving the EU, the UK should continue to abide by the Motor Insurance Directive. Not only will this continue to provide protection for those injured in road traffic accidents, by ensuring that insurance cover is in place to compensate victims, it will also prevent the UK being subject to additional red tape. If the UK seeks to no longer apply the Motor Insurance Directive, UK motorists driving abroad will be required to obtain a green card from the MIB.

¹ (C-162/13)

The Government is likely to be keen to avoid this extra bureaucracy and the expense it will lead to, so should continue to comply with the Motor Insurance Directive.

Q3) Compared with the current position, do you believe if the domestic law on motor insurance changed in line with the comprehensive option it would be better or worse? Why?

APIL believes that domestic law must be changed in line with the comprehensive option. The wider interpretation of the Motor Insurance Directive following the ruling in *Vnuk* is vital to ensure 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*, they would have been unlawfully denied.

There is no justification for a person in the circumstances of *Vnuk* not being entitled to damages. The case was decided correctly. The fact that the injury took place 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 ruling that there is no difference between private and public properties in terms of the obligation for insurance cover is very important for 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.

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.

There are many 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.

Example case study: horse rider thrown off by off-road motorcycle

A horse rider 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 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 likely have been denied.

Q4) Which of the Commission’s four suggestions do you believe would be best for amending the directive?

As above, we do not believe that the directive should be amended. *Vnuk* was decided correctly. We favour the first suggestion – do nothing.

Q5) If the Directive was amended so insurance was required when vehicles are used in traffic when compared to the comprehensive option would this make it better or worse?

If the directive was amended so that insurance was required when vehicles are “used in traffic”, this would mean that circumstances where there are off-road car races on private land for example, there would be no requirement for those vehicles to be covered by insurance. If there was an accident during the race, those injured or the families of those killed, would have no recourse to redress. Additionally, the circumstances of *Vnuk* itself would no longer be covered as the tractor was being used as a “machine or propulsion” device, and was not being used to “transport persons or goods in an area where the public has access in accordance with national law”. This is clearly unjust – as stated above, Mr *Vnuk* was not any less entitled to compensation, or any less injured, because the accident took place on private land and the tractor was being used a propulsion device rather than being driven at the time.

If the directive is amended, this would be worse than if the directive remained the same and was properly implemented in UK law. Any overly onerous consequences of fully implementing the directive in line with *Vnuk* can be appropriately handled by using the derogations allowed by Art 5 of the Motor Insurance Directive.

Q6) What do you think would be the effects in particular areas of the UK of using as the basis for compulsory insurance “areas where the public has access in accordance with national law”?

As above, we do not believe that the directive should be amended. We cannot comment on the effects in particular areas, but we believe that fully implementing the directive will mean that those injured will be able to obtain proper redress.

Q7) Do you think government should make use of the power available to derogate certain vehicles in the comprehensive/amended directive option?

The power to derogate certain vehicles has been available since Article 4 of the First Motor Insurance Directive in 1972. We think that the government should make use of the power available to derogate certain vehicles in the comprehensive directive option. This would ensure that where insurance is required to protect those involved in accidents caused by potentially harmful vehicles (regardless of where that accident occurred), it will be in place, but those vehicles that do not present a danger will not have to be subject to an onerous

insurance requirement. The factors to be taken into account when deciding which vehicles to exempt from insurance requirements need to be carefully decided.

Derogations – frequency of accidents

We are concerned that the frequency of accidents should not be one of the determining factors for derogation. Simply because an accident does not happen often does not lessen its severity or the importance of insurance in that case. There were five serious accidents involving mobility scooters and pedestrians in 2015². These accidents are likely to have left the pedestrian involved severely injured but unlikely to be able to make a claim because there is no requirement for the driver of the scooter to have insurance. There were only nine serious accidents involving mini buses in 2015 (compared to 3,433 involving cars), but no one would suggest that this should be a reason for minibuses not to be insured.

Derogations – current average cost of claims, cost of third party policy, how difficult it would be to enforce any requirement for insurance

We do not believe that the above three considerations should be main factors when deciding which vehicles to exempt from the insurance requirement. Insurance cover should be in place whenever there is a risk that a person is going to be harmed. The main factors to determine whether a vehicle is capable of harm will be its maximum speed and weight.

Derogations – maximum speed and weight

The maximum speed and weight of the vehicle would be appropriate reasons to derogate, but only if the maximum speed and weight of the vehicle is set so as to only incorporate those vehicles that could not harm people, and both factors are taken into account. Children's toys should not need to be insured, as they are light and only have a low maximum speed.

Derogations – where the vehicle is used

We suggest that a further consideration to take into account when deciding whether to exempt vehicles is where the vehicle is being used. If the vehicle has a low maximum speed and weight, and is being used purely on private land, where the public has no access – for example in a private fenced off garden, there should be no requirement for there to be insurance. This will provide an extra justification for exempting children's toys and lawn mowers, for example, if they border on the threshold of the maximum speed and weight requirements. It will also ensure that where the vehicle is perhaps on the threshold of the maximum speed and weight requirements, but is driven in areas where the public are present, no derogation will be allowed. Mobility scooters have the potential to cause serious harm despite only having a low maximum speed, because they are driven in areas that are heavily pedestrianised. Mobility scooters were involved in 9 deaths in 2014³, and while it is unclear whether the deaths were the drivers themselves or others hit by the scooters, this illustrates that there is the potential for these vehicles to cause harm. The extra check on whereabouts the vehicle is used will help to ensure that those vehicles at risk of causing

² <https://www.gov.uk/government/publications/reported-road-casualties-great-britain-annual-report-2015>

³ <http://www.telegraph.co.uk/news/uknews/law-and-order/11932407/Mobility-scooters-involved-in-nine-road-deaths-last-year.html>

harm will be insured. Where the vehicle is driven should not be a deciding factor for exemption on its own, however, and there must also be consideration of maximum speed and weight. Off road cars driven on private estates should be required to be insured.

Q10) Should a central register of every newly-in-scope vehicle be maintained?

We suggest that a central register of “newly in scope” vehicles should be maintained by the Government. It is also important that the vehicles have a traceability marking. These requirements do not need to be onerous. Provided that the Government makes use of the derogation requirements, only those vehicles that are at risk of causing injury will need to be traceable.

Q13) Should all SORN vehicles be required to have third party insurance under the comprehensive option?

We believe that any SORN vehicle which is used on private land must have insurance in place. SORN vehicles which are driven on private land are at risk of injuring people, and should have third party insurance in case of accident.

Q15) Should the same level of fine apply in respect of newly-in-scope vehicles as currently applies to cars?

Yes.

Q16) What requirements to deter fraud might be built into the claims procedure under the two main options in this consultation?

There should be a requirement to stop and swap details, or failing that report the incident to the police, if personal injury or damage is caused by any vehicle that is not included in the list of derogations. This requirement already exists for “mechanically propelled vehicles” at s170 of the Road Traffic Act 1988⁴. Mobility scooters are currently exempt from the requirement to stop and swap details, as they are classed as “invalid carriages”, as defined at s 185 of the Road Traffic Act⁵. The requirement must be extended to “newly in scope” vehicles that do not fall within the list of derogations.

The duty under s170⁶ is not onerous. If, as in the consultation document, a mobility scooter rider “bumps” into a fellow shopper in a mall, and no personal injury or damage arises, there will be no duty to swap information or report the incident to the police.

- Ends -

Association of Personal Injury Lawyers

- ▶ 3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX
- T: 0115 958 0585 ● W: www.apil.org.uk ● E: mail@apil.org.uk

⁴ And s 175 of the Road Traffic (Northern Ireland) Order 1981 in Northern Ireland, which requires details to be given to a constable on demand, and any other person who reasonably requires him to do so

⁵ And s 213 (b) Road Traffic (Northern Ireland) Order 1981

⁶ S 175 Road Traffic (Northern Ireland) Order 1981

