European Commission

Proposal for an amended Motor Insurance Directive

A response by the Association of Personal Injury Lawyers

July 2018

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

We welcome the European Commission's proposals to amend the Motor Insurance Directive to address the issues highlighted in the REFIT Review. We particularly welcome the proposal from the European Commission to amend the directive's scope to reflect case law. The amended Directive will make clear that the requirement for compulsory insurance is required whenever a vehicle is used in its normal function as a means of transport, and regardless of whether the vehcile is being driven in a private or public place. This will ensure that victims of road traffic accidents are properly compensated. The Directive's scope has, in the past, been a source of confusion for Member States, with different interpretations of the wording being incorporated into domestic law. It is now for the Member States to properly implement the amended directive to ensure that it is accurately reflected in domestic law, to ensure that those who are injured in road traffic accidents can access the compensation that they need and deserve.

Insolvency

APIL believes that all "Article 10 bodies" should become the funder of last resort in cases where the insurer is insolvent. At present, UK based insurers are covered by the Financial Conduct Authority should they become insolvent. In other jurisdictions, or where the accident has taken place in the UK but involving a foreign insurer, there may not be access to such a "fall back fund". Where the insurer is insolvent and all national compensatory options have been exhausted, there should be a requirement within the Directive that the Article 10 body deals with the claim. We are pleased that Article 10a provides that:

"…each Member State shall set up or appoint a body with the task of providing compensation for material damage or personal injuries caused by a vehicle insured by an undertaking which is subject to bankruptcy or winding up proceeding or where the insurer has not provided a reasoned reply within three months of the date when the injured party presented a claim for compensation for which the insurer has not provided a reasoned reply..."

We also welcome that under Article 10a, the body must reply to the claim within two months after the date on which the injured party has presented his or her claim for compensation. If the body does pay out, it is sensible that the Article 10 body should then have a right to sue the insolvent insurer for any money that it can recover. We believe that this approach is most beneficial to injured people, and would avoid them being left unsure of how to proceed with their claim, and ultimately having to pursue a complicated contractual claim against the insolvent insurer.

Minimum Amounts of Cover

We maintain that the standard set by the Road Traffic Act should be adopted within the Directive, and thus required across all Member States, with insurance cover for personal injury claims being unlimited.

Scope

We welcome that the scope of the Directive is to be amended to reflect case law in this area. It is vital that people who are injured in road traffic accidents are able to claim the compensation that they need and deserve. We welcome that draft Article 1 will amend the scope of the Directive to reflect the decisions of the Court of Justice of the European Union in *Vnuk, Andrade* and *Torreiro.*

We are very pleased to note that the European Commission will not be amending the Motor Insurance Directive to narrow the scope of the directive to the use of vehicles in traffic, as was proposed as part of the REFIT review. The interpretation of the Motor Insurance Directive following the ruling in *Vnuk*, and the subsequent cases of *Torreiro* and *Andrade*, is necessary 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,* would have been unlawfully denied. Limiting the scope of the directive only to accidents caused by motor vehicles in the context of traffic would have resulted in the directive then being too narrow. As a result, it would no longer achieve its objectives of protecting the innocent from the actions of the negligent. It would remove from scope many situations involving mechanically propelled vehicles which currently are not (on an incorrect reading of the directive) required to have compulsory insurance in domestic law. A simple example is a mobility scooter in a shopping centre being driven recklessly or negligently, harming an innocent passerby. With no requirement for the scooter to be insured, and with the Motor Insurance Bureau having no obligation to compensate in the absence of insurance, the injured person would be denied access to compensation, which is clearly unjust.

There is no justification for a person who is injured by a motor vehicle on private land, by a vehicle not “in traffic”, to be denied compensation because the driver of the vehicle was uninsured. An amendment to the directive to make clear that the intention of the European Commission is not to limit the scope of the directive purely to vehicles in traffic, means that a broader range of vehicles must be covered by compulsory insurance, so that innocent victims can claim compensation. Vehicles that can cause very significant harm should simply not be driven without insurance, and in the event that there is no insurance, the Member State’s guarantee fund must compensate. If compulsory insurance requirements are properly enforced, there should be no more call on the MIB for indemnity than at present.

The need for clarity

Despite a Department for Transport consultation on the issue taking place in April 2017, the correct 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. Amending the Motor Insurance Directive as proposed would send a clear message about the intended scope of the directive, and in light of this, the UK Government must amend domestic legislation accordingly. As we have mentioned in previous responses to both the European Commission and the UK Government, the failure of the UK Government to as yet amend the Road Traffic Act in line with the Directive opens up the risk of claimants bringing *Francovich* damages claims against the state, if their claim against the MIB is unsuccessful. It would be far simpler and less costly for the UK Government to properly implement the directive, to widen the requirement for compulsory insurance in the Road Traffic Act. The case below

demonstrates the sorts of situations where there should (and following amendment to the Directive, there will) be a clear requirement for compulsory insurance. The cases below demonstrate the need for an amended directive to make the state's obligations clear. In the second case study below, the case law assisted the claimants in obtaining damages. If the case law were incorporated into the Directive, as proposed by the European Commission, claimants would more easily be able to obtain the compensation that they need and deserve.

Woman injured at indoor go-carting event – Case study provided by Sam Elsby, Elsby Solicitors (since incorporated by Dean Wilson LLP)

Elsbys Solicitors (since incorporated by Dean Wilson LLP) were instructed by a client in 2016, who was injured at indoor go-cart event. The claimant was violently struck from behind by another participant who had failed to obey a red-light stop signal, that had been switched on as a result of another accident ahead on the track.

The organisers and venue had not been negligent and the potential defendant driver had no assets or income and was otherwise uninsured. As the Road Traffic Act has not properly implemented the Motor Insurance Directive, there was no requirement in domestic law for the go-cart to be insured, or for the Motor Insurers Bureau to compensate. The claimant was therefore left without an effective remedy.

Horse rider knocked down by off-road motor bike

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. This 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 have been denied.

We suggest that when transposing the Directive into domestic law, the UK Government produces accompanying guidance for the general public to make clear which sorts of situations will require compulsory insurance.

The amended directive is not overly onerous

APIL believes that the reading of the Directive following Vnuk is not overly onerous. Fears that Vnuk means that the Motor Insurance Directive is now interpreted too broadly are unfounded. This is particularly so following the case of *Rodrigues de Andrade,* which clarified that only the "normal use of the vehicle as a means of transport" should be covered by motor third party liability insurance, therefore excluding accidents where the vehicle was

used for exclusively agricultural use. 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.

The power to derogate certain vehicles from the scope of the directive has been available to Member States since Article 4 of the First Motor Insurance Directive in 1972. The starting point must, however, be for Member States to accurately transpose the directive into domestic law, to avoid any further confusion. Any overly onerous consequences as a consequence of the amended scope (such as a requirement to insure ride on lawn mowers) could be removed by Member States providing for certain vehicles that do not present a risk of causing harm to be exempt from the requirement of compulsory insurance. APIL does caution, however, that the UK Government must carefully decide the list of factors to consider when determining whether vehicles qualify for a derogation. APIL believes that the maximum speed and weight of a vehicle must be taken into account, as well as whether a vehicle is used in a public place. A ride on lawn mower with a low speed and weight only ridden in private should not require insurance, but a mobility scooter (which is perhaps on the borderline of the maximum speed and weight requirements) driven in a public place must have insurance. In any event, it is doubtful that a ride on lawn mower would satisfy the test in *Andrade,* as it is unlikely that it would be driven as a means of transport.

Motor sport

We welcome the European Commission's decision not to provide an exclusion for motor sport vehicles, as there was no evidence to show that including motor sport in the scope of the directive would lead to excessive costs, as had been argued by the motor sport lobby. APIL maintains that all vehicles that are capable of causing harm due to their maximum speed and weight should be subject to a requirement for insurance, regardless of where they are driven. The case study below demonstrates the dangers of off road racing:

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. 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 2 C-6/90 a promising career as both a semi-professional footballer and as an accountant. It was established that the driver of the vehicle was liable. The first defender was, however, uninsured. 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.