NINESTJOHNSTREET
PERSONAL INJURY

UPDATE ON MOTOR INSURANCE LAW

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24 April 2018
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Introduction

- This talk will focus on the impact of recent UK and European decisions upon motor insurance and seeking financial redress following RTA's.
- The starting point is Part VI of the Road Traffic Act 1988 ("RTA 1988"), which concerns:
  - the minimum compulsory insurance requirements, and
  - the rights and duties of insurers in relation to judgments obtained against persons insured.
- The RTA 1988 seeks to give effect to the United Kingdom's obligations under Community Law.
- The obligation on the UK courts is to construe the RTA 1988 in accordance with the relevant European "*Motor Insurance Directives*".

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The European Motor Insurance Directives

The relevant European "*Motor Insurance Directives*" are:

- First Directive (72/166/EEC);
- Second Directive (84/5/EEC)
- Third Directive (90/232/EEC),
- Fourth Directive (2000/26/EC)
- Fifth Directive, and the
- Sixth Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 ("the 2009 MID"), which consolidates the above Directives – (sometimes called the Codified Directive).

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The 2009 Directive

The 2009 Directive (in simplified terms):

- Article 3 - requires member states to implement a system for the compulsory insurance of "*the use of vehicles normally based in its territory*" ('the compulsory insurance obligation').
- Article 10 - imposes an obligation to have in place a body to provide compensation where someone is injured by the uninsured use of a vehicle (this being the MIB in the UK), save where the person knew the vehicle was uninsured.
- Article 12 –provides that Exclusion clauses within insurance policies are deemed to be void in respect of claims by third party accident victims, save where the victim voluntarily entered the vehicle knowing it to be stolen.

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Recent UK Caselaw

Recent UK cases include on motor insurance law include:

1. *Churchill Insurance Co Ltd v Fitzgerald & Wilkinson; Evans v Equity Claims Ltd [2012] EWCA Civ 1166 ("Churchill")*
2. *Sean Robert Delaney v Secretary of State for Transport (Court of Appeal) [2015] EWCA Civ 172*
3. Sahin v Havard [2016] EWCA Civ 1202 (permission to appeal to the Supreme Court has been refused)
4. UK Insurance Ltd v R & S Pilling [2017] EWCA Civ 259 (permission to appeal to the Supreme Court has been granted)
5. *Roadpeace v Secretary of State for Transport [2017] EWHC 2725 (Admin)*
6. *Cameron v Hussain & Liverpool Victoria Insurance [2017] EWCA Civ 366* (an application for permission to appeal to the Supreme Court is yet to be determined)

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Recent EU Caselaw

Recent European cases on motor insurance law include:

1. *Vnuk v Zavarovalnica Triglav D. D. [2016] RTR 188*
2. *Fidelidade-Companhia de Seguros SA v Caisse Suisse de Compensation Case C-287/16 "Fidelidade"(Judgment: 20 July 2017)*
3. *Farrell v Whitty C-413/15 (Farrell 2)[C-413/15]] (Judgment: 10 October 2017)*
4. *Rodrigues de Andrade [C-514/16] (Judgment: 28 November 2017)*
5. *Torreiro v AIG Europe Ltd Case C-334/16 (Judgment: 29 December 2017)*
6. *Smith v Meade and FBD Insurance Plc, Ireland, Attorney General. Case C/122/17(Opinion of Advocate General Bott delivered on 10th April 2018)*

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RTA 1988 Part VI

Minimum Compulsory Insurance requirements

- Limited to use of a motor vehicle "*on a road or [other public place]*" (see S 143(1) / S 145 / S 192) and, note:
- S 185(1) – Defines motor vehicle as a "*a mechanically propelled vehicle intended or adapted for use on roads*".

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RTA 1988 Part VI

Summary of the duty of motor insurers to satisfy judgments

- S151(5) imposes a duty on insurers to satisfy judgments in respect of insured third party liabilities, even if the insurer is not liable to its insured as a matter of contract , save that:
- S 152(2) – no sum is payable under S151 if the insurer has obtained a declaration the policy was void ab initio

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Uninsured Claims

- The MIB exists as a 'fund of last resort' to compensate victims of uninsured and untraced drivers
- The MIB's obligation is to handle claims in accordance with the Uninsured Drivers Agreements (listed in handout).
- All UK motor insurers must be a member of the MIB, and sign up to the MIB Articles of Association .
- Article 75 of the Articles of Association requires a motor insurer to meet a judgment, in circumstances where the insurer would not be liable to do so under S151.
- Art. 75 insurer steps into shoes of MIB and so the relevant UDA applies to the claim.

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The "Game-Changer"

Vnuk v Zavarovalnica Triglav D. D. [2016] RTR 188

- Knocked off a ladder in farm barn by a reversing tractor/trailer. CJEU Held:
- The definition of 'vehicle' under the Directives is "*any motor vehicle intended for travel on land but not running on rails, and any trailer, whether or not coupled*"
- Such definition is unconnected with the use made of the vehicle. So, the fact that a tractor, may be used as an agricultural machine, has no effect on whether it is a 'vehicle' within the meaning of the Directives.
- Thus "use" of a vehicle under the Directives includes the manoeuvre of a tractor in a private farm.

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Impact of Vnuk

- The CJEU judgment suggests that the compulsory insurance obligation extends to:
  - Any use of a vehicle
  - That is consistent with the normal function of the vehicle
  - Wherever the use takes place
- The RTA 1988 the insurance obligation relates only to road use and "other public places" – this is not compatible with the Directives. Nor is the RTA 1988 definition of a motor vehicle.
- Estimated £1.83bn in premiums in the first year to extend UK compulsory insurance requirements in line with *Vnuk*. (see article at https://www.12kbw.co.uk/rodrigues-de-andrade-v-salvador-ors/)
- Should the State or the MIB now meet uninsured accidents that occur on private land, as well as on the road?

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Cases post Vnuk

Torreiro v AIG Europe Ltd Case C-334/16 (judgment 29 December 2017)

- T, an officer in the Spanish army, was injured whilst travelling in an all-terrain military vehicle with "Anibal" wheels which was being used on private land as part of a military exercise area
- He was refused compensation under Spanish law on the ground that the accident had not resulted from "an act classifiable as use of a vehicle". Various questions were referred to the CJEU for preliminary ruling.
- The CJEU concluded that at the time of the accident the vehicle was being "used as a means of transport", and it should have been subject to compulsory insurance. Consistent with *Vnuk*, it did not matter where the vehicle was being used.

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Pause for Thought

Connelly v Lancaster & MIB Manchester County Court, 4 March 2011, (Unreported).

- Client drove his FLT into collision with a motor vehicle on a public road.
- Was this a case for compulsory insurance under the RTA 1988?
- If so, then the claim was excluded under the client's Plant Insurance Policy and the MIB would meet the claim.
- **HELD:** The FLT was not a vehicle intended or adapted for use on roads, therefore CI not required.
- Would this case be decided differently today?

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Cases post Vnuk

Rodrigues de Andrade [C-514/16] (judgment 28 November 2017)

- C was spraying herbicides in a vineyard when, due to a landslip the stationary tractor carrying the herbicides moved, killing C
- Was this a case for compulsory insurance under the Directives?
- ECJ Held: No.
- Where a vehicle is intended to be used not only as means of transport but also as a machine for carrying out work it is necessary to determine the use at the time of the accident.
- Compulsory insurance is only required where principal use was means of transport (see para. 40)
- A reigning back of the Vnuk decision?

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Wait a minute!!

Connelly v Lancaster & MIB Manchester County Court, 4 March 2011, (Unreported).

- On the journey out the FLT carried a large concrete block, and so the FLT was being used as a machine to carry out work.
- However on the journey back (when the accident occurred) the FLT simply carried the client, and so was being used as a means of transport.
- Applying *Vnuk* and Rodrigues de Andrade, would the FLT need to carry motor insurance on the journey back, but not on the journey out when the principal use was carrying the concrete blocks?

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The UK Fallout

- ***Roadpeace v Secretary of State for Transport [2017] EWHC 2725 (Admin)***

- Following Vnuk the Claimant charity maintained in JR proceedings that specific domestic law provisions which governed compulsory insurance for motor vehicles contravened European Union law.

- One of the complaints is that the current insurance scheme was still restricted to use of motor vehicles on roads or other public places.

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The UK Fallout

Roadpeace v Secretary of State for Transport [2017] EWHC 2725 (Admin)

- Roadpeace sought a *Marleasing* interpretation of the insurance provisions of the RTA 1988 to extend to cover to use of motor vehicles in any UK geographic location
- Mr Justice Ouseley –HELD – NO:
- Reading in words as proposed by the Claimant was against the principles enunciated in *Vodaphone No 2 v HM Revenue and Custom Commissioner [2009] EWCA civ 446*
- *Scope of Vnuk's* judgment is unclear. /Changing the law would cause chaos / EU considering legislative change post Vnuk.
- However, Ouseley J noted the possibility of Franovich damages, where a breach of the Directive had in fact caused loss, referring to *Delaney v Secretary of State [2015]*.

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The UK Fallout

Roadpeace v Secretary of State for Transport [2017] EWHC 2725 (Admin)

- *Roadpeace* have since sought permission to appeal, and a reference to the CJEU on the restrictions on use issues

- Furthermore, the judgment is said to acknowledge the following infringements*:

i. Sections 145 and 192 of the Road Traffic Act 1988 wrongly restricts third-party motor cover to vehicle use in public spaces

ii. Sections 145 and 182 of the Road Traffic Act 1988 wrongly restrict the types of vehicles subject to the compulsory insurance to road vehicles

iii. Section 152(2) of the Road Traffic Act 1988 wrongly permits an insurer to invoke its policyholder's misrepresentation or non-disclosure to avoid its statutory liability to compensate claimants

iv. Regulation 2 of the Rights Against Insurers Regulations wrongly limits the direct right of action against motor insurers to UK accidents

- *As summarised by Mr Nick Bevan in https://www.newlawjournal.co.uk/content/defending-indefensible

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Options for Claimants

So how does a Claimant seek to recover damages where UK framework falls short of the Directives?

- A Franovich action against the Secretary of State for failing to implement the directives properly (as identified in *RoadPeace*)?
- An action against the MIB, on the basis that they are an emanation of the state against which the provisions of the Directives have direct effect?
- The RTA insurer?

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A Franovich action?

Sean Robert Delaney v Secretary of State for Transport (Court of Appeal) [2015] EWCA Civ 172)

- November 2006 - D was seriously injured whilst travelling as a passenger in SP's Mercedes, whilst out to sell cannabis
- SP's insurers (Tradewise) avoided the policy of insurance pursuant to s 152(2) of the RTA 1988
- Tradewise therefore became the Art 75 insurer.
- In a previous claim, HHJ Gregory and CA held that Tradewise were entitled to rely on cl 6(1)(e)(iii) (the crime exemption) of the Uninsured Drivers' Agreement 1999, so D's claim was dismissed.
- D therefore brought Franovich claim against SS.

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A Franovich action?

Sean Robert Delaney v Secretary of State for Transport (Court of Appeal) [2015] EWCA Civ 172)

- As it was a "Franovich" claim, D had to establish:

i. That EU provisions were infringed, that were intended to confer rights on individuals;

ii. The breach was sufficiently serious;

iii. There was a direct causal link between the breach and the loss sustained;

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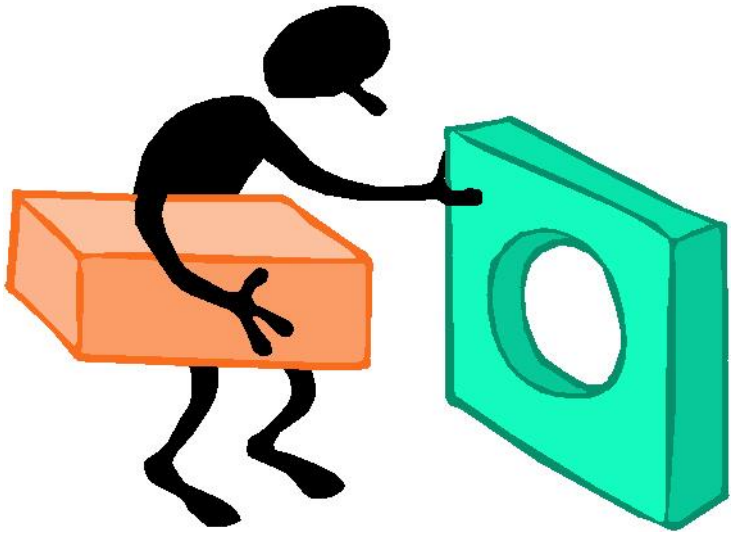
A Franovich action?

Sean Robert Delaney v Secretary of State for Transport (Court of Appeal) [2015] EWCA Civ 172)

- Justice Jay held that "*Clause 6(1)(e)(iii) was a material addition to the list of excepted categories*", and was not consistent with the specific exceptions permitted by Articles 1.4 and 2.1 of the Second Council Directive (NB now codified as Art 10 and 12 of 2009 Directive).

- CA endorsed this and agreed that the breach by the Secretary of State was sufficiently serious to establish a Franovich claim for damages from the state.

- Following this case, the "crime exemption" clause was removed from the subsequent UDA, issued in 2015.



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Direct Effect against the MIB?

Farrell v Whitty [2017] EUECJ C-413/15 (Farrell 2)

- In 1996 Ms Farrell was gravely injured in a motor accident in the Irish Republic, whilst sat in the loading area of a van with no seating. The van was uninsured.
- Motor Insurers' Bureau of Ireland (MIBI) rejected claim on basis that s56 of the 1961 RTA Act only applied to those parts of a vehicle equipped with seating.
- Proceedings were issued against the impecunious driver, MIBI and the Irish state (in the latter case, as a *Francovich* action).
- Case referred to ECJ.

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Direct Effect against the MIB?

Farrell v Whitty [2017] EUECJ C-413/15 (Farrell 2)

- This first reference to ECJ found that the S56 exception fell short of the compulsory insurance obligation (under what is now Art 3 of the 2009 Directive)
- Subsequently in January 2008 Mr Justice Birmingham found that the MIBI was bound by the direct effect of the relevant provisions of the Directive, and judgment was given against MIBI
- MIBI appealed the judgment all the way to the Irish Supreme Court, leading to a second referral to ECJ

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Direct Effect against the MIB?

Farrell v Whitty [2017] EUECJ C-413/15 (Farrell 2)

- The ECJ ruled that:
- Arts 3 and 10 of the Directive qualify for direct effect.
- Art 10 (which defines the role of the compensating body that both the MIBI and the MIB discharge) is 'a task in the public interest'.
- MIBI has 'special powers beyond those which result from the normal rules applicable to relations between individuals', due to the express and practical effect of s 78 of the Road Traffic Act 1961 which requires every Irish motor insurer to be a member of the MIBI.

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Direct Effect against the MIB?

Farrell v Whitty [2017] EUECJ C-413/15 (Farrell 2)

- The ECJ concludes at para [42] thus:
- *'... **provisions of a directive that are capable of having direct effect may be relied on against a private law body on which a Member State has conferred a task in the public interest**, such as that inherent in the obligation imposed on the Member States by .... [* now Article 10 of the Directive *], and which, for that purpose, possesses, by statute, special powers, such as the power to oblige insurers carrying on motor vehicle insurance in the territory of the Member State concerned to be members of it and to fund it.'*
- The Irish Supreme Court is still to make the final determination concerning the MIBI.

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The RTA Insurer?

Smith v Meade and FBD Insurance Plc, Ireland, Attorney General. Case C/122/17(Opinion of Advocate General Bott delivered on 10th April 2018)

- Another seating case, but this time with an insurer (FBD):
- *On* 5th February 2009 the High Court in Ireland concluded that it was possible to interpret both the 1961 Act and the 1962 Regulations in a manner that was consistent with the Third Directive. Therefore FBD went on to settle Mr Smith's claim, and FBD was subrogated to the rights of Mr Smith as a result of the payment.
- FBD appealed and CA said the HC's interpretation was *contra legen*.

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The RTA Insurer?

Smith v Meade and FBD Insurance Plc, Ireland, Attorney General. Case C/122/17(Opinion of Advocate General Bott delivered on 10th April 2018)

- CA referred the dispute between FBD and the State of Ireland to the ECJ. AG Bott's opinion (which ECJ is likely to follow) is that:

i. When FBD settled Mr Smith's claim, they fulfilled an obligation which was incumbent on the Irish state. That obligation cannot be legally transferred to FBD, as that would be tantamount to the Directive having direct effect against the Insurer.

ii. The insurer who had complied with the national law, was not responsible for compensating the victim.

iii. The State had been unjustly enriched by the settlement, and that needs to be remedied.

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The RTA Insurer?

Smith v Meade and FBD Insurance Plc, Ireland, Attorney General. - Discussion

- The author's view is that the application of the case is probably limited to those situations where:-
  - The national law is not compatible with the Directives, and
  - The national law cannot be interpreted in a manner which is consistent with the Directives.
- If both those circumstances exist, it is the state that is responsible for compensating the victim for injury, not the Insurer who has created a policy and calculated an insurance premium, based upon the incompatible legislation.
- In contrast, where the incompatible legislation can be interpreted in a manner which is consistent with the Directives, then arguably the Insurer may still be exposed to an unexpected liability.

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The RTA Insurer?

Cameron v Hussain & Liverpool Victoria Insurance [2017] EWCA Civ 366

- C injured in RTA. She sued the registered keeper (D1) and the insurer.
- It transpired that the keeper was not the driver and insurance provided by LV was in fact held by a fictitious person.
- Problem – insurer's S151 obligation only arises once a judgment is obtain against an insured person.
- C sought to amend the CF to substitute D1 for "*the person unknown driving vehicle registration number...*". Was this permissible?
- *CA said YES*

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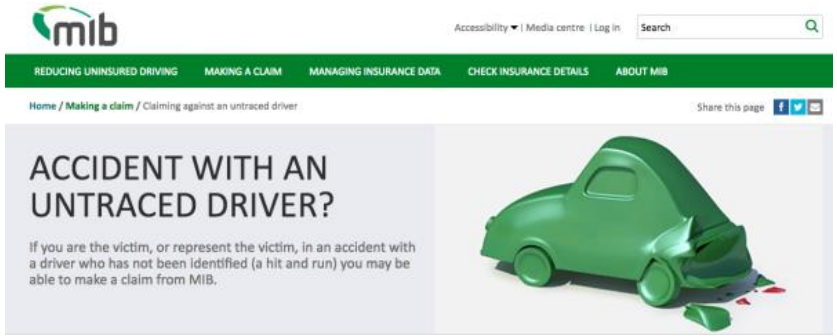
The RTA Insurer?

Cameron v Hussain & Liverpool Victoria Insurance [2017] EWCA Civ 366

- So why is this case important?
- A claim a against an insurer is significantly more cost effective than a claim against the MIB under the UtDA.
- Exposes insurers to claims they previously thought would fall to the MIB.
- Fear of scope for fraud – policies for fictitious drivers with purpose of claiming against an untraced driver.
- Case due to go to Supreme Court later this year.



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Duty to Satisfy Judgments

***Fidelidade-Companhia de Seguros SA v Caisse Suisse de Compensation* Case C-287/16 20 July 2017 (AB 36 – 40) "*Fidelidade*".**

- Motorcyclist killed by D's negligent driving. D insured by F.
- Under Portuguese law, D's insurance policy with F was held to be null and void due to false statements.
- Deceased motorcyclists' claim settled by Swiss NGF. The Swiss NFG sought to recover their outlay from F.
- Issue for the ECJ – could the policy invalidity be invoked against the innocent motorcyclist?

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Duty to Satisfy Judgments

***Fidelidade-Companhia de Seguros SA v Caisse Suisse de Compensation* Case C-287/16 20 July 2017 (AB 36 – 40) "*Fidelidade*".**

- ECJ HELD: No, under the Directives, the nullity could not be invoked against the victim.
- There is only one permitted derogation from the Directive's obligation that the insurer compensate the victim:

"*..namely where the company can prove that the victim knew the vehicle had been stolen (judgment of 1 December 2011, Churchill Insurance Company Limited and Evans, C-442/10, EU:C:2011:799, paragraph 35).*"

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Duty to Satisfy Judgments

Mr Meme Oryloss v The Mistress and Her Insurers (Unreported)

- Drivers policy was voided by declaration (she had not disclosed her loss of licence).
- Insurers relied on S 152(2) RTA to avoid any liability under s151. Thereby becoming Art 55 insurers.
- As Art 75 insurers, they sought to rely on Clauses 6 (e)(ii) of the 1999 UDA (exception if passenger knows the vehicle was uninsured)
- My Argument:

i. Client passenger did not have insurance knowledge

ii. Even if he did, then according to RoadPeace "*the true effect of Fidelidade was that s152(2) RTA was no longer compatible with EU law.*"

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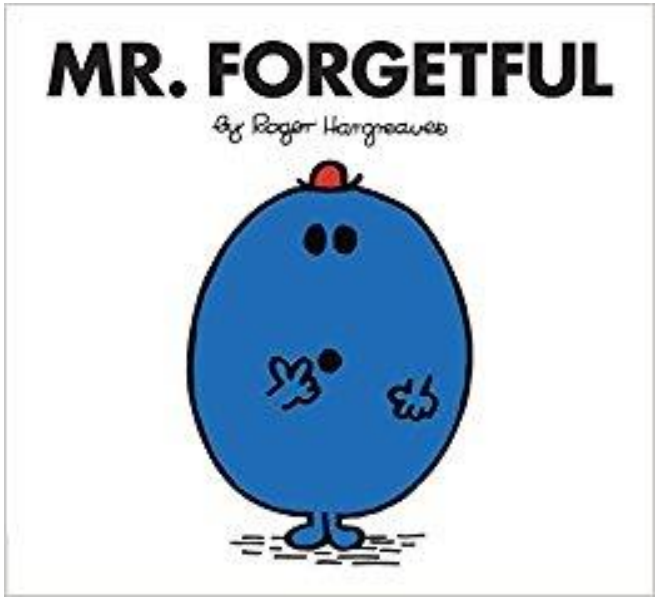
Duty to Satisfy Judgments

Mr Meme Oryloss v The Mistress and Her Insurers (Unreported)

- Sought to argue words needed to be inserted to S 152(2) to make it compatible with EU law, (as had occurred in the Churchill case). Proposing :

  "save that this subsection may only be invoked against persons who voluntarily entered the vehicle which caused the damage or injury when the insurer can prove that they knew the vehicle was stolen".

- Outcome - Client failed to recall the accident in enough detail to establish negligence against the driver!!



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Conclusions

Key Messages

- Recent ECJ decisions make it clear that the EU Directives deliver something very different to the UK framework.
- There is a new legal landscape which many EU countries including the UK have only recently woken to.
- The Directives requirements as to compulsory insurance are far more wide ranging than previously thought.
  - No longer should you overlook RTA's arising on private land.
  - No longer should you overlook RTA's involving plant and machinery.
  - The rights of the MIB and RTA insurer's to avoid claims have been curtailed by Europe.
- Consider your options - more detail in my handout.
- Make hay whilst the sun shines.

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Brexit – Taking Back Control

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