MOTOR INSURANCE IN COMMUNITY LAW

Recent Developments

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This talk focuses on how victims of motor vehicle incidents are compensated under domestic law and the growing divergence between this and the more generous provision required by Community law, namely the Motor Insurance Directives.

I COMMUNITY LAW BASICS

The proper approach to interpreting our domestic law in this area should always begin with the relevant Community law. This may seem counterintuitive to many tort law practitioners but this has become common place in the fields of health and safety, employment law and human rights.

It is well known that the UK has ceded a portion of its sovereignty to the European Community under a number of consolidated treaties. This is particularly relevant to the primacy of Community law principle. Most of us are familiar with Lord Denning's dictum in *H.P. Bulmer Ltd v J. Bollinger SA* **[1974] Ch 401** [at 418], to the effect that whenever an area of UK law is covered by Community law, it becomes part of our national law and *"is equal in force to any statute".*

The Community has two main legislative processes:

Regulations

These are binding in their entirety and have direct effect in each member state, pursuant to Art 249 of the Treaty of Rome 1957 (as amended and consolidated).

Directives

These usually set out high level policy objectives and confers a wide discretion as to how individual member states implement them. They are teleological in nature, as Art 249(3) makes clear: *"A directive shall be binding, as to the result to be achieved, upon each member state to which it is directed but shall leave to the national authorities the choice of form and methods."* All directives are prefaced by a series of recitals; these state the Community policy underscoring the objectives. The operative parts of a directive are set out within the articles that follow.

II INTERPRETING COMMUNITY LAW

When it comes to interpreting a directive, the Court of Justice of the European Union (CJEU) is the ultimate authority (Art 220 of the Treaty). This principle is confirmed by s.3(1) of the European Communities Act 1972 (ECA 1972) which incorporates relevant CJEU rulings into UK law. Article 234 of the treaty confers the CJEU's jurisdiction to deliver preliminary rulings on issues referred to it by a national court. When interpreting a directive, the CJEU will tend to consider its purpose as opposed to applying a literal construction to the words used. Although our national courts have jurisdiction when it comes to interpreting our domestic law and the impact on it of Community law, s.3 of ECA 1972 requires them to do so by applying the relevant rulings of CJEU.

Article 10 of the treaty imposes a duty on national courts to interpret domestic legislation in a way that is consistent with Community law. The purposive interpretation principle was enshrined in *Marleasing SA v La Comercial Internacional de Alimentacion SA* **[1990] ECR I-4135**. It is worth citing a more recent CJUE ruling from 2006, *Adeneler and Others v Ellinikos Organismos Galaktos Case C-212/04* **[at 108 to 109]**.

> *"When national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third para of Art 249 EC (see* Joined Cases C-397/01 to C-403/01 Pfeiffer and Others *[2004] ECR I-8835, para 113, and the case-law cited). This obligation to interpret national law in conformity with Community law concerns all provisions of national law, whether adopted before or after the directive in question (see* Case C-106/89 Marleasing *[1990] ECR I 4135, para 8, and* Pfeiffer and Others*, para 115).*
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> *"The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of Community law when they determine the disputes before them (see* Pfeiffer and Others*, para 114)."*

III THE MOTOR INSURANCE DIRECTIVES: BACKGROUND

Between 1972 and 2005, the European Council enacted five different directives with the aim of delivering a consistent approach across the European Community by member states to ensure that civil liability for use of motor vehicles is covered by some form of insurance provision.

These directives are not intended to alter civil or criminal liability arising out of the use of vehicles. In this, member states retain their autonomy; subject only to the principle that their laws must not indirectly deprive the directives of their effectiveness.

The original requirement in Art 3(1) of the First Motor Insurance Directive: 24/04/1972 (72/166/EC) [now Art 3 of the Sixth Directive] was that member states *'shall…take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures.'*

Article 1 defines "vehicle" as "any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled".

The Directive does not define "use of vehicles". There are also subtle linguistic variations in the different language editions of the Directive. This ambiguity conferred a wide discretion on member states as to how they implemented the legislative objectives. This resulted in divergences across the European Community.

This latitude has been restricted by successive directives and CJEU rulings to ensure a consistent approach across the Community. For instance Article 2(1) of the Second Directive 30/12/1983 (84/5/EC) [now Art 13 of the Sixth Directive] provides a list of policy exclusions which are deemed to be void as against a third party. By way of derogation from that obligation, the second sub-para of Art 2(1) provides that certain persons may be excluded from compensation by the insurer, having regard to the situation they have themselves brought about (persons entering a vehicle which they know to have been stolen)

Ordinarily, one might infer from the presence of such a list that all other exclusions are prima facie valid. A similar line of reasoning has been advanced in the interpretation of s 148 of the Road Traffic Act 1988.

In *Rafael Ruiz Bernáldez* **[1996] Case C-129/94** however, the CJEU applied a purposive construction that went beyond what one would expect of a literal interpretation.

That case involved an insured driver who caused property damage as a result of driving intoxicated, liability for which was excluded by the driver's insurance policy. The CJEU ruled emphatically that such an exclusion was incompatible with the policy and objects of Directives and that the list of void exclusions in Art 2(1) - far from being a self-contained list of exceptions to a basic rule - merely served to illustrate the kind of exclusions that Art 3(1) prevented. It emphasised the protective purpose of the directives and the importance of a consistent approach across the different member states. It also explained how successive directives had removed the discretion of member states to allow their own exclusions and restrictions to the third party motor insurance cover requirement they impose and how any disparities in the treatment of victims threatened to undermine the effectiveness of their legislative objective.

The CJEU's restrictive interpretation of Art 2(1) has been endorsed and approved in subsequent rulings, such as in *Candolin* **[2005] ECR I-5745, Case C-537/03**.

Although *Bernaldez* did not consider the geographic or technical scope of the insurance required under these directives, it expounded the inclusive nature of their legislative aim of protecting motor accident victims across Europe. This lies at the heart of any proper construction of Arts 1 and 3. Its effect was to remove the discretion to permit exclusions or limitations in cover save where expressly sanctioned by the directives.

In 2009 these provisions were incorporated into a consolidating Sixth Directive (Council Directive 2009/103/EC) word for word, by which time their meaning had changed significantly because the intervening directives sought to introduce conformity and to close the gaps in protection and a raft of CJEU rulings interpreting

the meaning and effect of these provisions, the most significant of which was *Bernaldez*.

In September 2014 the CJEU delivered judgment *Vnuk v Zavarovalnica Triglav d.d, Case C-162/13*; arguably the most important ruling on motor insurers' liability and the scope of the compensatory guarantee scheme for motor accident victims since *Bernaldez*.

IV *VNUK*

On 13 August 2007, Mr Vnuk was working in a farmyard, on a ladder, when the ladder was struck by a trailer coupled to a tractor reversing across the yard in order to deliver hay bales to the nearby barn. He fell from the ladder, sustaining injury. He later brought proceedings before the Slovenian courts for compensation in a sum just short of €16,000 for his loss and damage.

The Slovenian courts dismissed his claim, on the basis that the requirement for compulsory insurance was limited to use of the tractor and trailer as a vehicle for road use and did not extend to cover situations where the use was as a machine or propulsion device.

The Slovenian appeal court referred the case to the CJEU, noting that the domestic legislation intended to implement Art 3(1) of The First Directive had been interpreted by the domestic courts in such a way as to limit its application to use of vehicles on public roads.

The question for the CJEU was therefore whether the requirement for compulsory insurance in Art 3(1) applied to the accident in question, which had taken place on private land and where the tractor was being used as farm machinery. It answered this question in the affirmative.

In other words, the fact that a vehicle, together with an attachment, can be used as agricultural machinery, does not affect its status as a "vehicle" for the purposes of Art 3(1). Moreover, following an analysis of the different language versions of the First Motor Directive, any use of the vehicle which is "consistent with the normal function of that vehicle" comes within Art 3(1).

V IMPLICATIONS OF *VNUK*

This decision has immediate, obvious and far-reaching implications for our statutory and extra-statutory provision for TPMI in the UK.

(1) The duty to insure under domestic law and the scope of the policies that the Department for Transport is responsible is inconsistent with Community law

In particular, it puts Community law on a direct collision course with s.143 of the Road Traffic Act 1988, which expressly limits the requirement for third party liability insurance to "roads" or "other public places". In other words, it does not extend to private property. This wording cannot now, even in the context of generous judicial interpretation powers (see *Ghaidan v Godin-Mendoza* **[2004] 3 All ER 411, [2004] 2 AC 557***,* [33] per Lord Nicholls for an explanation of how powerful a tool this can be*)*, be read consistently with the UK's obligations under the Motor Insurance Directives.

Further, the duty only applies to vehicles intended or adapted for use on roads; and Finally, it means that the Court of Appeal's ruling in *EUI Ltd v Bristol Alliance Ltd Partnership* **[2012] EWCA Civ 1267**, that motor insurers have a free hand to qualify or otherwise restrict their liability to compensate third party victims, save where expressly precluded from doing so by the Road Traffic Act 1988, is clearly wrong.

The exclusion of insurance for off-road or private land use is a breach of Community law.

(2) An injured party whose claim for damages is refused by insurers under s.143 RTA 1988 may now have a claim for **Francovich** *damages against the Department for Transport.*

Such claimants can derive substantial support from the recent Court of Appeal decision in *Delaney v Secretary of State for Transport* **[2015] EWCA Civ 172**, upholding Mr Justice Jay's strident finding that the UK government was liable to compensate a seriously injured car passenger for his injuries.

This *Francovich* action arose out of an earlier claim by Sean Delaney against his driver (Shane Pickett) and the vehicle's motor insurers (Tradewise). It proved to be something of an empty victory. Although the driver admitted full responsibility for the accident, he was not the main target. Delaney's only hope of recovering his extensive compensatory needs depended on his establishing that Tradewise was also liable to compensate him: either directly under s.151 of the Road Traffic Act 1988 (RTA 1988), or indirectly as agents of the Motor Insurance Bureau (MIB) under the terms of the Uninsured Drivers Agreement 1999.

Delaney's first set-back was in January 2011 when HHJ Gregory dismissed both claims on two grounds. He held that the claim against the driver was barred on grounds of public policy, i.e. *ex turpi causa*. Second, that as the claimant knew or ought to have known that the vehicle was being used in the course or furtherance of crime, namely to traffic and supply cannabis, cl 6(1)(e)(iii) of the Uninsured Drivers' Agreement 1999 applied to exclude any liability on Tradewise or the MIB to satisfy the claim.

His appeal in *Delaney v Pickett & Tradewise* **[2011] EWCA Civ 1532, [2011] All ER (D) 201 (Dec)** failed. Although the *ex turpi causa* finding was reversed, the Court of Appeal applied the natural meaning of the words used in both Part VI of RTA 1988 and the Uninsured Drivers Agreement 1999. In doing so it upheld the first instance finding that exempted Tradewise and the MIB from any liability under cl 6.

Neither party (nor the trial or appellate Courts) considered whether clause 6 of the 1999 Agreement was permitted by Community law.

This *Francovich* award is significant not simply because it confirms that cl 6 is incompatible with Community law but because of the Court of Appeal's readiness to endorse Mr Justice Jay's reasons for finding that the UK's defective implementation of European law was sufficiently serious to warrant a damages award. Its unanimous decision was that the judge was right to conclude, when applying Lord Clyde's multifactorial approach for determining whether the breach was serious enough to warrant liability under *Francovich* principles (see *R v Secretary of State for Transport, ex p. Factortame Ltd (No.5)* **[1993] 3 CMLR 597, [2000] 1 AC 524, at pp. 554-556**), that the relevant Community law had been sufficiently and clearly

explicated as long ago as in *Bernaldez*, which preceded the 1999 Agreement by three years.

Jay J held that the rationale in *Bernaldez* had a general application and that any fair reading of the opinion of the Advocate General and the judgment of the court itself would or should have led to the conclusion that as between insurer and victim the former could not rely on an exclusion clause which was not expressly conferred under the directive. Furthermore, after *Bernaldez* the point was *"close to being self-evident"* without needing a directly applicable case authority.

In essence, *Delaney* confirms the general applicability of the *Bernaldez* ratio. This is fairly sensational because not only does this directly contradict the same court's earlier ruling in *EUI v Bristol Alliance Limited Partnership* **[2012] EWCA Civ 1267, [2013] 1 All ER (Comm) 257**, but it also exposes the government to a raft of similar *Francovich* actions for the numerous homespun exclusions and restrictions of liability that pepper the UK's statutory and extra-statutory provision in this area.

VI WHAT NEXT?

Delaney is a significant development. The Government can no longer assert with any credibility that its national law provision satisfies Community law. Along with *Churchill v Wilkinson* **[2012] EWCA Civ 1166, [2013] 1 All ER 1146** and *Vnuk*, *Delaney* reveals that our entire national law provision in this area is in disarray and means the state will be liable for any incompatible exclusions and restrictions of insurer or MIB liability, back to 1996.

The government faces a stark choice: it must implement widespread reform or face a raft of expensive legal challenges.

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