MOTOR INSURANCE LAW UPDATE
A LANDCSAPE RIPE FOR CLAIMS?

INTRODUCTION

1. This talk is specifically concerned with Part VI of the Road Traffic Act 1988 ("RTA 1988"), which concerns:
   (i) the minimum compulsory insurance requirements, and
   (ii) the rights and duties of insurers in relation to judgments obtained against persons insured.

2. The RTA 1988 seeks to give effect to the United Kingdom's obligations under Community Law. That being so, there is an obligation on the courts to construe the RTA 1988 in accordance with the relevant European "*Motor Insurance Directives*" ("the Directives").

3. The Directives require member states to:
   - implement a system for the compulsory insurance of the use of motor vehicles ('the compulsory insurance obligation').
   - 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).

4. Until at least 31st December 2020[1] judges in the UK must continue to overrule primary legislation where it does not comply with EU law[2]. What has become clear from a significant number of recent judgments from both the UK Courts and the ECJ, is that in many respects Part VI of the RTA 1988 is incompatible with the European "*Motor Insurance Directives*".

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[1] Being the supposed end date of the Brexit transition period

[2] In accordance with the European Communities Act 1972

5. This talk will consider the position as provided by Part VI of the RTA 1988, recent UK and ECJ case law, the changing legal landscape, and whether the time is ripe for RTA claims that previously would have been relegated to the dustbin.

The Road Traffic Act 1988

6. The UK's Minimum Compulsory Insurance requirements under the RTA 1988:

- S 143(1) provides that a person must not use, or cause or permit another person to use, "*a motor vehicle on a road [or other public place] unless there is in force*"... a policy of insurance that "complies with the requirements of this Part of this Act" (also see S 145 / S 192) .
- Essentially therefore, insurance is only required under the RTA 1988 for use of a motor vehicle on a road or public place
- S 185(1) RTA 1988 defines a motor vehicle as a *"a mechanically propelled vehicle intended or adapted for use on roads"*.

7. To summarise issue (ii) – The duty of insurers to satisfy judgments, the RTA 1988 provides:

- S 151(5) imposes a duty on motor 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 (provided that certain conditions are met, and the insurer has none of the defences available to him by s 151).

- One such defence is provided by S 152(2). This provides that no sum is payable by an insurer under S 151 if (within three moths of commencement of the proceedings in which judgment was given), the insurer has obtained a declaration he is entitled to avoid the policy on the ground that it was obtained—
  - by the non-disclosure of a material fact, or
  - by false representation of some material fact

- S151(8) enables an insurer who is liable in consequence of S 151, to recover the amount it has had to pay, from any person who was insured by the policy and who caused or permitted the use of the vehicle which gave rise to the liability.

The Motor Insurer's Bureau

8. The MIB exists as a 'fund of last resort' to compensate victims of uninsured and untraced drivers that cause personal injury and damage to property.

The Uninsured Drivers Agreements ("UDA")

9. The MIB's obligation is to handle claims in accordance with the Agreements entered into between MIB and the Government (namely the Secretary of State for Transport).

10. There have been various agreements over time, which apply depending on the date when the accident occurred. The agreements are not retrospective. The most relevant are:

- UDA 1999 applies to accidents between October 1999 and 31 July 2015
- UDA 2015 applies to accidents on or after 1 August 2015.
- Supplementary UDA 2017, which amends the 2015 UDA and came into force on 1 March 2017.

11. The UDA's govern the liability of the MIB to meet uninsured claims. They include exceptions, for example, Clauses 6(1) (e) (ii) of the 1999 UDA / Clause 8(1) of the 2015 UDA (which survives the 2017 amendments), excludes the MIB's liability if a claimant passenger *knew or ought to have known* that the vehicle was being used without there being in force in relation to its use such a contract of insurance as will comply with Part VI of the 1988 Act.

12. The leading judgment on the interpretation of the above clause is White v White [2001] UKHL 9, [2001] 2 All ER 43. This held at paragraph 23 (AB 29):

> *"The exception spelt out in clause 6(1) (e) (ii) of the agreement was intended by the parties to carry through the provisions of the Directive. The phrase "knew or ought to have known" in the agreement was intended to be coextensive with the exception permitted by article 1 of the Directive. It was intended to bear the same meaning as "knew" in the Directive. It should be construed accordingly. It is to be interpreted restrictively.* ***"Ought to have known" is apt to include knowledge which an honest person who enters the***

vehicle voluntarily would have. It includes the case of a passenger who deliberately refrains from asking questions. It is not apt to include mere carelessness or negligence. A mere failure to act with reasonable prudence is not enough. *Hence it does not embrace the present case. Brian White's claim is not excepted from the MIB agreement. On this I respectfully differ from the view of the Court of Appeal."*

13. Thus a passenger can be treated as having knowledge that the driver was uninsured where the passenger has deliberately refrained from asking questions lest his suspicions should be confirmed.

14. In such a case, the burden is on the MIB to prove that a claimant passenger knew or "had a state of mind tantamount to actual knowledge" that the vehicle in which he was travelling was uninsured. Where proven, the UDA entitles the MIB to reject the claim of the Claimant passenger.

MIB Articles of Association

15. The MIB Articles of Association embody the agreement between the MIB and its members. Any company that underwrites compulsory motor insurance in the UK must be a member of the MIB.

16. Article 75 of the MIB Articles of Association sets out when a motor insurer must accept liability to meet a judgment, in circumstances where the insurer would not be liable to do so under the RTA 1988 (hereinafter referred to as an "RTA insurer").

17. So for example, having obtained a S 152(2) declaration, an RTA Insurer reverts to an "Article 75" insurer and steps into the shoes of the Motor Insurers' Bureau (MIB). In such a case, the insurer's liability is framed by the terms of the relevant UDA, although it is the insurer, not the MIB, who is liable to satisfy any judgment obtained by the injured party.

18. This means that the so-called Article 75 insurer can rely upon any relevant provision within the UDA, to avoid meeting the particular claim.

The Governing European Framework

19. The Road Traffic Act 1988 ("RTA 1988") seeks to give effect to the United Kingdom's obligations under Community Law.

20. That being so, there is an obligation on the courts to construe the RTA 1988 in accordance with the relevant European "*Motor Insurance Directives*". These being the:

- 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).

21. In very simplified terms, the 2009 Directive:

- Article 3 - requires member states to implement a system for the compulsory insurance of "*the use of motor vehicles 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.

22. A number of recent decisions have brought into question whether certain provisions of the RTA 1988 are compatible with the Directives, and accordingly whether legitimate claims under European law are being wrongly denied by the UK courts.

23. This area is RIPE for further litigation in terms of both the extent of compulsory insurance and liability of motor insurers / MIB pursuant to the RTA 1988 / the UDA's and the underlying EU law.

Impact of Community Law

24. The impact of the Directives has already been considered in a number of recent UK cases, including:

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

25. Furthermore, a significant number of recent European cases have extensive ramifications for claims in the UK, in particular:

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

26. The first mentioned case, namely *Churchill* is a good place to start, as it involves a prior ECJ referral and explains the interpretive methods:

***Churchill Insurance Co Ltd v Fitzgerald & Wilkinson; Evans v Equity Claims Ltd* [2012] EWCA Civ 1166 ("Churchill")**

27. Churchill considered whether s 151(8) of the RTA was compatible with the provisions of the European Directives, in light of a preliminary ruling from the European Court (Fourth Chamber) in the same case, recorded at *Case C-442/10* (see AB 41-47).

28. The relevant background is that S151(8) enables an insurer to recover payments it had been required to make under S151 to a victim, if the victim was insured by them and "had caused or permitted the use of the vehicle which gave rise to the liability".

29. An example of such a scenario is where insured person A permits uninsured person B to drive his vehicle, and A is injured by B's negligent driving. A's insurers must meet A's claim under s151(5), despite the fact they may have grounds to avoid or cancel his policy. However by S151(8), the insurers can then recover back the sum they paid A. This means that A is excluded from the benefit of compulsory insurance.

30. The European Court in *C-442/10* had ruled:

> *"the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, must be interpreted as precluding national rules the effect of which is to omit automatically the requirement that the insurer compensate a passenger who is a victim of a road traffic accident when that accident was caused by a driver who was not insured under the insurance policy and when the victim, who was a passenger in the vehicle at the time of the accident, was insured to drive the vehicle himself but who had given permission to the driver to drive it."*

31. Considering that ruling, the Court of Appeal subsequently held at paragraph 48:

> *"Thus, when a national court applies domestic provisions enacted to implement a particular Directive, it must interpret that national law in conformity with Community law. In doing so the court must consider its national law as a whole in order to assess to what extent any particular*

national law may be applied so as not to produce a result contrary to that sought by the Directive. (Ibid at 115.) The national court must, of course, use interpretive methods recognised by its own national law. The court should use such interpretive methods so as, first, to avoid a conflict between the provision of the national law derived from the Directive and any other rules of domestic law; and, secondly, to reduce the scope of the other rule of domestic law in such a way as to be able to achieve the result sought by the Directive. (Ibid at 116.)"

32. The parameters of interpretation were then outlined at paragraphs 49- 50, as including inter alia; the implication of words necessary to comply with Community law obligations; and as permitting the departure from the strict and literal application of the words which the legislature has elected to use.

33. The Court of Appeal in Churchill went on to "notionally" add words to Section 151(8) as follows:

"[76] Accordingly, I would prefer the interpretation advanced by the insurers and the SST. I would interpret s 151(8)(b) as notionally including the words added in bold italics:

"Where an insurer becomes liable under this section to pay an amount in respect of a liability of a person who is not insured in a policy . . . he is entitled to recover the amount from . . . any person who –

. . .

(b) caused or permitted the use of the vehicle which gave rise to the liability, ***save that where the person insured by the policy may be entitled to the benefit of any judgment to which this section refers, any recovery by the insurer in respect of that judgment must be proportionate and determined on the basis of the circumstances of the case.""***

34. The Court of Appeal considered that this amendment, ensured compliance with the Directives and at the same time reflected the ability of Member states to exercise their powers relating to civil liability, in respect of the use of a motor vehicle based solely on the basis of the victim's contribution to the occurrence of the loss.

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

35. In order to understand Delaney v Secretary of State for Transport CA [2015] , we must first consider *Delaney v Pickett and another - [2012] 1 WLR 2149* and *Delaney v Secretary of State for Transport [2014] EWHC 1785 (QB) (AB 100 – 124)*:

Delaney v Pickett and another - [2012] 1 WLR 2149

36. The facts: Sean Delaney (D) and Shane Pickett (SP) were seriously injured in a head on collision with a van on 25 November 2006. D was a passenger. SP was driving a Mercedes 500 SL that was insured with Tradewise Insurance Services Ltd. It was common ground that the collision was caused by P's dangerous and negligent driving.

37. On 4 March 2009 Tradewise obtained an order to the effect that it was entitled to avoid this policy of insurance pursuant to s 152(2) of the RTA 1988 on the grounds that the driver SP had failed to disclose that: (i) he suffered from diabetes; (ii) he suffered from depression; and (iii) he was a habitual cannabis user.

38. The Court of Appeal (Ward LJ dissenting) found that both SP and D had embarked on their journey with a criminal intention of selling the cannabis and in so doing they were using the vehicle in the course of a crime at the time of the accident.

39. Tradewise - standing in the shoes of the MIB - became the "Article 75 insurer" liable to meet the road traffic act liability brought about by SP's driving on this occasion, subject to it being proven that one of the exceptions set out in the UDA 1999 was applicable.

40. On 25 January 2011 HHJ Gregory found that D knew or ought to have known that the vehicle was being used in the course or furtherance of crime, namely the transportation of cannabis for the purpose of subsequent supply, and cl 6(1)(e)(iii)[3] of the Uninsured Drivers' Agreement 1999 was accordingly applicable.

[3] Which provides that the MIB do not have to meet claims where the injured person voluntarily allowed himself to be carried in a vehicle which he knew was being used in the course of, or furtherance of a crime.

41. An appeal on the clause 6(1)(e)(iii) issue was dismissed on 21 December 2011. However, this was not the end of the matter:

Delaney v Secretary of State for Transport [2014] EWHC 1785 (QB)

42. In separate proceedings issued on behalf of the same D on 16 November 2012, a claim for damages was pursued against the Secretary of State for Transport , for "*being in breach of art 1(4) of Directive 84/5*".

43. This was a "Franovich" damages claim, in which Mr Delaney 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;

44. As to issue i, it was argued that cl 6(1)(e)(iii) (the crime exemption) was incompatible with the relevant EU Directives.

45. Justice Jay undertook a detailed review of the ECJ cases, and made reference to Churchill Case C-442/10 (at paragraph 51).

46. Justice Jay held that "*Clause 6(1)(e)(iii) was a material addition to the list of excepted categories*", and was therefore not consistent with the specific exceptions permitted by Articles 1.4 and 2.1 of the Second Council Directive (see Paragraph 70).

47. He also held that "*the United Kingdom, in the legal personification of this Defendant, is in plain breach of EU law, and the question of liability to pay compensation on Francovich principles therefore arises*". (See Paragraph 72).

48. I note at this stage that the case briefly referred to cl 6(1)(e)(ii) (the insurance knowledge exemption), to which I turn later in this hand-out. However, Delaney's Counsel did "not dispute that, if cl 6(1)(e)(ii) were held to apply, it would operate to defeat his client's claim" (para 118). In any event Justice Jay went on to consider

White v White, and concluded that D had given no thought to the issue of insurance, and so his claim was to be met.

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

49. The Court of Appeal unanimously upheld Mr Justice Jay's decision that the exclusion from compensation where a vehicle was being used in furtherance of a crime, was an infringement of the rights to compensation under the Directives.

50. The CA also accepted that the breach by the Secretary of State was sufficiently serious to establish a Franovich claim for damages from the state.

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

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

52. On 13 August 2007, Mr Vnuk was working as a farmhand in Slovenia. He was working from ladders storing bales of hay in a barn. He suffered injury when he was knocked from the ladder by a trailer attached to a tractor that was reversing on private property (the courtyard of a farm).

53. Mr Vnuk sought compensation against Zavarovalnica Triglav, the insurance company with whom the owner of the tractor had taken out compulsory motor insurance.

54. The Slovenian courts dismissed the claim and it's appeal, stating that compulsory insurance in respect of the use of a motor vehicle covered damage caused by the use of a tractor as means of transport, but not damage caused when a tractor is used as a propulsion device.

55. The Slovenian appeal court referred the case to the Court of Justice of the European Union (CJEU) to determine whether the duty to insure "the use of vehicles" within the meaning of Article 3(1) of the First Directive, covered the circumstances of the accident.

56. Article 3(1) of the First Directive states:

> *'Each Member State shall, subject to Article 4, 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.'*

57. The question for the CJEU to consider was whether the concept of 'use of vehicles' within Article 3(1) of the First Directive was to be interpreted as including circumstances such as the manoeuvre of a tractor in the courtyard of a farm in order to bring the trailer attached to that tractor into a barn.

58. Prior to the CJEU ruling the case was the subject of an Opinion from Advocate General Mengozzi ("the AG"). The AG found that a broad interpretation of movement and "use" implies no requirement for the vehicle to be on a road. Reversing a tractor in a farmyard must be regarded as use of a vehicle.

59. The requests of the German Government, Ireland and the United Kingdom Government seeking the reopening of the oral part of the procedure were rejected.

60. The Commission was of the opinion that that provision applies to the use of vehicles, whether as a means of transport or as machines, in any area, both public and private, in which risks inherent in the use of vehicles may arise, whether those vehicles are moving or not.

61. The CJEU delivered its judgment followed the AG's approach. At its outset the judgment sought to put in context EU law underpinning compulsory motor insurance, and highlighted the relevant parts of the First to the Fifth Directives, now codified in Sixth Directive 2009/103/EC, running through of the development of compulsory motor insurance, and it's broadening scope over time.

62. The CJEU referred to the definition of "vehicle" within the directives, namely:

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

63. The CJEU then concluded that such definition of 'vehicle' is unconnected with the use which is made or may be made of the vehicle in question. Consequently, 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 Article 1(1) of the First Directive.

64. In summary, the CJEU judgment in Vnuk suggest 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

65. Under the RTA 1988 the insurance obligation relates only to road use and "other public places". *Vnuk* is therefore expected to have a huge impact, as implicit within the decision is that insurance of vehicles is compulsory for "any use" of a vehicle.

66. The RTA definition therefore is not compatible with the Directives, as it cannot be interpreted in accordance with EU law following Vnuk. The financial ramifications here could be enormous, given the Directives also impose an obligation on Member States to have in place a body to provide compensation where someone is injured by the uninsured use of a vehicle[4]. Arguably the MIB should now be meeting uninsured accidents that occur on private land, as well as on the road.

67. In the December 2016 "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", the Department of Transport said this:

> "The challenge Government is facing at the moment arises from a judgment by the European Court of Justice which was a **complete game-changer** as far as motor insurance is concerned. We were disappointed with the judgment which interpreted the Motor Insurance Directive in a

[4] It has been estimated that it would cost £1.83bn in premiums in the first year to extend the UK compulsory insurance requirements in line with *Vnuk*. (see article at https://www.12kbw.co.uk/rodrigues-de-andrade-v-salvador-ors/).

way that neither we, nor many of our counterparts across Europe, expected or desired. Nonetheless, it is an interpretation that we must, by law, recognise and take account of in developing the legislative framework governing motor insurance in Great Britain."

68. The ruling has also raised fundamental questions as to what constitutes a vehicle. The case has also prompted the European Commission to look again at the original requirements of the Directive.

69. The question of "what is a vehicle" strikes a personal note with the author, having previously been involved in a contested trial on a preliminary issue of whether a fork lift truck was a "mechanically propelled vehicle intended or adapted for use on roads" within the meaning of the compulsory insurance requirements of the RTA 1988, (*Connelly v Lancaster & MIB Manchester County Court, 4 March 2011, Unreported*).

70. The Background – The FLT had been driven into collision with a motor vehicle on a public road. I represented the driver / owner of the FLT. If the FLT was not a vehicle intended or adapted for use on roads then the client's Business / Plant Insurers would be liable to pick up the claim. However if it was vehicle intended or adapted for use on roads, then the Business / Plant insurance excluded liability, and the claim would be met by the MIB. The MIB would of course, in turn, seek recovery from my client's personal assets.

71. The judge found in favour of my client and the MIB, concluding that the FLT was not suitable for general use on the roads, and was therefore not subject to compulsory insurance requirements. This meant that the claim was met by the Business / Plant Insurers.

72. However would this case be approached differently today? Certainly the Business / Plant Insurers could put up a stronger argument that the FLT was subject to compulsory insurance, as it falls within the Directives definition highlighted by *Vnuk*, namely "any motor vehicle intended for travel on land and propelled by mechanical power but not running on rails, and any trailer, whether coupled or not".

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

73. The CJEU has revisited its decision in *Vnuk* in *Rodrigues de Andrade.*

74. The Facts – The case involved a dual use vehicle, ie a vehicle which could be used as a means of transport but also has another specific mechanical function. An agricultural worker called Mrs Alves was employed to spray herbicides in a vineyard when a tractor which was carrying the herbicide drum moved, crushing her. The tractor in question had previously sat stationary, but was caused to move by a landslip. Mrs Alves died as a result.

75. The issue was whether the motor insurer of the tractor was liable. This depended upon whether the circumstances fell within the compulsory insurance requirements of the 2009 Directive.

76. The court confirmed the basic findings in *Vnuk*, making it clear that, just because a vehicle was stationary, whether its engine was running or not, was not determinative and it was certainly possible to fall within the concept of the use of vehicles which required compulsory insurance cover even when stationary.

77. Where however, the vehicle was a dual use vehicle, ie it had a use other than as a means of transport, it had to be determined what the principal use was at the time which led to the accident. It would only be where the vehicle was being used principally as a means of transport that this would be covered by the concept of the use of vehicles within Article 3.

78. The CJEU considered what was meant by the 'use of vehicles' concluding:

- the concept does not depend on the characteristics of the terrain on which the motor vehicle is used [35];
- it covers any use of a vehicle as a means of transport [38];
- thus, whether a vehicle is stationary or moving or whether its engine is running or off is not determinative [39];

- however 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 whether, at the time of the accident, the vehicle was being used principally as a means of transport [40].

79. On the facts of the case, it was clear that the principal use of the tractor was not as a means of transport when the accident occurred, rather the *"tractor was being used to generate the motive power required to drive the pump of the herbicide sprayer attached to it for the purpose of applying herbicide to the vines on a farm"*.

80. As the use was principally connected with the function of the tractor as a machine for carrying out work as opposed to a means of transport, it was not covered by the concept of 'use of vehicles' within the meaning of Article 3(1) of the First Directive. Therefore, subject to verification by the referring court, the tractor was not subject to the compulsory insurance requirements under the Directives.

81. On the face of it the case is not on all fours with *Vnuk*. The use of a tractor as a means of powering agricultural equipment is clearly part of the normal function of such a vehicle, and the Directives make no reference to the compulsory insurance obligation being confined to the use of vehicles for transport. Thus the CJEU has reeled back somewhat, and has confined the compulsory insurance obligation in respect of vehicles which are capable of being used for work, to occasions when those vehicles are being used principally as a means of transport.

82. Yet this raises even more questions. In the *Connelly* case described above, the FLT was returning back a short distance along a public road from one section of his scrap yard business to another. On the journey out he had 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 used as a means of transport.

83. Applying *Vnuk* and *Rodrigues de Andrade*, the FLT would need to carry motor insurance on the journey back, but not on the journey out when he delivered the concrete block!

84. The distinction between use as a means of transport and other uses will need to be considered if and when amendments are made to the RTA 1988 to comply with *Vnuk* and also by Claimants considering *Francovich*-type claims in respect of accidents suffered on private land.

85. The European Commission are considering whether to amend the Directives as a consequence of *Vnuk*. Proposals are not expected until next year.

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

86. T, an officer in the Spanish army, was injured on 28 June 2012 when a military vehicle in which he was travelling as a passenger overturned while on night-time military man oeuvres. The vehicle in which T travelled was an all-terrain military vehicle with "Anibal" wheels which was being used on private land within part of a military exercise area, suitable for tracked vehicles.

87. 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.

88. 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.

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

89. Following *Vnuk*, the UK's implementation of the Directives has already been a matter of legal challenge before the High Court as part of judicial review proceedings in *RoadPeace v Secretary of State for Transport.*

90. The Claimant charity maintained that specific domestic law provisions which governed compulsory insurance for motor vehicles contravened various provisions of European Union law or did not comply with it sufficiently to give it lawful effect.

91. By the time of the trial the many complaints had been reduced to a few areas of criticism. One of the areas was the fact that the current insurance scheme was still restricted to use of motor vehicles on roads or other public places. The Claimant invited the court to:

i. Set aside parts of or adopt a *Marleasing* interpretation[5] of the insurance provisions of the RTA 1988 so that they were extended to cover use of motor vehicles in any geographic location within the UK, or

ii. To set a timetable for the introduction of legislation to meet the MID requirements.

92. The decision on this case was handed down by Mr Justice Ouseley many months later on 7 November 2017. The judgment declined to attempt a *Marleasing* style reinterpretation, dealing with this at paragraphs 81 to 91:

- Reading in words as proposed by the Claimant was against the principles enunciated in *Vodaphone No 2 v HM Revsenue and Custom Commissioner [2009] EWCA civ 446*[6] (paragraph 90)
- It was felt that changing the law would cause chaos (paragraph 89)

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[5] ***Marleasing SA v La Comercial Internacional de Alimentacion SA*** (1990) C-106/89 was a decision of the European Court of Justice concerning the indirect effect of European Union law. It established that the courts of European Union member states have a duty to interpret national legislation in light of unimplemented European Union directives.

[6] The interpretative obligation in the *Marleasing* case [1990] ECR I-4135 was discussed in *Vodafone 2 v Revenue and Customs Comrs* [2010] Ch 77, paras 37 and 38 by Sir Andrew Morritt C, with whom Longmore and Goldring LJJ agreed. He said at para 38 in particular:

"Counsel for HMRC went on to point out, again without dissent from counsel for V2, that: 'The only constraints on the broad and far-reaching nature of the interpretative obligation are that: (a) the meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed": see per Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 33; Dyson LJ in *Revenue and Customs Comrs v EB Central Services Ltd* [2008] STC 2209, para 81. An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment (see per Lord Nicholls, at para 33, Lord Rodger, at paras 110–113 in *Ghaidan's* case; per Arden LJ in *R (IDT Card Services Ireland Ltd) v Customs and Excise Comrs* [2006] STC 1252, paras 82 and 113); and (b) the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate: see the *Ghaidan* case, per Lord Nicholls, at para 33; per Lord Rodger, at para 115; per Arden LJ in the *IDT Card Services* case, at para 113.'"

- It was very relevant that the European Commission itself is contemplating legislative amendment (paragraph 91)
- The scope of the judgment in *Vnuk's* case was unclear. Ouseley J stating at paragraph 90:

  "Did it decide that all use of a motor vehicle, whether on public and private land, in a manner consistent with the normal function of the vehicle, must be covered by insurance against liability to a third party, without limitation or exclusion, as Mr Hyam for RoadPeace contended? Did it simply mean that a motor vehicle used other than on a road or public place, in a manner consistent with the normal function of the vehicle, had to be covered by insurance against third-party liability, subject to such limitations as might be agreed between insurer and insured, as Mr Palmer for the SST and Mr Worthington for the MIB contended? What the Court of Justice meant by normal function of the vehicle is unclear: was this the normal function of the type of vehicle, or of the particular vehicle in question? And, if types, how are they broken down into different types? Many issues are left for debate, and it would appear for domestic law or court decision."

93. Ouseley J also refused to set a timetable for the Secretary of State to make legislative changes. Nevertheless at paragraph 87, 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]*, as discussed above.

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

95. Furthermore, the judgment is said to acknowledge the following infringements[7]:
    - Sections 145 and 192 of the Road Traffic Act 1988 wrongly restricts third-party motor cover to vehicle use in public spaces
    - Sections 145 and 182 of the Road Traffic Act 1988 wrongly restrict the types of vehicles subject to the compulsory insurance to road vehicles
    - 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

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

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

96. These findings, together with the revisions to the MIB agreements conceded during the action, represent the most far reaching revision to motor insurance for decades.

So how does a Claimant seek to recover damages in a Vnuk type case, ie where UK legislation falls short of the Directives?

97. There are three possibilities to consider:

i. A Franovich action against the Secretary of State for failing to implement the directives properly (as identified in *RoadPeace*);

ii. 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;

iii. A claim against the RTA insurer;

98. The difficulty with a Franovich action, is proving that the breach is sufficiently serious (particularly if the incident occurred before or shortly after *Vnuk*).

99. The following case is relevant to the second (the MIB) possibility:

Farrell v Whitty 2* Case (C 413/15) *(Judgment: 10 October 2017)

100. Credit is given to the following description given by Nicholas Bevan in his article which can be found at https://www.newlawjournal.co.uk/content/state-liability-betwixt-between-brexit-pt-2:

101. On 26 January 1996 Ms Farrell was gravely injured in a motor accident in the Irish Republic. She was one of a party sitting in loading bay area at the back of a van that had no seating. Its driver (Mr Whitty) lost control and hit a wall. The van was not insured.

102. A claim was submitted to the Motor Insurers' Bureau of Ireland (MIBI), which is tasked by the Republic with compensating victims of uninsured and untraced drivers in Ireland on an almost identical basis to the MIB in Britain. As with the MIB, its

responsibilities as the authorised compensating body are governed by a series of private law agreements with the relevant minister (at that time the MIBI's 1988 Agreement was in force).

103. In both jurisdictions, these agreements limit the compensating body's liability to incidents that are already subject to compulsory third party insurance: in Ireland, this is prescribed by s 56 of the Road Traffic Act 1961; in the UK, it is s 145 of the Road Traffic Act 1988.

104. The claim was rejected by MIBI on the basis that s 56 of the 1961 Act only applied to those parts of a vehicle equipped with seating; a limitation peculiar to that jurisdiction.

105. In the Republic, as in the UK, the statutory provision for compulsory motor cover and the extra-statutory compensatory guarantee are supposed to comply with the minimum standards of compensatory protection mandated by the Directives.

106. Proceedings were issued against the impecunious driver as well as the MIBI and the Irish state (in the latter case, as a *Francovich* action).

107. The on-going issue is whether MIBI is an emanation of the state, against which the relevant provisions of the motor directives have direct effect.

The first reference to the ECJ

108. The Irish High Court stayed the action and referred two issues to the ECJ for a preliminary ruling. Unfortunately the first reference (Case C-356/05) did not enquire whether a compensating body like the MIBI was bound by the direct effect of the Directive.

109. Instead the ECJ was consulted on two preliminary issues:

i. first, whether the seating exception at s 56 of the 1961 Act was prohibited by:

- the obligation on member states to ensure that civil liability for the use of motor vehicles is covered by insurance (under what is now Art 3 of the 2009 Directive) and by

- the requirement that passengers are included in the protection required by Art 3 (under what is now Art 12 of the 2009 Directive),

ii. and second, whether these EU law provisions satisfy the threshold conditions of clarity and unconditionality to qualify for direct effect against the state.

110. The ECJ answered affirmatively in both instances. It then referred the case back to the national court, unbidden, to determine the question that had not been put: was the MIBI caught with direct effect of these provisions? In doing so it referred to the criteria in para [20] of its earlier ruling in *Foster*.

111. In January 2008 Mr Justice Birmingham found that the MIBI was bound by the direct effect of the relevant provisions of the Directive.

112. Accordingly, judgment was given against the MIBI based on the wording of the Directive, as distinct from any contractual or statutory liability. At para [4.5] the judge revealed that the MIBI had been at pains to prevent the burning question of its potential exposure to direct effect being referred to the ECJ. This suggests that the MIBI, at least, was aware of the profound implications that such a finding would have. Yet after settling the claim, the MIBI proceeded to appeal the judgment all the way to the Irish Supreme Court.

The second reference to the ECJ

113. In July 2015 the case was referred once more to the ECJ by the Irish Supreme Court in *Farrell 2* (Case C413/15). Clarification was sought on how the *Foster* criteria should be applied. The ECJ's general guidance on this point is considered in Pt 1.

114. The ECJ ruled that Arts 3 and 10 of the Directive qualify for direct effect. It then made some very specific findings relevant to the MIBI; once more unbidden.

115. It begins by making two preliminary rulings.

- First, that 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'.

- Second that the 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.

116. *Farrell 2* concludes at para [42] thus:

> *'In the light of the foregoing, ... **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.'*

117. The Irish Supreme Court was to make the final determination concerning the MIBI but the outcome appears to be a foregone conclusion.

Applying Farrell 2 in the UK

118. The MIB clearly satisfies the above criteria[8]. However the MIB does not accept the decision and I understand that the High Court may consider this matter later in the year.

119. A possible ground of contention might be that the MIB's special powers are not sufficiently identical to those conferred by s 78 of the 1961 Act. However, that would be to ignore the purposive, principle based, approach to applying the *Foster / Farrell 2* criteria as well as the fact that ss 95(2), and 145(2) of the Road Traffic Act 1988 that require all authorised UK insurers to be members of the MIB is essentially on all fours with its Irish counterpart.

Direct effect of Article 3 Against the MIB

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[8] See 'Putting Wrongs To Rights, Pt 2' at https://www.newlawjournal.co.uk/content/putting-wrongs-rights-pt-2 for a more detailed discussion of the MIB's special powers as well as the evidence for an alternative ground: the state control over the MIBI and its compensatory role.

120. Direct effect against the MIB will prove particularly helpful for accident victims denied a compensatory guarantee where the Road Traffic Act 1988 falls short of the more generous scope of the Directives [9].

121. The following scenarios illustrate the sort of incidents that are excluded from the compensatory guarantee mandated by Art 3 because they fall outside the natural meaning of the words used to define the scope of the s 145 of the 1988 Act. In particular, those which:

- occur on private property, or
- are caused by a variety of vehicles not intended or adapted for road use, or
- are caused by mechanical or software defects not attributable to the user or keeper's fault.

122. According to Nicholas Bevan, in his article, "*State liability: betwixt & between Brexit (Pt 2)*"

> "*Farrell 2 confers on individuals a new and direct cause of action against the MIB based on the wording of Arts 3 and 10, as though their text was enshrined in a UK statute. The MIB will be liable to compensate in an equivalent and as effective a manner as though the defendant was fully insured, in accordance with Evans v SoS for Transport and MIB [2005] EUECJ Case C-63/01 [2005] All ER (EC) 763. Accordingly, QOCS (qualified one-way costs shifting) will apply.*"

Brexit effect

123. *Farrell 2* suggests that an ordinary person who suffers an accident but is deprived of a claim under the UDA in circumstances in which the legislation or UDA falls short of the protection intended by the Directives, can rely upon the wording of a Directive in an ordinary civil action. Sadly, this EU law remedy will probably lapse for all claims that postdate Brexit. [10]

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[9] See also 'Still Driving Dangerously', 166 *NLJ* 7693, p 18 for a critical overview of the UK's defective implementation.
[10] See 'Putting Wrongs To Rights (Pt 2)' 166 *NLJ* 7701, p 13

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

124. To summarise *Fidelidade*, the European Court ruled that a motor policy, once issued, must meet the assured's civil liability to third parties even where the contractual rights were vitiated at the inception of the policy due to the policyholder's fraudulent misrepresentations. Thus, any national law that permits motor insurers to deny a third-party claim on the ground that the policyholder's misrepresentation renders it void *ab initio,* conflicts with EU law.

125. The facts - Mr S, a Swiss domiciled motorcyclist, was killed in a motor accident in Portugal. The vehicle responsible was driven by a Mr P and it was insured with Fidelidade-Companhia de Seguros (Fidelidade), a Portuguese insurer.

126. Mr S's estate's claim was met by the Swiss National Guarantee Fund (Swiss NGF). However when the Swiss NGF sought to recover its outlay from Fidelidade ("the Portuguese Insurers), they contended that the contract for motor vehicle insurance was not valid, on the ground that their policyholder had made false statements on the date the contract was concluded, claiming to be both the owner of the vehicle and its usual driver (see para 15). As a result of the false statements, the policy was rendered null and void under Portuguese law.

127. The issue – whether the Portuguese Insurers were required to meet the claim relating to Mr S's estate, in circumstances where the policy had been rendered null and void at inception.

128. The Portuguese Court of Appeal ruled that that invalidity could not be invoked against the victims. The insurers lodged an appeal, claiming that the nullity could be invoked against both the victim — Mr S— and the Swiss NGF.

129. The Portuguese Supreme Court decided to refer the issue to the ECJ.

The Ruling / Directives

130. After reviewing the relevant Articles from the Second Directive, and in particular from the first subparagraph of Article 2(1) of the Second Directive[11] the ECJ stated at paragraph 27 that the Insurer could not "*.. ..rely on statutory provisions regarding the nullity of the contract or to invoke that nullity against a third-party victim so as to be released from its obligation under Article 3(1) of the First Directive to compensate that victim for an accident caused by the insured vehicle.*"

131. Paragraph 26 confirms that derogations may only be made this:

> *"in one single, specific case, 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)."*

132. Therefore, the fact that the insurance contract was rendered null and void due to omissions or false statements on the part of the policy holder did not enable the insurer to invoke that nullity against the third party victim.

Ramifications

133. The case was similar to one that I was recently involved in. I shall refer to it by the use of fictitious names:

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

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[11] *Article 2(1) of the Second Directive* ***(now codified at Article 13(1) of the 2009 Directive)*** *is worded as follows:*

'Each Member State shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3(1) of [the First Directive], which excludes from insurance the use or driving of vehicles by:

- *persons who do not have express or implied authorisation thereto, or*
- *persons who do not hold a licence permitting them to drive the vehicle concerned, or*
- *persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned,*

shall, for the purposes of Article 3(1) of [the First Directive], be deemed to be void in respect of claims by third parties who have been victims of an accident.

However the provision or clause referred to in the first indent may 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.

...'

134. Mr Meme Oryloss was on a clandestine trip out with his Mistress. Whilst the pair were arguing she drove into collision with another vehicle. Mr Meme Oryloss left the scene of the accident, and decided the Mistress was bad news and did not bother to stay in touch with her.

135. However he went on to claim for his injuries suffered in the accident and sued both The Mistress and Her Insurers. After issue of the proceedings and within the allowed three months, Her Insurers brought separate proceedings seeking a declaration that they were entitled to avoid the policy ab initio on grounds that The Mistress falsely represented that she was a "regular driver", when in fact her driving licence had been revoked.

136. The Defence put Meme Oryloss to proof, and sought to avoid the claim in any event by relying upon S 152(2) of the RTA 1988.

137. It will be recalled that S 152(2) provides that no sum is payable by an insurer under s151 if, in an action commenced before, or within three months after, the commencement of the proceedings in which judgment was given, he has obtained a declaration that the policy is void ab initio due to:

(i) a non-disclosure of a material fact, or

(ii) a representation of fact which was false in some material particular,

138. Having obtained such a declaration, Her Insurer maintained that it was an "Article 75" insurer and stepped into the shoes of the Motor Insurers' Bureau (MIB). This meant that Her Insurer could rely upon the UDA, and in particular Clauses 6 (e)(ii) of the 1999 UDA (which excludes the MIB's liability under the Uninsured Drivers' Agreement if a claimant passenger *knew or ought to have known* that the vehicle was being used without insurance in force).

139. My detailed Skeleton Argument put in issue the correct interpretation of Section 152(2), and submitted that a literal interpretation of S152(2) is contrary to the guidance given by the European Courts in *Fidelidade in 20 July 2017, and in Churchill (discussed below)* and specifically relied upon Roadpeace v Secretary of State for Transport [2017] EWHC 2725 (Admin) in which Mr Justice Ouseley

confirmed that he agreed with a submission that "*the true effect of Fidelidade was that s152(2) RTA was no longer compatible with EU law.*"

140. In particular on a literal reading, S152(2) deprives an innocent victim of the benefit of compulsory insurance, as it allows the Insurer to avoid it's obligations to C as RTA insurer.

141. I was set to argue that as had occurred in the Churchill case, words needed to be inserted to S 152(2) to make it compatible with EU law, with the following words:

> *"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"*

142. As matters turned out, Mr Meme Oryloss was hopelessly forgetful about the accident circumstances, and failed to establish primary negligence against The Mistress. Furthermore the judge (Recorder Male QC) confirmed in his view that Mr Meme Oryloss did not have knowledge that The Mistress was uninsured. So my arguments sadly went untested.

143. However I remain of the view that it is open to a Claimant passenger to challenge an RTA insurer who attempts to deny his claim on grounds that he / she knew that the vehicle in which they being driven at the time of the accident was uninsured. This could turn a claim for catastrophic injuries that is doomed to fail, into a successful claim.

144. In my view, following the Fidelidade, Churchill and RoadPeace decisions , an RTA insurer should only be able to avoid meeting it's S 151 obligation where it can prove that the Claimant was injured by a stolen vehicle (in circumstances where they voluntarily entered the stolen vehicle with knowledge that the vehicle was stolen).

145. However an anomaly is that the "knowledge of lack of insurance" exception is permitted where there is no insurer identified and the claim is made directly against the body tasked with meeting claims where the insurance obligation under Article 3 (2009 Directive) (namely the MIB).

146. In particular, by reference to the 2009 Directive:

- Where the insurance obligation under Article 3 has not been satisfied, the MIB may exclude claims if the person "knew it was uninsured" (Article 10, para.2)
- However, where an insurance policy has been issued in accordance with Article 3, the effect of Article 13 is to limit the available exclusions to circumstances where the person knew that the vehicle was stolen.

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

147. Mr Smith was seriously injured whilst he travelled in the back of a van owned and travelled by Mr Meade. The rear area of the van did not have any seating provision.

148. Mr Meade held a motor insurance policy with FBD, but it excluded cover for persons carried as passengers in any part of the vehicle not constructed with seating accommodation.

149. The FBD policy had been approved in accordance with applicable Irish legislation. In particular, the exception did not fall foul of either Section 65(1) of the Road Traffic Act 1961, or Article 6(1)(a) of the Road Traffic (Compulsory Insurance) Regulations 1962, which were in force at the relevant time.

150. Prior to Smith's claim going to Court, the ECJ had given a judgment on 19th April 2007, in *Farrell [C-356/05, EU: C: 2007: 229],* which held that the Third Directive was to be interpreted as precluding national law whereby compulsory motor vehicle civil liability insurance does not cover liability for personal injuries to persons travelling in a part of a motor vehicle which has not been designed and constructed with seated accommodation for passengers. *Farrell* also held that Article 1 of the Third Directive conferred rights which individuals could rely directly upon before the national courts (in other words the rights under the Directive produced direct effect).

151. 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.

152. However that was not the end of the matter. FBD next brought an appeal against the judgment of the High Court, maintaining that there had been a mis-application of the case law resulting from the *Marleasing* judgment (C-109/89, EU:D:1990:395).

153. The Court of Appeal agreed, stating that it was

> "not possible to interpret (the 1961 Act and the 1962 Regulations and the 1962 Regulations) in a manner which would be compatible with the requirements of the Third Directive, as to do otherwise would be to adopt an interpretation which would be *contra legen* and which would do violence to the actual wording of both provisions" (as quoted at paragraph 28).

154. FBD therefore argued that as there was no legal obligation to insure Mr Smith under Irish law, he was uninsured, and so the obligation to cover should be incumbent on the MIBI, not themselves (the insurers being a private body, which cannot be regarded as an emanation of the state).

155. The response position of the Irish state was that the Third Directive still imposed an obligation on FBD to compensate Mr Smith.

156. The Court of Appeal was uncertain what to do over the ongoing contest between FBD and the Irish state and so stayed the proceedings and asked the ECJ for a preliminary ruling. So far we have the opinion of Advocate General Bott dated 10th April 2018.

157. The opinion needs to be read in the light of the questions posed (as detailed at paragraph 38 of the Opinion). Those questions accepted that in this particular case, the language of the national provisions were such that a re-interpretation to conform

with EU Law was simply not possible. Bearing this in mind, AG Bott concluded (at paragraphs 75- 79) that:-

i. When FBD settled Mr Smith's claim, they in fact 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. As a consequence, there has been unjust enrichment of the Irish state, which needed to be remedied.

iii. "*In the context of a dispute between, on the one hand, an Insurance Company which is subrogated to the rights of a victim to whom it has paid compensation, and on the other hand, the state, the referring Court is required to disapply the provisions of its national law whereby compulsory motor vehicle civil liability insurance does not cover liability for personal injuries to persons travelling in a part of the motor vehicle which has not been designed and constructed with seating accommodation for passengers, such provisions having been found contrary to Article 1 of the Third Counsel Directive*".

iv. "*Such disapplication of the provisions of national law ... cannot have the consequence of imposing on the Insurer, who has complied with such provisions, the responsibility for compensating the victim for injury or damage not covered by the improved insurance policy.*"

158. I take the view 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.

159. 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.

160. 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. However the opinion of AG Bott has certainly muddied the waters and out of caution the Claimant would need to sue both the insurer and the state and / the MIB.

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

161. The issue in this case was whether as a matter of procedural law, the Claimant could sue an unknown driver of an insured vehicle.

162. In summary, the Court of Appeal said yes. This means that insurers now have to satisfy judgments obtained against unnamed individuals, purely on the basis that they insured the vehicle.

163. Background: The claimant suffered personal injuries in an RTA in May 2013. She issued proceedings against the first defendant, who was the other vehicle's registered keeper, and a declaration that the second defendant, which insured the other vehicle, was obliged under section 151 of the RTA 1988 to satisfy any judgment obtained against the first defendant.

164. It later transpired that the first defendant had not been driving the vehicle and that insurance provided by the second defendant had been in the name of a fictitious person.

165. Consequently the claimant needed to obtain a judgment against the unidentified individual who had been driving the first defendant's vehicle in order for the second defendant to be liable under section 151.

166. The claimant applied under CPR r 19.2 to amend her claim form so as to substitute for the first defendant "*The person unknown driving [the first defendant's vehicle] who collided with [the claimant's vehicle] on [the date of the collision]*".

167. The district judge refused the application and gave judgment for the second defendant. Next, HHJ Parker dismissed the claimant's appeal against that decision,

holding that it would be unjust to the second defendant to allow the claimant to obtain a judgment enforceable against it when it could not hope to trace any unknown defendant so as to attempt recoupment, and that there would be no injustice to the claimant in refusing to permit the amendment sought because she could still claim compensation under the Motor Insurers' Bureau's Untraced Drivers' Agreement.

168. The Claimant appealed to the Court of Appeal, who held:

(1) that although the Civil Procedure Rules generally required that parties to proceedings be named, in appropriate cases it was permissible for a claimant to bring proceedings against an unnamed defendant, suitably identified by an appropriate description, not only for an injunction, or in relation to future relief, but also for damages; and whether such permission should be granted would depend on whether this would further the overriding objective in CPR r 1.1 of deciding cases justly and at proportionate cost.

(2) Allowing the appeal (Sir Ross Cranston dissenting), that it was entirely consistent with the policy of Part VI of the Road Traffic Act 1988 that an identified insurer's liability under section 151 of that Act in relation to a policy of insurance, written in respect of a specific vehicle and a specific named insured, should not depend on whether, as at the date of issue of the proceedings, or thereafter, the claimant could identify the tortfeasor by name. Therefore, in a case such as the present, the court should exercise its procedural powers to permit a claim form and particulars of claim to be amended so as to allow a claimant to substitute an unnamed defendant driver identified by reference to the specific vehicle which he or she was driving at a specific time and place so that a judgment could be obtained against that defendant which an identified insurer was required to satisfy pursuant to section 151 of the 1988 Act. Accordingly the claimant was permitted to make the necessary amendments to her claim form and particulars of claim.

So why is this case important?

169. The Claimant could alternatively have brought her claim against the MIB under the Untraced Drivers' Agreement (UtDA). However this is less advantageous for a number of reasons. Firstly, the costs allowed in such a claim under the UtDA are

significantly less than can be expected in court proceedings. Secondly, subrogated claims are not met under the UtDA but must be satisfied by a section 151 insurer if a judgment is obtained against a driver responsible for the accident.

170. It was also of significant importance to the Second Defendant. The Second Defendant would not have to directly fund any award under the UtDA. Such award would be met from MIB's central funds. Any judgment against a driver (whether identified or not) would have to be met by the Second Defendant pursuant to section 151 of the Road Traffic Act 1988. It did not matter whether they insured the driver or not under their policy.

171. A concern is that the case has connotations from a fraud perspective. For example policies could be set up and claims brought against the policy without any driver being named and without the insurer having any ability to take an account from the policy holder or alleged driver.

172. Another concern is that the case opens the floodgates. In submissions made to the Supreme Court seeking permission, the MIB estimated that between 1,500 and 2,400 claims a year would be affected by the decision.

173. However, obtaining a S 152 declaration will avoid the section 151 liability and the claim will fall back into the UtDA scheme transferring the liability from the insurer to MIB's central fund.

What next?

174. Cameron was a split decision and is due to go to appeal to the Supreme Court later this year.

175. The supplemental UDA which came into force in March 2017 did not address Vnuk (the EU requirement to insure and compensate wherever a motor vehicle is used). Therefore the MIB's liability continues to apply only where there is an absence of compulsory as meets the requirements of the RTA 1988.

176. More litigation is expected – watch this space.

JULIE-ANNE LUCK

9 St John Street Chambers

23rd April 2018