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Irreconcilable Differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives.

James Marson,^{*} Katy Ferris^{**} and Alex Nicholson^{*}

Abstract

The UK has a chequered past in relation to its compliance with EU law. In some instances, it has gone beyond the minimum requirements imposed by its EU parent in providing protection for individuals (see for instance the UK's implementation of Art. 9 of the Motor Vehicle Insurance Directive 2009/103/EC). Regrettably, however, there is a greater number of examples where the UK has failed in its transposition obligations. One area where a significant disconnect exists between national and EU law is third party motor vehicle insurance. This is perhaps justifiable in some instances given the evolution of the domestic and EU laws, their original incarnation compared with modern requirements, and the effects of judicial interpretation and the creativity of the Court of Justice of the European Union. However, other inconsistencies are less easy to accept. There are an increasing number of errors in interpretation, historic and contemporary, which necessitate a comprehensive review of the national law, a policy review of the state's abrogation of its responsibilities to the victims of uninsured and untraced drivers, and corrective action to prevent liability being imposed on the UK.

Introduction

In the UK, the Road Traffic Act 1988 (RTA88) is the mechanism which, in most cases, ensures the innocent victims of negligent driving gain protection. This is achieved through the obligation imposed on the owners of vehicles to have, as a minimum, third party motor insurance for vehicles used on a road or other public place.¹ In respect of liability incurred by uninsured or untraced drivers, the UK has alternative, extra-statutory arrangements in place with a private organisation called the Motor Insurers' Bureau (MIB) to ensure compensation is available. However, in recent years it has become apparent that the combined protection afforded by the existing statutory and extra-statutory framework in the UK falls short of that which is required under EU law. These EU laws have evolved through a series of directives (known collectively as the Motor Vehicle Insurance Directives (MVID))² to impose

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¹ RTA88 s.143.

² (The First Directive) Council Directive 72/166/EEC on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability [1972] OJ L103/1; (The) Second Council Directive 84/5/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1984] OJ LL8/17; (The) Third Council Directive 90/232/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use

obligations on member states to ensure that funds are always available to compensate the innocent victims of a motor vehicle accident, regardless of the financial position of the negligent driver. In many cases, the RTA88 and the agreements in place with the MIB (“the MIB agreements”) provide requisite protection. However, the High Court,³ as confirmed in the Court of Appeal,⁴ recently declared a particular exclusion which, until 1 August 2015, was contained within the MIB agreements, to be incompatible with EU law and awarded damages in state liability in respect of that transposition failure. Furthermore, the Court of Justice of the European Union (CJEU) has confirmed, in a preliminary reference from Slovenia, that the requirement for member states to ensure that third party victims of motor vehicle accidents are adequately compensated, extends to vehicles operated on private land.⁵ This reference has highlighted a further deficiency in the UK’s transposition as the national law and extra-statutory arrangements do not presently cover the full extent of “vehicles” and the geographic scope of their use.

It is unfortunately not just these two developments which necessitate a fundamental review⁶ of the RTA88 and the MIB agreements as substantial sections of both are contrary to the MVID.⁷ In the absence of reform, further state liability claims against the UK, and/or infringement proceedings by the EU Commission seem the natural consequence. Practitioners⁸ who use the MVID as the starting point for their advice, and who use the existing tools to invoke EU law in the courts, including compelling a teleological interpretation of the domestic law, will find domestic law can be changed more promptly than waiting for action from the Secretary of State and MIB.

Contractual and statutory insurer

The natural “hierarchy” of responsibility to the third party victims of accidents involving a motor vehicle is first, the claimant would seek redress from the contractual insurer. Where this is not applicable under the contractual relationship between the insurer and the insured person, s.148 RTA88 has

of motor vehicles [1990] OJ L129/33; Directive 2000/26/EC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (The Fourth Motor Insurance Directive) [2000] OJ L181/65; (The Fifth Directive) Directive 2005/14/EC amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles [2005] OJ L149/14; and (The Sixth Directive) Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11.

³ *Delaney v Secretary of State for Transport* [2014] EWHC 1785 (QB).

⁴ *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172.

⁵ Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav* [2014] Judgment 4 September.

⁶ For an excellent discussion of the necessity for reform of the statutory and extra-statutory arrangements see Bevan, N. “On the Right Road” (Parts I-IV) (2013) 163 *New Law Journal* 7546, p.94; 7547, p.130; 7548, p.160; 7549, p.193.

⁷ For an authoritative review of the domestic and EU law on motor insurance law see Merkin, R.M., and Hemsworth, M. “The Law of Motor Insurance” (2015) Sweet and Maxwell.

⁸ See the work of Nicholas Bevan who, through his blog *Nota Bene* (<http://www.nicholasbevan.blogspot.co.uk/2013/04/call-for-reform-of-our-national.html>) and contributions in the *New Law Journal*, has campaigned vigorously for the reform of the law.

the ability to modify the contract of insurance or s.151 RTA88 statutorily binds the insurer to continue with its insurance obligations. This sees the application of what is known as an “Article 75 insurer” procedure and finally, the MIB acts as the “insurer of last resort” in cases where insurance claims would not be satisfied where, for instance, a driver has no insurance or where the insurer avoided the contract of insurance.

Interpretative difficulties

Although the RTA 1930 was enacted to provide a system of compensation, through compulsory insurance, to innocent victims of accidents involving the use of motor vehicles, it was underpinned by common law rules. These allowed insurers to evade their responsibilities in this regard through the operation of privity of contract, even though the nature of the contractual agreement was for the benefit of the third party. The insurers would restrict their contractual liability to their policyholders (and seeking to exclude any other claimant on this policy – such as the third party victim) and further used this to prevent the settlement of claims direct with such victims (due to their status as non-contracting parties). Beyond the development and extension of the many exceptions to the privity rule, it continues to be a principle of the English legal system. The remnants of the restrictions that exist between the statutory provisions and the civil law can be seen in ss.148 and 151 RTA88, each included only to circumvent the flaws contained in the original RTA 1930 relating to contractual / tortious liability. It is their inclusion that also has caused many of the underlying problems in the UK’s adherence to the MVID. Third party victims had the contractual benefit of the insurance policy protection transferred to them, but this operated on a subrogated basis and therefore any contractual defences available by the insurer to the policyholder could also be exercised against the third party.⁹

Section 148(2) identifies eight reasons, referred to as ‘matters’, which, if used by an insurer to avoid a policyholder’s claim under that policy (for example because the insurer argues a breach of contract on the part of the policyholder) would be held as void. The result is that the insurer would continue to have to satisfy a third party’s claim for damage or loss suffered as a consequence of the accident. The eight reasons include the age or physical or mental condition of persons driving the vehicle (such as the driver operating a car whilst drunk); the condition of the vehicle (such as a car having illegally worn tyres); the number of persons that the vehicle carries; the weight or physical characteristics of the goods that the vehicle carries; the time at which or the areas within which the vehicle is used; the horsepower or cylinder capacity or value of the vehicle; the carrying on the vehicle of any particular apparatus; or the carrying on the vehicle of any particular means of identification other than that required by law.

Where problems occur is in the interpretation of the legislators’ intentions. Was the list to be illustrative or exhaustive? It is evident, with hindsight at

⁹ See *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 1 All ER 577.

least, that the intention of Parliament was to ensure independent statutory rights to compensation (beyond the contractual and common law principles which had restricted those rights) but that they had inadvertently established a qualified entitlement to access based on matters beyond the third party's control or access (the contractual agreement between the insurer and the assured). The MVID incorporate certain derogations¹⁰ for member states from the obligation of ensuring compulsory insurance of vehicles, whilst also expressing a (non-exhaustive)¹¹ list of possible exclusions which would be held as void against third parties.¹² Demonstrating an unfortunate misunderstanding of the relationship between the MVID and the RTA88, in *EUI v Bristol Alliance Partnership*,¹³ when considering the extent of *Ruiz Bernaldez*¹⁴ (where the CJEU confirmed that the only permissible grounds for excluding a third party's right to claim against the policyholder's insurers was where the third party knew that the vehicle was stolen)¹⁵ the Court of Appeal held that the principles established in *Bernaldez* were not of general application. In a unanimous judgment delivered by Ward LJ, the Court of Appeal retreated to the safety of concluding that the use of a finite list in s.148(2) was, by implication, instructive that all contractual exclusion clauses outside of this list were permissible. Given that in *Correia Ferreira v Companhia de Seguros Mundial Confiança SA*,¹⁶ *Candolin v Vahinkovakuutusosakeyhtio Pohjola*,¹⁷ *Farrell v Whitty*,¹⁸ and *Churchill v Wilkinson and Tracey Evans*¹⁹ the CJEU had applied the interpretation of exclusions of liability consistently within the strict reasoning of *Bernaldez*, for the Court of Appeal to ignore these cases suggests either negligence or a misunderstanding of the hierarchy of EU and domestic law, explicitly established in s.2 European Communities Act 1972. Indeed in *Candolin*, the CJEU referred to *Bernaldez*²⁰ when commenting that it had previously "... held that Art 3(1)... precludes an insurer from relying on statutory provisions or contractual clauses in order to refuse to compensate third-party victims of an accident caused by the insured vehicle."²¹

The MIB and associated agreements

¹⁰ Art.5.

¹¹ Case C-129/94 *Rafael Ruiz Bernáldez* [1996] ECR I-1829.

¹² Art.13 Directive 2009/103/EC.

¹³ [2012] EWCA Civ 1267.

¹⁴ Case C-129/94 *Rafael Ruiz Bernáldez* [1996] ECR I-1829.

¹⁵ The CJEU achieved this through purposively interpreting the list of void exclusions provided in Art.2(1) of the Second MVID (now contained in Art.13(1) of the Sixth MVID) as being illustrative and thereby extending the scope of the civil liability insurance requirement contained in Art.3(1) of the First MVID.

¹⁶ Case C-348/98 *Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correia Ferreira v Companhia de Seguros Mundial Confiança SA* [2000] ECR I-6711.

¹⁷ Case C-537/03 *Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen v Vahinkovakuutusosakeyhtio Pohjola and Jarmo Ruokoranta* [2005] ECR I-5745.

¹⁸ *Elaine Farrell v Alan Whitty* (C-356/05) [2007] ECR I-3067.

¹⁹ Case C-442/10 *Churchill Insurance Company Limited v Benjamin Wilkinson and Tracy Evans v Equity Claims Limited* [2011] ECR I-00000.

²⁰ at [20].

²¹ at [18].

The MIB is a private company,²² incorporated in 1946, which exists to reduce the negative consequences for victims of road traffic accidents caused by uninsured and/or untraced drivers in the UK, principally by providing compensation to the innocent victims where they would otherwise be left without an adequate remedy.²³ The MIB reports that uninsured and untraced drivers "... kill 130 people and injure 26,500 every year."²⁴ As such, it plays a vital role in protecting road users in the UK. It exists to compensate the victims of negligent uninsured,²⁵ untraceable motorists²⁶ or accidents caused by the negligent driving of foreign motorists,²⁷ and every insurer operating a business incorporating the underwriting of compulsory motor insurance is required to be a member of the MIB.²⁸

The MIB's liability to an individual victim derives solely from agreements that it has entered into over the last 70 years with the Secretary of State for Transport and his predecessors. For an accident occurring today, the MIB's legal obligations are contained within the Uninsured Drivers' Agreement (UDA) 2015 and the Untraced Drivers' Agreement (UtDA) 2003 (as amended), both of which contain provision for termination by either party on 12 months' notice.²⁹ In the absence of these agreements or following their termination by either party, the MIB would have no liability for accidents occurring (post termination) as there is no legislation in force which makes the MIB responsible for uninsured/untraced³⁰ drivers' liability.

The UDA 2015 applies to accidents occurring on or after 1 August 2015, whilst those occurring prior to this would be dealt with according to the agreement of 1999.³¹ The MIB's principal obligation under that agreement is to pay (or cause to be paid) any judgment that a claimant has been awarded

²² Although it could equally be argued that it exists as an emanation of the national motor industry.

²³ "Memorandum and Articles of Association" (1946, as amended by special resolution passed on 7 June 2012) *Motor Insurers' Bureau*; see <http://www.mib.org.uk/NR/rdonlyres/32A4AB2C-5B4A-43A8-8610-1A629B7A933B/830/ArticlesofAssociation070612.pdf> (accessed 27 May 2015), pp.2-4.

²⁴ "Two million warnings sent to tackle uninsured driving" (27 November 2014) *Motor Insurers' Bureau*; see <http://www.mib.org.uk/NR/rdonlyres/F7D8D0E9-9FFF-4A12-B516-6EDEBB808ACB/0/PressreleaseTwomillionwarningsenttotackleuninsuredriving.pdf> (accessed 27 May 2015), p. 1.

²⁵ In the event of accident being caused, or contributed to by, a driver who was uninsured at the time (holding no valid policy of insurance), but who, by the nature of the event is identified, the MIB will consider dealing with the claim for compensation from the victim.

²⁶ This applies to victims of an accident where the driver deemed responsible for the accident leaves the scene without identifying him/herself and cannot be traced. The MIB will consider claims of compensation in respect of damages to property and personal injury.

²⁷ The 'green card scheme' applies to accidents caused through the negligent driving of foreign motorists. Here the MIB may deal with the victim's claim for damages to property or personal injury rather than require them to seek communication from the foreign insurer.

²⁸ See ss.95, 143 and 145(2) of the RTA88.

²⁹ The UDA 2015, cl.2(3); see <http://www.mib.org.uk/media/166917/2015-uninsured-drivers-agreement-england-scotland-wales.pdf> (accessed 8 October 2015) and The UtDA 2003, cl.3(2); see <http://www.mib.org.uk/NR/rdonlyres/CF78D433-D453-4AB5-9DCA-10C00538CBBC/0/030207MIBUntracedAgreement7Feb2003sealedversion.pdf> (accessed 28 May 2015).

³⁰ The UDA 1999, cl.4(1)(b).

³¹ The UDA 1999, cl.4(1) and the UDA 2015, cl.2(1).

which comprises liability that is required to be covered by insurance pursuant to Part VI of the RTA88, and which has not been satisfied in full within 7 days, whether or not the driver is in fact insured.³²

The UDA and UtDA have each been amended, supplemented and/or replaced on a number of occasions: in recent history the UDA 1999 was amended on 7 November 2008³³ and then effectively replaced (in respect of future incidents) on 3 July 2015,³⁴ and the UtDA 2008 has been amended five times, on 30 December 2008,³⁵ 15 April 2011,³⁶ 30 April 2013,³⁷ 8 June 2015³⁸ and 3 July 2015.³⁹ These amendments predominantly represent attempts to bring the framework in to line with the requirements of EU legislation. However, as a result of the lack of a statutory basis for the MIB's liability and the reactive, piecemeal manner in which these agreements have been amended since their formation,⁴⁰ establishing liability against the MIB has become a somewhat complicated, convoluted and confusing task, and there remains considerable scope for incompatibility with European legislation.

Accessing the MVID

As this paper identifies some of the more serious breaches of the MVID, and as there has been a confusing level of inaction by the EU Commission on the matter of enforcing the MVID in the UK, how the MVID may be enforced or how they may be invoked in national courts is of immediate concern. Whilst it is beyond the scope of this paper to examine which articles of the MVID would satisfy the criteria to be directly effective in national courts, the significant first step is to identify if the MIB is an emanation of the state to facilitate further investigation into the provisions within the MVID.

³² The UDA 1999, cl.5(1) and the UDA 2015, cl.3.

³³ Supplementary Uninsured Drivers' Agreement 1999; see <http://www.mib.org.uk/NR/rdonlyres/5ADC3E9F-44B9-4667-9B78-69A458D00800/0/SupplementaryAgreement071108.pdf>.

³⁴ Effective for claims on or after the 1 August 2015
<http://www.mib.org.uk/Downloadable+Documents/en/Agreements/Uninsured+Agreements/Default.htm>

³⁵ First Supplementary UtDA; see <http://www.mib.org.uk/NR/rdonlyres/AA4DF623-8461-4263-9D02-E37BF498A6A1/0/SupplementaryUntracedDriversAgreement2009.pdf> (accessed 28 May 2015).

³⁶ Second Supplementary UtDA: see http://www.mib.org.uk/NR/rdonlyres/DD1C220B-F488-414F-B8B5-39ADC8D8077A/0/2nd_Supplementary_Agreement_for_the_Untraced_DriversAgreement.pdf (accessed on 28 May 2015).

³⁷ Third Supplementary UtDA; see http://www.mib.org.uk/NR/rdonlyres/06ED4EEF-7DDD-4A9E-98A0-3434854DBB13/0/Untraced_PD_limitation_supplementary_30_April_2013_signed.pdf (accessed on 28 May 2015).

³⁸ Fourth Supplementary UtDA; see <http://www.mib.org.uk/media/166877/2015-fourth-supplementary-agreement-for-the-untraced-drivers-agreement-england-scotland-and-wales.pdf> (accessed on 8 October 2015).

³⁹ Fifth Supplementary UtDA; see <http://www.mib.org.uk/media/166874/2015-fifth-supplementary-agreement-for-the-untraced-drivers-agreement-england-scotland-and-wale.pdf> (accessed on 8 October 2015).

⁴⁰ Bevan, N. "A Call for (More) Reform" 165 *New Law Journal* 7661, p.9.

The existence of the MIB as a compensatory body for the requirements of EU law

In 1972, the first Motor Vehicle Insurance Directive was enacted which required member states to, *inter alia*, “take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in [their] territory [was] covered by insurance”.⁴¹ On 1 January 1973, the UK became a member of the then European Economic Community⁴² and consequently was obliged to follow superior EU laws. As the RTA was already in existence, and indeed was the inspiration for the First Motor Vehicle Insurance Directive, it was chosen as the main domestic mechanism for the transposition of the MVID.⁴³

Part VI of the RTA88 implements much of the content of the MVID. In Art.10, the MVID requires member states to make “provision for a body to guarantee that the victim will not remain without compensation where the vehicle which caused the accident is uninsured or unidentified.” The body chosen in the UK was the MIB and in this respect, two significant questions are present in relation to its function and the remit of its operation. First, does the MIB exist as an emanation of the state for the purposes of enforcing EU law? Secondly, if the MIB exists as the statutorily required insurer of last resort (for the purposes where the claimant is the victim of an uninsured or untraced driver), what role does it have when it is being applied in domestic law where *some* insurance exists?

In respect of the requirements regarding the liability of uninsured and untraced drivers, following the enactment of each directive the UK has consistently opted to retain the arrangements that were already in place with the MIB many years earlier, subject to variations of the agreements where this was considered appropriate. Responsibility for paying compensation in instances of uninsured / untraced drivers rests with the MIB. Responsibility for paying compensation to persons suffering loss when the state is in breach of EU law rests with the state⁴⁴ and the direct effect of directives is only (save exceptional cases)⁴⁵ applicable vertically against an emanation of the state. It is the very nature of the agreement relationship between the MIB and the state that raises questions as to whether it would satisfy the tests as outlined in *Foster and others v British Gas plc*?⁴⁶ as:

⁴¹ Council Directive 72/166/EEC on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability [1972] OJ L103/1, Art.3(1).

⁴² Decision of the Council of the European Communities concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway, and the United Kingdom of Great Britain and Northern Ireland to the European Coal and Steel Community [1972] OJ L73/12, Art.2.

⁴³ As subsequently updated through to the Sixth, consolidating, Directive.

⁴⁴ As a matter of national procedural law.

⁴⁵ Such as *Case C-194/94 CIA Security International SA v Signalson SA and Securitel SPRL* [1996] ECR I-2201.

⁴⁶ *Case C-188/89 Foster v British Gas* [1990] ECR I-3313.

“a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond that which result from the normal rules applicable in relations between individuals...”⁴⁷

Historically, claims of state liability were made against the central state itself but this was not a limiting factor. The CJEU adopted a unitary concept of the state (according to an international court model) and hence there was no demarcation of activities of the authority as either being responsible for the breach of the EU law or in the paying of damages. Bodies undertaking the functions of the state (be they administrative or legislative) began to be held responsible for breaches.⁴⁸ Beyond identifying the liability of state bodies in damages, the CJEU turned its attention to the concept of the state for the purposes of the direct effect of directives. Including *Foster*, former nationalised utility bodies,⁴⁹ a regional authority,⁵⁰ a police force,⁵¹ a health authority,⁵² a tax authority⁵³ and the board of governors of a state school⁵⁴ have been held to satisfy the bipartite / tripartite⁵⁵ tests for establishing the status as an emanation of the state. Bodies which are legally distinct from the state, but to which administrative tasks have been delegated or assigned had also been similarly designated.⁵⁶ Particularly relevant to the MIB and its agreement with the state was the case of *Mighell and ors v Reading*⁵⁷ where claimants who sought to rely directly on the Second Motor Vehicle Insurance Directive failed to persuade the Court of Appeal that the MIB was an emanation of the state. However, in *Evans v Secretary of State for the Environment, Transport and the Regions*,⁵⁸ whilst the Advocate-General accepted the claimant’s argument that the MIB was not an emanation of the state for the purposes of that directive, the CJEU disagreed, considering rather that Art.1(4) did not refer to the legal status of the compensatory body

⁴⁷ at [20].

⁴⁸ See for instance Case C-2/97 *Klaus Konle v Republic of Austria* [1999] ECR I-3099 and Case C-118/00 *Gervais Larys v Inasti* [2001] ECR I-5063.

⁴⁹ *Foster*, and *Griffin and others v South West Water Services Ltd* [1995] IRLR 15.

⁵⁰ Case 103/88 *Fratelli Costanzo SpA v Comune di Milano* [1989] ECR 1839.

⁵¹ Case 222/84 *Johnston v Chief Constable of the RUC* [1986] ECR 1651.

⁵² Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723.

⁵³ Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53.

⁵⁴ *National Union of Teachers and others v Governing Body of St Mary’s Church of England (Aided) Junior School and others* [1997] IRLR 242 CA.

⁵⁵ The bipartite test (established in national court) identified a body having the status as an emanation of the state where 1) it acted under the authority or control of the state or 2) had ‘special powers.’ The cumulative tripartite test was established in the CJEU (but applied by the House of Lords) and consisted of the body being made responsible by the state for: 1) providing a public service; 2) under the control of the state; and 3) for those purposes has ‘special powers.’ Neither test is absolute and it appears that the bipartite test may be more appropriate for non commercial bodies (e.g. the board of governors in *National Union of Teachers and others v Governing Body of St Mary’s Church of England (Aided) Junior School and others* [1997]).

⁵⁶ Case C-424/97 *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein* [200] ECR I-5123.

⁵⁷ *Mighell and ors v Reading* [1999] 1 CMLR 1251.

⁵⁸ Case C-63/01 [2005] All ER (EC) 763.

and the “fact that the source of the obligation of the body in question lies in an agreement concluded between it and a public authority is immaterial...”⁵⁹ Similarly, in *Rieser Internationale Transporte GmbH v Autobahnen-und Schnellstraßen-Finanzierungs-AG*⁶⁰ and *Sozialhilfeverband Rohrbach*⁶¹ limited liability companies owned by the Austrian state and a local authority association (respectively) were still held as emanations of the state. The state’s control (direct or indirect) of the organisation was pertinent to its designation. If one also considers the public service function of the MIB, its requirement to follow the provisions of the MVID, to compensate victims of uninsured and untraced drivers, its duty to compensate for motor vehicle accidents abroad, and its relationship with the Department for Transport, it satisfies many of the necessary public service provisions. Further, evidence of its control by the state can be seen in the agreements reached between the two, and the requirement for it to comply with the MVID. Finally, the MIB’s ability to almost single-handedly legislate on behalf of the state when establishing the UDA and UtDA,⁶² the levy it imposes on its members, its powers to settle claims, its powers to compel disclosure and to deny access to compensation for infractions of procedural requirements, appear collectively to be strong indicators that it does possess the necessary special powers (under *Foster*), bestowed by the Secretary of State, far beyond those applicable between individuals. When this issue is raised again in the national courts, both *Foster* and *Evans v Secretary of State for the Environment, Transport and the Regions* will be instrumental in clarifying the status of the MIB as an emanation of the state.

Therefore, in requiring the body to give effect to the law through the vertical direct effect of directives, the MIB would likely be susceptible to claims by an affected victim in national courts relying on the MVID. Even were this not the case, it would leave the UK in a precarious position. Art.10 is clear in the requirement on member states to establish the compensatory body to satisfy claims from victims of uninsured or untraced drivers. This duty evidently lies with the state (although it can make whatever local arrangements are necessary to provide this basic function). Were the UK to be successful in arguing that the MIB has no public function (in accordance with the *Foster* reasoning), the consequence would be that the UK has been in breach of the MVID since the requirement to establish a compensatory body was introduced.

The UDA 2015 and UtDA 2003 (as amended) each consist of deficiencies which breach EU law and would enable enforcement mechanisms to be pursued. This is a matter of subsidiarity and consequently how the law is actually enforced is a matter for the state to determine in relation to the principles of effectiveness and equivalence.⁶³ This has caused problems in the application of the MIB agreements (particularly so the UtDA 2003) as

⁵⁹ at [34].

⁶⁰ Case C-157/02 *Rieser Internationale Transporte GmbH v Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)* [2004] ECR I-1477.

⁶¹ Case C-297/03 *Sozialhilfeverband Rohrbach* [2005] ECR I 4305.

⁶² Bevan, N. “Bad Law?” (2014) 164 *New Law Journal* 7624, p.7.

⁶³ Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

there exists no obvious comparable civil procedure by which to test the equivalence criterion.⁶⁴ Conversely, the EU parent MVID and its imposition of obligations on the state is a matter of EU law and the underlying principle applicable here is its ability to be invoked in domestic courts. Hence, every citizen in the member states has the guaranteed protection of his/her rights, and this applies regardless of the choice of body / procedural route the state wishes to adopt. The result is that where the claimant applies to the MIB for redress, seeking to obtain an enforcement against it through use of the MVID, and this fails (either due to the absolute refusal of the MIB to entertain such an argument or because an appeal court holds the MIB as not satisfying the criteria as an “emanation of the state”), the fact that the claimant has sought to invoke EU rights obliges that court to give effect to the MVID due to the primacy of EU norms and this will manifest itself in a change in either the obligations between the MIB and the Secretary of State or a direct changing of the agreement itself.⁶⁵

The second issue, of where and when the MIB should become involved in issues relating to the consequences of motor vehicle claims, is even more concerning. Its position as insurer of last resort is misunderstood and almost universally misapplied in the UK. As *Delaney*, among many other cases, has demonstrated,⁶⁶ the MIB is often invoked where an insurer wishes to avoid the insurance of the policyholder through this insured person’s breach of contract or other activity. The insurer argues that the activity removes its contractual responsibility of indemnification and thus requires the MIB to undertake the responsibility. Beginning with *Churchill Insurance v Wilkinson and Tracey Evans*, these joined cases involved individuals who were injured whilst passengers in vehicles in respect of which they held valid insurance. The driver, however, in each case was uninsured but driving the vehicle with permission. In *Wilkinson* permission was provided with the passenger’s knowledge that the driver was uninsured, whilst in *Evans*’ case the issue was never contemplated. In each case, s.151(5) RTA88⁶⁷ operated to compel the insurer to fulfil the coverage required under the policy (a statutorily-imposed obligation), regardless of the breach by the policyholder. Section 151(8) however provided the insurer a (statutorily-granted) right to recover any sums paid out to the third party victim under the policy from the policyholder where he/she caused or permitted the use of the vehicle which gave rise to the liability. This caused a conundrum. The victims were insured to drive the cars in question, yet they were passengers in this instance and allowed the uninsured person to drive the car (they were the passenger victim and the policyholder at the same time). They were injured in the accident through the

⁶⁴ See for instance the (unsuccessful) arguments presented and challenges made to the national procedural arrangements in relation to the UtDA 2003 in *Carswell v Secretary of State for Transport and MIB* [2010] EWHC 3230 (QB) on the basis of the impossibility of excessive difficulty for the claimant to present a claim.

⁶⁵ See *Cour d’Arbitrage*, judgment No.41/2005 of February 16, 2005, a case heard by the Belgian constitutional court.

⁶⁶ Bevan, N. “A World Turned Upside Down” (2014) *Journal of Personal Injury Law* 3, p.136.

⁶⁷ Section 151 RTA88, which imposes the duty on insurers to satisfy judgments against persons insured or secured against third party risks, is qualified against s.152 RTA88. Section 152 RTA88 outlines exclusions from liability and imposes procedural obstacles prior to the insurer being liable for any sum awarded.

uninsured driver's negligence and hence made a claim against the insurer for compensation. The insurer was obliged to make good on the claim although of course any award made to the passenger under the policy following a s.151(5) action would be clawed back by the insurer against the policyholder through the insurer invoking s.151(8).

The cases were decided differently at first instance and were heard at the Court of Appeal (which made a preliminary reference to the CJEU). The CJEU reiterated the protection afforded to a third party victim through the MVID and that the only exclusion to the insurers indemnity requirements as permitted in Art.2(1) of the Second Directive (and contained now in Art.13 of the Sixth Directive) is where the passenger voluntarily entered the vehicle causing the loss or damage in the knowledge that it was stolen and the insurer can prove this knowledge. The MVID was to be interpreted as precluding any national rules which seek to exclude *automatically* an insurer's obligation to compensate a passenger injured in an accident caused by a driver who is not insured to drive the vehicle concerned. This did not prevent the operation of s.151(5) in its entirety. It was the automatic nature of its application that was contrary to the MVID and future cases should be determined on their individual merits. This is the position due to the MVID, which are not intended to harmonise civil liability but rather to establish basic safeguards below which the member states may not transgress. The states' powers to limit or to exclude liability are not removed, insofar as the MVID's effectiveness is not undermined.⁶⁸ This does cause possible confusion for the future application of s.151(8) RTA88 as the Court of Appeal adopted a rewording of the Act (suggested by the Secretary of State) to facilitate the MVID provision, but refused to expressly exclude its application to situations where the victim and policyholder were one and the same person (a circularity argument). Therefore, insurers may be successful in seeking to claw back damages awards from the policyholder in similar circumstances to *Churchill Insurance v Wilkinson and Tracey Evans* but where, perhaps, the victim(s) included a pedestrian rather than the passenger in the vehicle, this will remain in breach.

A further (probably unintended) consequence of the actions of the Secretary of State and the Court of Appeal in *Churchill Insurance v Wilkinson and Tracey Evans* is the application of s.143(b) RTA88 which provides a direct cause of action for the third party where the policyholder has caused or permitted the use of an uninsured vehicle. In permitting him/herself to be a passenger in a motor vehicle driven by an uninsured driver, the policyholder's action is directly causative of the insurer's loss. This decision may have led to the establishment of a policyholder's responsibility in (a newly developed) tort⁶⁹ of wrongfully exposing the insurer to liability under s.151(5) (unless the policyholder takes proactive steps to remove permission),⁷⁰ and a new species of statutory fault.

Returning though to the issue at hand, the MIB became embroiled in cases such as *Delaney*, *Churchill Insurance v Wilkinson and Tracey Evans* and

⁶⁸ Case C-129/94 *Rafael Ruiz Bernáldez* [1996] ECR I-1829 at [19].

⁶⁹ The authors would like to thank Nicholas Bevan for alerting us to this new development.

⁷⁰ See *Lloyd-Wolper v Moore* [2004] EWCA Civ 766.

Farrell (in the Irish equivalent – the MIBI) even though in each case insurance was held by the policyholder. In *Delaney*, Pickett was the driver but the insurer used s.151(5) RTA88 to obtain a declaration that his contractual breach absolved it of any requirement to indemnify.⁷¹ In *Farrell*, the victim suffered injury whilst travelling in the rear of a vehicle unsuitable for the carriage of passengers which led to the insurer using statutory provisions to deny responsibility. In each case, however, the national MIB body was used to deal with the compensation for the victim due to the insurers' denial of indemnity for breach of contract, allowed in national law. Jay J, in *Delaney*, appeared to take a holistic view of the protection of third party victims and that the matter was simply whether the system operated effectively as one unit.⁷²

It was in the Hungarian reference in *Csonka*⁷³ where the CJEU put to rest any issue of the appropriate use of the MIB (and similar organisations used throughout the member states). The issue arose when insured individuals became personally liable for claims arising out of road traffic accidents when their insurer, MAV General Insurance Company, became insolvent and unable to satisfy claims. The victims tried to claim from the Hungarian equivalent of the MIB and the state required guidance on the interpretation of the MVID and in particular Art.10 which confined the obligation on the national compensating body to recompense a victim of the use of “a vehicle in respect of which no insurance policy exists.” Evidently there did exist motor insurance by the policyholders and consequently the Hungarian MIB was not obliged to compensate victims of the policyholders whose insurer had become insolvent. The CJEU was unequivocal as to the role of the MIB as insurer of last resort.⁷⁴ The outcome of this ruling is that the UDA 1999 and 2015 only apply to those cases where the vehicle which is responsible for the victim's loss or damage has no insurance in place or to those where the exclusion relates to passengers and their (provable) knowledge that the vehicle was stolen. Beyond this permitted exclusion, no other exclusion clause or limitation of liability against the third party victim is allowed and the insurer is required to fulfil the award of damage itself, either as a contractual or statutory (s.151) insurer. Almost more importantly, the ruling effectively removes the (in)famous Article 75 procedure⁷⁵ which operated in *Delaney* and enabled the insurers to exploit the inherent weaknesses of the UDA 1999 (such as benefiting from the

⁷¹ Although note the development of the law relating to consumer contracts (including motor vehicle insurance contracts). The Consumer Insurance (Disclosure and Representations) Act 2012 applies to consumer contracts entered into after the 6 April 2013 creating a distinction between, on the one hand, misrepresentations which are careless, and those, on the other, which are deliberate or reckless. The burden of proof rests with the insurer to demonstrate recklessness or deliberate misrepresentations. It allows the insurer to avoid the contract where it demonstrates the misrepresentation and that given true information being available before underwriting the contract would not have been established.

⁷² at [39].

⁷³ Case C-409/11 *Gábor Csonka and others v Magyar Állam* 2014 CJEU.

⁷⁴ at [31].

⁷⁵ Article 75 refers to that part of the Articles and Memorandum of the MIB and is an intra-insurer protocol where the insurer contends it has the right to repudiate / avoid the contract. It is widely criticized as it is often used (and seen as the only mechanism) to give effect to third party victims of insufficiently insured drivers seeking access to compensation under the UDA 1999 (on poorer terms than would be available through claims against the insurer).

application of the MIB agreement and the cl.6(1)(e)(ii) escape from liability clause).

Similarly, the existing s.151(4) RTA88 establishes an avoidance of liability route for the insurer where the victim is injured as a passenger in a stolen vehicle and this victim “knew or had reason to believe that the vehicle had been stolen or unlawfully taken...” (authors’ emphasis). Despite this term being applied as to the victim’s actual knowledge or whether they deliberately chose not to notice or care,⁷⁶ following case law from the CJEU, it would no longer provide an effective exclusion of liability on behalf of the insurer.⁷⁷

Enforcing the MVID

Since *Evans v Secretary of State for the Environment, Transport and the Regions*,⁷⁸ the Secretary of State for Transport has faced a number of claims alleging different failures to properly implement the MVID. Whilst not all of these claims have been successful,⁷⁹ the position is looking increasingly tenuous for the existing arrangements. In *Byrne*, the distinction in the application of protective rights between the MIB agreements in insurance, compared with the procedure application of remedies available in torts law, as enshrined in ss.28 and 38(2) Limitation Act 1980, demonstrate not only the problems in existence between insurance and torts liability, but also the uneasy relationship between national law and the EU parent. It required the Court of Appeal, affirming the decision of the lower court and relying heavily on *Evans*, to confirm that the MIB agreement and its operation to be “equivalent to” that provided under the court system.⁸⁰ In his judgment, Carnwath LJ criticised the Department for Transport for its failure to take action, noting that the judgment in *Evans* itself “... might have been expected to trigger a more active response from the Department.”⁸¹

It was as a result of *Byrne*, and in an attempt to avoid further state liability claims, that the UK agreed, on 30 December 2008, to the first variation of the UtDA, which removed the offending time limit exclusion and replaced it with a requirement that, in the case of a claim for death or personal injury, an application must be made to the MIB within “... the time limits provided for the victims of traced drivers bringing actions in tort by the Limitation Act 1980...”⁸²

⁷⁶ *White v White* [2001] 1 WLR 481 and *Stych v Dibble and Tradex* [2012] EWHC 1606 (QB).

⁷⁷ The constructive knowledge dimension here in the Uninsured Drivers Agreement and also used in s.151(4) RTA88 are contrary to EU law. The requirement is that the third party knew that either the vehicle was being used in the course or furtherance of a crime / had been stolen (as applicable) and this is provable by the insurer. There is no allowance at EU law for the third party’s perceived or subsequent knowledge to be used as an escape from indemnity by the insurer, as currently still exists in s.151(4) RTA88.

⁷⁸ Case C-63/01 *Evans v Secretary of State for the Environment, Transport and the Regions* [2005] All ER (EC) 763.

⁷⁹ For example, see *Arlene Carswell (The Personal Representative of James Carswell Deceased) v The Secretary of State for Transport, The Motor Insurers’ Bureau* [2010] EWHC 3230 (QB).

⁸⁰ *Byrne v Motor Insurers’ Bureau and another* [2009] QB 66 at [18].

⁸¹ *Byrne v Motor Insurers’ Bureau and another* [2009] at [44].

⁸² First Supplementary Untraced Drivers’ Agreement, cl.4; see <http://www.mib.org.uk/NR/rdonlyres/AA4DF623-8461-4263-9D02->

However, the Department was also forced to agree additional arrangements with the MIB in respect of those claimants whose claims had already been unlawfully rejected under the old provisions.⁸³ Furthermore, less than five years later the Department considered that another amendment in respect of limitation was necessary, this time so as to remove the requirement for property damage claims to be brought within nine months of the accident,⁸⁴ and instead to subject claims of all types to the limitation periods for the victims of untraced drivers bringing actions in tort under the Limitation Act 1980.⁸⁵

Arguably the most damaging blow to the arrangements was delivered by Jay J through his High Court judgment in *Delaney v Secretary of State for Transport*⁸⁶ regarding the (in)compatibility of cl.6(1)(e)(iii) UDA 1999 with Art.1(4) of the Second European Motor Vehicle Directive. The substantial, determinative issue in *Delaney* was whether the exclusion cited within Art.1(4) was the *only* permissible exclusion and therefore whether the (crime) exclusion in cl.6(1)(e)(iii) was consistent with the specific exclusion permitted by Art.1(4) of the directive. Relying heavily on Advocate-General (A-G) Lenz's opinion in the case of *Ruiz Bernáldez* (C-129/94)⁸⁷ and also the more recent cases of *Candolin v Vahinkovakuutusosakeyhtio Pohjola*⁸⁸ and *Farrell v Whitty*⁸⁹ (cases not strictly relating to the obligation under Art.1(4)), Jay J held the UK to be in "plain breach" of its EU obligations (with regards to a lack of discretion as to the exclusions of liability and discretion being assessed according to EU law, not the state's instructions or the powers afforded to the official or institution under national rules.)⁹⁰ Since 1996 and the decision of the CJEU in *Ruiz Bernaldez*, member states had no reason to be misinformed that they did not possess discretion to add to the list of exclusions of liability under those directives. Secondly, existing decisions of the Court of Appeal will ultimately be determined as having been incorrectly decided. In *EUI v Bristol Alliance Partnership*,⁹¹ the Court of Appeal, when considering *Ruiz Bernaldez*, held that the principles established were not of general application. Even though the Court of Appeal did not specifically identify *EUI* in the *Delaney* judgment, it appears to be self-evident that future submissions based on the

E37BF498A6A1/0/SupplementaryUntracedDriversAgreement2009.pdf (accessed 28 May 2015).

⁸³ See <http://www.mib.org.uk/NR/rdonlyres/21F7CBB6-6A0F-4190-AB31-E4BD47965655/0/MOUWebsitewording1.pdf> (accessed 28 May 2015).

⁸⁴ The UtDA 2003, cl.4(3)(a)(ii); see <http://www.mib.org.uk/NR/rdonlyres/CF78D433-D453-4AB5-9DCA-10C00538CBBC/0/030207MIBUntracedAgreement7Feb2003sealedversion.pdf> (accessed 28 May 2015).

⁸⁵ Third Supplementary UtDA, cl.3(a); see http://www.mib.org.uk/NR/rdonlyres/06ED4EEF-7DDD-4A9E-98A0-3434854DBB13/0/Untraced_PD_limitation_supplementary_30_April_2013_signed.pdf (accessed on 28 May 2015).

⁸⁶ [2014] EWHC 1785 (QB).

⁸⁷ Case C-129/94 *Rafael Ruiz Bernáldez* [1996] ECR I-1829.

⁸⁸ Case C-537/03 *Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen v Vahinkovakuutusosakeyhtiö Pohjola and Jarno Ruokoranta* [2005] ECR I-5745.

⁸⁹ *Elaine Farrell v Alan Whitty* (C-356/05) [2007] ECR I-3067.

⁹⁰ Case C-424/97 *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123 at [40].

⁹¹ [2012] EWCA Civ 1267.

principle established therein must be open to question (and the operation of s.148(2) as a finite list be abandoned).⁹²

Taking time to assess the seriousness of the UK's breach, the court referred[□] to the *Francovich*, *Brasserie*, and *Factortame*⁹³ tests (which collectively establish the modern application of the tests to be satisfied).⁹⁴ The first of the tests being satisfied relatively easily, the most complex and traditionally challenging test of whether the state's breach of EU law was "sufficiently serious"^{□95} to warrant the imposition of liability in damages was discussed. Typical examples (if such a concept exists) of sufficiently serious breaches of EU law include: (1) where the state's (wilful) transposition failure has caused the individual to be denied the rights conferred by the directive;⁹⁶ (2) where the state had little room for discretion in the transposition process and it failed to adequately give effect to the law;⁹⁷ and (3) where the state had failed, completely, to transpose the law in the prescribed period.⁹⁸ It was in *Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG v Council and Commission of the European Communities*,⁹⁹ as later confirmed in *Factortame III*¹⁰⁰ where the court held "... the decisive test for finding that a breach of Community law is sufficiently serious is whether the member state or the Community institution concerned manifestly and gravely disregarded the limits on its discretion."¹⁰¹ To manifestly and gravely disregard its limits on

⁹² Section 150 RTA88 too falls victim to the line of reasoning of the CJEU in *Bernaldez, Churchill v Wilkinson and Tracey Evans and Csonka* and must therefore be of questionable authority in terms of the inclusive and comprehensive nature of the MVID rather than the limited and prescriptive wording of the RTA88. Section 150 RTA88 protects fare paying passengers in a car despite any existence or designation in the insurance policy that the vehicle is not used for commercial purposes (social / domestic use only). Cars insured for social / domestic use only, but used for ostensibly commercial purposes may be considered to constitute "unauthorised" use and hence essentially be uninsured when used for certain activities beyond the scope of the policy (s followed in *Seddon v Binions* [1978] RTR 163). To circumvent some of the more unwelcome aspects of this application when the vehicle in question has injured a third party, the Court of Appeal has had to be creative as to identifying parts of a journey as "commercial" and those which are for "social / domestic" use (see *Keeley v Pashen* [2004] EWCA Civ 1491).

⁹³ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany* and *R v Secretary of State for Transport, ex p. Factortame (III)* [1996] ECR I-1029; [1996] 1 CMLR 889.

⁹⁴ Famously, the tests to be satisfied are 1) the rule of law infringed must have intended to confer the rights of individuals; 2) the breach must be sufficiently serious; and 3) there must exist a direct causal link between the breach of the EU law and the damage sustained by the claimant.

⁹⁵ "Those factors include, in particular, in addition to the clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law." Case C-278/05 *Robins v Secretary of State for Work and Pensions* [2007] ECR I-1053 [77].

⁹⁶ *R v Secretary of State for the Home Department ex p. Gallagher* [1996] 2 CMLR 951.

⁹⁷ Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553, All ER (EC) 493.

⁹⁸ Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci and others v Italy* [1991].

⁹⁹ [1978] ECR 1209.

¹⁰⁰ [1996] QB 404, 499.

¹⁰¹ at [55].

discretion is a high test to satisfy, evidenced in the relatively low success rate of challenges against the UK¹⁰² since the *Francovich* judgment.¹⁰³ However, in *Delaney* and the reference to the UK's transposition of the "crime exclusion clause" into national law, the court held the UK possessed no discretion¹⁰⁴ or legislative choice,¹⁰⁵ and this resulted in the State being afforded no availability of a defence to Delaney's argument.¹⁰⁶ Regardless of the attempts by the State to bend the wording of the EU parent directive and the national implementing measures to satisfy its defence, the court rejected each as without justification. It was also no defence that the state had not intended to breach the law or that it had not received any legal advice before enacting the national law.

Similarly, when the *Vnuk* ruling is applied to the UK, an innocent victim suffering injury in similar circumstances on private land may be advised to now bring a state liability action against the UK on the basis of the 'geographic scope' restriction of the RTA88. The UK seemingly has no discretion in the restriction of compulsory third party insurance on private land; the extension of liability since 2000 to a "road or public place" is not sufficient to provide the required protection to vulnerable individuals, and the first and third *Francovich* criteria are particularly straightforward (and as such need no discussion here). Conversely, a claim for damages against the UK on the basis of the use of 'vehicles' for the RTA88 would unlikely succeed in state liability due to the differing approaches observed throughout the member states' implementation and use of discretion in transposition. Requiring a consistent statutory interpretation of the CJEU's *Vnuk* ruling would, however, be required and would give effect to the provision.

Historically, the judiciary has at times been unwilling to give effect to EU law, particularly if this would have been to distort the meaning of legislation when giving such effect.¹⁰⁷ However, since *Litster v Forth Dry Dock & Engineering Co Ltd*,¹⁰⁸ this approach has been identified as incorrect where the national legislation was clearly intended to transpose the Directive. Further, *Ghaidan*¹⁰⁹ also enables the judiciary, through the exercise of statutory interpretation, to add and/or remove words to facilitate compliance. Whilst *Ghaidan* involved the interpretation of the Human Rights Act 1988, Underhill P in *EBR Attridge LLP v Coleman*¹¹⁰ found nothing "impossible"¹¹¹ about taking

¹⁰² See Marson, J., and Ferris, K. "The Transposition and Efficacy of EU Rights. Indirect Effect and a Coming of Age of State Liability?" (2015) 36 *Business Law Review* 4, 157.

¹⁰³ Of course, recent successes may be pointing to a turning point in the willingness of the judiciary to accept state liability claims – see *Delaney* and *Barco de Vapor BV and others v Thanet District's, Council* [2014] EWHC 490 (Ch).[□]

¹⁰⁴ Unlike in *Recall Support Services Limited and others v Secretary of State for Culture, Media and Sport* [2013] EWHC 3091 (Ch) where the state liability action failed due to the Directive's lack of an exhaustive list of restrictions which provided suitable discretion to the Member State. Per Rose J at [178].

¹⁰⁵ *Delaney v Secretary of State for Transport* [2014] at [105].

¹⁰⁶ *Delaney v Secretary of State for Transport* [2014] at [104].

¹⁰⁷ See the judgments of the House of Lords in *Duke v GEC Reliance* [1988] AC 618, and *Webb v EMO Air Cargo (UK) Ltd (No. 2)* [1995] IRLR 647.

¹⁰⁸ [1990] 1 AC 546, HL.

¹⁰⁹ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

¹¹⁰ [2010] ICR 242.

such an approach in relation to the interpretation of EU-based law, although he continued that the interpretation of national law was "... an extension of the scope of the legislation as enacted, but it is in no sense repugnant to it."¹¹². Such reasoning had already been provided by Lords Nichols and Rodger in *Ghaidan*, where they remarked that purposive statutory interpretation of the national law in light of the EU parent would not extend to an interpretation that was not "compatible with the underlying thrust of the legislation"¹¹³ or one which was "inconsistent with the scheme of the legislation or with its general principles."¹¹⁴ Finally, in the most significant case on the power of indirect effect, *Marleasing SA v La Comercial Internacional de Alimentación SA* held that courts are permitted to insert "additional words... They could be taken out; they can be moved around."¹¹⁵ As such, *Marleasing* not only provides the domestic court with the tools to be creative and expansive in its interpretation but actively requires the court to adopt this approach.

Defining "motor vehicle" and the geographic scope of motor vehicle insurance

Part VI RTA88 provides for the requirement of compulsory third party motor insurance. In s.143 provision is made for a person not to use (or cause to be used) a motor vehicle on a road or other public place unless there is in force in relation to the use of the vehicle insurance or security in respect of third party risks. Where this is not adhered to, an offence may be committed, unless an exclusion, as provided for in RTA88, is applicable.

In *Vnuk*,¹¹⁶ the CJEU addressed the issue of "use of vehicles" and the requirement for motor vehicle insurance to apply beyond a road or public place, thereby calling into question the UK's restrictive interpretation of motor vehicle and the requirement for compulsory motor insurance to apply to motor vehicles operated on a "road or other public place." Here Mr Vnuk was injured whilst carrying out work in a barn on farmland. He fell from ladders when a driver, using a tractor and drawing a trailer, backed the trailer into the ladders on which Vnuk was standing. Under Slovenian law, there was no requirement for an insurance policy to cover injuries concerned with accidents involving the use of vehicles on private land.

Vnuk argued that the interpretation provided by the court was too narrow in that the word "use" did not relate only to, nor was its meaning restricted to, the use of vehicles on public roads. As there was no definition provided in national legislation, a reference was made to the CJEU on the concept of "the use of vehicles" within the meaning of Art.3(1) of the First Directive, specifically where the incident did not occur in the context of a road traffic accident.

¹¹¹ *EBR Attridge LLP v Coleman* [2010] at [14].

¹¹² *EBR Attridge LLP v Coleman* [2010] at [14].

¹¹³ *EBR Attridge LLP v Coleman* [2010] at [33].

¹¹⁴ *EBR Attridge LLP v Coleman* [2010] at [121].

¹¹⁵ *EBR Attridge LLP v Coleman* [2010] at [49].

¹¹⁶ Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav* [2014] Judgment 4 September, nyr.

In his opinion, A-G Mengozzi identified that the insurance obligation under Art.3(1) had been initially based on the need to remove the insurance checks carried out at the borders of each member state before vehicles entered their territory. Prior to this enactment, such checks hindered the freedom of movement of persons and of goods. Despite these initial reasons, and the success on this criterion achieved by the First Motor Vehicle Insurance Directive, the legislation evolved and expanded its reach to specify the protection to be afforded to victims of road traffic accidents.¹¹⁷

Therefore, Mengozzi considered that it was clear that the CJEU (having interpreted the provisions of the MVID which may be favourable to victims¹¹⁸ broadly and generously and interpreting restrictively those provisions which aim or have the effect of excluding categories of persons from the obligation to pay compensation¹¹⁹) intended the MVID to protect individual victims of accidents on private land. When examining the terminological imprecision of the EU legislature and the diversity of national practices,¹²⁰ confusion and ambiguity in the transposition of EU law was present. Depending upon which version of the directive provided in the Official Journal one was to use,¹²¹ the interpretation of the use of motor vehicles was open to seemingly expansive interpretation. As such, two broad arguments were present. The first restricted obligations in respect of road traffic accidents (the position adopted by the defendant in the proceedings before the referring court). The second was to adopt a broad interpretation whereby the obligation extended to covering any damage connected in any way with the use or operation of the vehicle.

National case law has frequently departed from the wording of the transposed legislation in order to extend, or on the contrary and perhaps more commonly, to restrict the scope of the obligation to take out insurance. Using just two

¹¹⁷ As provided for at [37]: Directive 84/5 laid down the principle of compulsory cover for damage to property and personal injuries, set the minimum guaranteed amounts of compensation and required the setting-up of a body with the task of providing compensation for damage caused by unidentified or uninsured vehicles (article 1 of Directive 84/5), and limited the exclusion clauses contained in insurance policies (article 2 of Directive 84/5). Directive 90/232 extended the cover to personal injuries to all passengers other than the driver (article 1 of Directive 90/232) and provided for the right of persons involved in an accident to information regarding the name of the insurance company concerned (article 5 of Directive 90/232). Directive 2000/26 provided for the establishment of a new information centre (article 5 of Directive 2000/26) and of a compensation body (article 6 of Directive 2000/26). Directive 2005/14 restricted insurance cover exclusion clauses and extended that cover to personal injuries and damage to property suffered by pedestrians, cyclists and other road users, while prohibiting the application of excesses against injured parties and further extending their right to information (article 4 of Directive 2005/14).

¹¹⁸ Case C-129/94 *Rafael Ruiz Bernáldez* [1996] ECR I-1829, at [18], and Case C-442/10 *Churchill Insurance Company and Evans* [2011] ECR I-12639, at [30]. That objective has also been reiterated recently (see *Haasová*, at [47 and 49], and *Drozdovs*, at [38 and 40]).

¹¹⁹ Case C-348/98 *Mendes Ferreira and Delgado Correia Ferreira* [2000] ECR I-6711; and Case C-356/05 *Farrell* [2007] ECR I-3067; *Haasová* and *Drozdovs*.

¹²⁰ Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav* [2014] delivered 26 February, at [18].

¹²¹ Nuances of the terms 'use', 'circulation', and 'utilisation' were effected in the transposition of article 3(1) of the directive by France, the UK, Slovenia, Bulgaria, Czech Republic, Estonia, Finland, Latvia, Malta, Slovakia, Denmark, Germany, Hungary, Lithuania, Romania and Sweden.

member states as examples, the Court of Cassation (Luxembourg), adopting the broad approach,¹²² held that a vehicle covered by insurance against civil liability in respect of motor vehicles is, unless otherwise agreed, insured wherever it is, irrespective of whether or not the damage has been caused in a traffic incident. On the contrary, the Lietuvos vyriausiosios administracinės teisės (Lithuanian Supreme Administrative Court) used a significantly more restrictive interpretation than that to which its national law appeared to authorise. It held that the owner of the vehicle involved in an accident occurring in an enclosed area was not subject to the obligation to take out insurance.¹²³ This situation established a pressing need for clarity as to the meaning of Art.3(1) because:

“[the concept] of ‘circulation’ or ‘use’, which in itself makes no express reference to the law of the Member States for the purpose of determining its meaning and scope, must be considered an independent concept of EU law and therefore be given an independent and uniform interpretation throughout the EU...”¹²⁴

The lexicon employed through the evolution of the MVID also appeared to give weight to Mengozzi’s broad interpretation of the First Directive. The directive focuses on the notion of the vehicle in the context of a road traffic situation, using concepts such as “vehicles normally based,”¹²⁵ “movement of travellers” and “use of vehicles.”¹²⁶ However, such wording evolved to distance itself from such “vehicle-centred”¹²⁷ terminology and rather began to adopt a more “person-centred” approach. This manifested itself in the subject matter of the insurance being the categories of accident victims, be they “passengers other than the driver,”¹²⁸ “parties involved in a road traffic accident,”¹²⁹ “any passenger,”¹³⁰ and “injured parties to the accidents.”¹³¹ The trend, it appeared, was towards the concept of the accident itself and there was no connection with “road traffic” or the “use” of the motor vehicle required in every circumstance. For example, the MVID refer to an “accident caused... by a vehicle,”¹³² “motor vehicle accident[s],”¹³³ “accidents caused by... vehicles,”¹³⁴ and “accidents... caused by the use of vehicles”.¹³⁵ Completing

¹²² Judgment No 65/12 of the Luxembourg Court of Cassation of 20 December 2012.

¹²³ Judgment No N575-1685/2011 delivered on 23 September 2011.

¹²⁴ Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav* [2014] opinion delivered 26 February, at [30].

¹²⁵ Articles 1(4), 2(2) and 3(1) of Directive 72/166.

¹²⁶ Recital 6 and article 6 of Directive 72/166 respectively.

¹²⁷ Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav* [2014] delivered 26 February, at [33].

¹²⁸ Art.1 of Directive 90/232.

¹²⁹ Art.5 of Directive 90/232.

¹³⁰ Recital 15 of Directive 2005/14.

¹³¹ Art.4 of Directive 2005/14.

¹³² Art.5 of Directive 72/166.

¹³³ Fourth recital in the preamble to Directive 90/232; Recitals 8, 11 and 20 in the preamble to Directive 2000/26; Recital 14 in the preamble to Directive 2000/26; and Recitals 20 to 23 in the preamble to Directive 2005/14.

¹³⁴ Eighth recital in the preamble to Directive 90/232, article 1(3) of Directive 2000/26, recitals 5, 7 and 8 in the preamble to Directive 2005/14 and article 4 of that Directive.

this line of reasoning, Mengozzi referred to Art.8 of the Fourth Directive which amends, in part, the First Directive. Whilst noting that this amendment did not concern the classification of the risks to be covered by compulsory insurance as laid down in Art.3(1), as stated in Point 10 of Annex A to Directive 73/239,¹³⁵ reference is made, in respect of civil liability of motor vehicles operating on the land, to “[a]ll liability arising out of the use of motor vehicles operating on the land (including carrier’s liability).” The conclusion to be drawn is that Directive 73/239 does not restrict the risk to be covered to road traffic incidents.

Ultimately the CJEU held “vehicle”, for the purposes of Art.3(1), can include agricultural machinery including attachments to it and, in the last paragraph of its ruling, commented “the concept of ‘use of vehicles’ in article 3(1) covers any use of a vehicle that is consistent with the normal function of that vehicle.”¹³⁷ The CJEU, whilst commenting on the different national approaches regarding road use or partial road use in the interpretation of the directive when transposing its provisions into domestic law, identified the importance of a consistent approach. The concept of “use”, pertinent as it is to the application of Art.3(1) could not be left to individual member states to determine.

In the aftermath of *Vnuk*, s.185 RTA88 provides a definition of ‘the meaning of motor vehicle’ which is clearly too restrictive to comply with the MVID. Vehicles currently exempted from the RTA88 and its requirement to hold compulsory motor vehicle insurance will now fall within this category – even perhaps ride along mowing vehicles.¹³⁸ Section 143(1)(a) RTA88 requires that “a person must not use a motor vehicle on a road [or other public place] unless there is in force... a policy of insurance.” Even given the additional words included following *Clarke v Kato and Cutter v Eagle Star Insurance Ltd*¹³⁹ it is evident that “other public place” must now be interpreted purposively as securing a right to compensation in places where the public have, or can be expected to have, access. Following *Harrison v Hill*,¹⁴⁰ ‘public’, in relation to statutory provisions of the RTA 1930 is not a term to be held as identifying a special class of persons who have occasion to visit the premises for the purposes of business or social engagements, nor is a public place restricted to one where individuals are invited or granted permission. A distinction must be drawn between that definition and one of “places” where the general public have access due to the nature of it being open to them. *Vnuk* has resolved much of the confusion in the RTA88 surrounding those roads or areas where s.143 applied and where it did not, yet of course, s.143 RTA88 remains the domestic law applicable and requires the lawyers and

¹³⁵ Article 1(1), first subparagraph, and (2) of Directive 2000/26. Worded in similar terms, article 1(1), second subparagraph of the same Directive.

¹³⁶ First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life insurance.

¹³⁷ *Damijan Vnuk v Zavarovalnica Triglav* [2014] Judgment 4 September at [60].

¹³⁸ For commentary on the *Vnuk* ruling see Bevan, N. “Ignore at your Peril” (2014) 164 *New Law Journal* 7628, p.7.

¹³⁹ *Clarke v Kato and Cutter v Eagle Star Insurance Ltd* [1998] All ER (D) 481.

¹⁴⁰ *Harrison v Hill* [1932] JC 13, [1931] SLT 598 at p. 16.

judiciary to apply the *Vnuk* ruling via *Marleasing* and *Pfeiffer*.¹⁴¹ It would be compatible with, and arguably not inconsistent with the thrust of the RTA88 for the courts to insert the words “or other public or private place” (authors’ emphasis) to give effect to the MVID and whilst it may be almost “simpler” for an innocent victim to claim against the state for damages, an action via indirect effect would have the broader implications of necessitating an immediate change in the application of the existing law for all parties (pending any legislative action the government is currently assessing). Despite Lord Clyde’s judgment in *Cutter* and the Lords’ refusal to use *Marleasing* to stretch the concept of “road” to “or any public place” this seems to be a misunderstanding of the requirement on the judiciary to utilize the purposive approach to statutory interpretation. This was certainly not the approach taken by the Employment Appeal Tribunal recently in *USDAW v Ethel Austin Ltd and WW Realisation 1 Ltd*¹⁴² where it (albeit later to be held as an incorrect interpretation¹⁴³ of the parent EU directive in question)¹⁴⁴ deleted words¹⁴⁵ from national legislation¹⁴⁶ to ensure a consistent approach could be followed. Both *Delaney* and *USDAW v Ethel Austin* point to a willingness on the part of the judiciary to use the full extent of its powers in fulfilling EU requirements on consistent interpretation and of awarding damages to individuals when caused loss through the state’s breach. Finally on this point, even where a consistent interpretation of the law is not possible, the judiciary cannot avoid its EU obligations as:

“... the national court is... obliged to disapply that [incompatible] rule, provided always that this obligation does not restrict the power of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for protecting the individual rights conferred by Community law.”¹⁴⁷

Unlike in *Cutter* where the advocates attempted to persuade the judiciary to follow their interpretation of the national law, the national and EU courts have clearly identified that the current national provisions are in breach of EU law; hence the only options open to a court when faced with actions based on the RTA88 ss.144B(5)(b) and 152(2) are to purposively interpret the law according to *Marleasing* and *Pfeiffer* or to disapply the law under the *Factortame* reasoning.

¹⁴¹ Case C-397/01 to C-403/01 *Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV* [2004] ECR I-8835. The CJEU interpreted Art. 4(3) of the Treaty of Maastricht as imposing a duty on member states to take all measures appropriate to ensure fulfilment of Treaty obligations, extending this to all the authorities within those member states, including their courts.

¹⁴² *USDAW v Ethel Austin Ltd (In Administration)* [2013] UKEAT/0547/12/KN, and *USDAW and Wilson v Unite the Union, WW Realisation 1 Ltd and Secretary of State for Business, Innovation & Skills* [2013] UKEAT/0548/12/KN.

¹⁴³ Case C-80/14 - *USDAW and Wilson*.

¹⁴⁴ Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the member states relating to collective redundancies.

¹⁴⁵ ‘We hold that the words “at one establishment” should be deleted from section 188 as a matter of construction pursuant to our obligations to apply the Directive’s purpose.’ at [53].

¹⁴⁶ Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992

¹⁴⁷ Cases C-10-22/97 *Ministero delle Finanze v IN.CO. '90 Srl* [1998] ECR I-6307 at [21]; Case C-314/08 *Krzysztof Filipiak*, 19 November 2009 at [18].

Conclusions

The UK is required to take remedial action to reconcile the incompatibility of the RTA88 and MIB agreements with the MVID. Sections 143 (the duty to insure), 145 (third party insurance cover), 148 (limitations on certain exclusions within the holder's insurance policy), 150 (private use of a vehicle), 151(4) (knowledge of theft or unlawful taking), 152 (exceptions to indemnity under s. 151), 185 (definition of a motor vehicle), and 192 (definition of road or other public place) RTA88 are all in breach of EU law. Lawyers guiding their clients need to be aware of these breaches and how to correctly give effect to the proper construction of the MVID. *Marleasing* and *Pfeifer* require the judiciary to purposively interpret the RTA88 to give effect to the MVID in domestic courts, and state liability actions have been demonstrated in *Delaney* to be considerably more accessible in national courts due to the UK's clear and fundamental breaches of EU law (as confirmed in the case law of the CJEU), ignored by the UK and disregarded by the MIB. Given the likelihood that the MIB would be held as possessing the status of an emanation of the state, it may be subject to the direct use (effect) of the MVID and the state is vulnerable to damages actions for losses incurred by individuals for the incorrect / non-transposition of the MVID. This is not limited to claims following the *Delaney* ruling, but can be back-dated to other cases where the individual had suffered loss and failed to bring such an action (under the equivalence and effectiveness principles and subject to national law such as the Limitation Act 1980).

Not until the 1 August 2015 had the MIB agreement taken into account the implications of the *Delaney* ruling, albeit continuing with a raft of errors and continuing breaches of the MVID and being non-retrospective which affects any injured person or those suffering loss prior to 1 August 2015. The government has yet to amend the RTA88 in respect of *Vnuk* and those issues raised in this paper which are contrary to the MVID. Such a policy of inaction can be effectively remedied through litigation and public awareness. In the absence of immediate and more complete action by the state, exposure to liability and continued political disobedience is the consequence.