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# Driving Towards a More Therapeutic Future? The Untraced Drivers Agreement and Conscious Contracting

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## ABSTRACT

Therapeutic jurisprudence (TJ) is an emerging and developing philosophy which, established by Winnick and Wexler, and continued by the work of Perlin (*inter alia*), has been predominately used to explain the operation and efficacy of drug courts and the criminal justice system generally. It recognises that law has the potential to have both therapeutic and anti-therapeutic effects, and thus it is in the use of its rules, whilst not transgressing normative values, that therapeutic outcomes should be realised. More recently, however, TJ has been used to explore other legal jurisdictions beyond its drug and mental health origins – even to musical TJ.<sup>1</sup> In respect of the law surrounding motor vehicle insurance and the compensation applicable to third-party victims, a TJ approach has been used to discuss the standard of care in torts law (in an American context<sup>2</sup> and that of the law in India)<sup>3</sup> recognising the common agenda present in both the deterrence of potential injurers and the restoration of the injured. In the UK, motor vehicle insurance is governed through statutory (for example the Road Traffic Act 1988) and extra-statutory measures (for example the Untraced Drivers' Agreement 2017), underpinned by the United Kingdom (UK)'s obligations to the European Union (EU). The extra-statutory element of this regulatory scheme is the focus of this paper. It is unique in the exploration of the procedural rules relating, primarily, to the Untraced Drivers' Agreement concluded between the Motor Insurers' Bureau and the Secretary of State for Transport. This Agreement has been defective in correctly transposing EU law into national law and, we argue, the UK's fulfilment of its withdrawal from the EU could prove the opportunity for a new Agreement, based on conscious contracting, to remove the anti-therapeutic features present and to expunge the worst elements of an agreement that often fails to ensure the restoration of vulnerable third-party victims.

## 1. INTRODUCTION

The EU was formed on the basis of four key principles known as the four freedoms - the free movement of goods, services, capital and labour. Not only were they enshrined in the treaty establishing the European Economic Community (EEC) in 1957's Treaty of Rome, they were reinvigorated to ensure their completion through the Single European Act 1986, the 1992 Maastricht Treaty and the Treaty of Lisbon in 2007. These freedoms were created to facilitate free trade throughout the EU as a trading block (the EEC) and formed the basis for the development to the EU (incorporating various social policy rights). Underlying provisions of these freedoms were the free movement of persons and of goods which, in respect of motor vehicle insurance, were the catalyst for the Motor Vehicle Insurance Directives (MVID), a suite of Directives<sup>4</sup> which required Member States of the EU to transpose their provisions into national law. The UK attempted to achieve this through various statutory measures, including the Road Traffic Act 1988 (RTA88), but also through agreements concluded between the UK (via the Secretary of State for Transport) and the Motor Insurers' Bureau (MIB - a private body owned by a conglomerate of the motor insurance industry). Two agreements were used to achieve this requirement – the Uninsured Drivers' Agreement (UDA - where the MIB would act as the insurer of last resort for the negative consequences affecting third-party victims of uninsured drivers), and the Untraced Drivers Agreement (UtDA - where, in a similar vein, the MIB would settle the claims of third-party victims of

untraced drivers / vehicles).<sup>5</sup> This paper focuses on the latest (2017) UtDA, but to place in context the discussion presented, we refer to the previous UtDA (2003) and both the latest and previous UDAs (2015 and 1999) to highlight the continuation of many of the most anti-therapeutic elements of the Agreements and the lack of positive engagement on the part of the Government and MIB to remedy the defects in the latest iterations.

There have been several Agreements concluded between the Secretary of State and the MIB to give effect, in part at least, to developments at EU law. This has been due to the enactment of new Directives, the judgments of the Court of Justice of the European Union (CJEU) which have necessitated changes to the UDA and/or UtDA, or indeed it has been through some critical reflection on the part of the parties, perhaps also due to some criticism levelled at those Agreements through academic commentary.<sup>6</sup> However, the result is that there have been significant disparities between the requirements imposed on Member States and the UK giving effect to these. The consequence is that in many situations the third-party victims of negligent uninsured or untraced drivers have been in a worse position nationally than they should have been had the requirements in these EU Directives been correctly transposed.<sup>7</sup>

Motor insurance law has in recent years received greater attention from academics. This is largely due to some high-profile cases<sup>8</sup> where the interaction between national and EU law, and the disparity between the two, has been highlighted. However, this particular area of the law (the consistency between the two sources of law in respect of third-party victims' rights and the newest UtDA concluded in 2017 between the Secretary of State and the MIB) has yet to attract academics' attention. Perhaps this was due to the looming presence of Brexit and the conclusion, at least prior to the COVID-19 outbreak and its global effect on the development of politics and treaty agreement and dissolution,<sup>9</sup> of the debate as whether the UK would actually ever truly leave the EU. This being settled following the election of the Conservative government in December 2019, it became a moot point whether the UK breached its EU obligations in the realm of motor vehicle insurance law as the Prime Minister had categorically confirmed that the UK would no longer remain part of the Single Market or the EU Customs Union (and hence the existing requirement the UK to maintain all laws which facilitate the free movement principles upon which the MVID were based). Given that enforcement of the MVID domestically had been haphazard at best, this development to the UK's conclusive withdrawal from the EU had not assisted in the academic scrutiny of the MVID and the UK's statutory and extra-statutory implementing/transposing measures. Some authors, such as Channon,<sup>10</sup> have proffered what a future MIB series agreement may look like, removed from the shackles of having to conclude their agreements with the Secretary of State whilst simultaneously adhering to the requirements of the MVID. What we intend to do in this paper is to present some of the more problematic aspects of the substantive and procedural defects and deficiencies within the UtDA, and then to consider how these might be ameliorated by a movement to a TJ philosophy, adopting a conscious contracts approach, which could remove the most anti-therapeutic aspects of the existing and future UtDA.

## **2. A MOVEMENT TOWARDS CONSCIOUS CONTRACTS?**

The MIB is a not-for-profit limited company which was established in 1946 and represents the interests of all the regulated motor vehicle insurance bodies in the UK. Every insurer who issues policies in the UK must be a member of the MIB and a proportion of every premium paid by customers is taken by the MIB to fund its work and facilitates the payments it makes to the qualifying third-party victims of accidents caused by uninsured or untraced drivers. The two sources, nationally, which facilitate the protection for such victims are the UDA

2015 (as amended) and the UtDA 2017. Both of these are concluded between the MIB and the Secretary of State for Transport, and they incorporate (transpose) provisions as required in the MVID. Therefore, the two main parties are the MIB and Secretary of State, and they contract (even though the title is an ‘agreement’) on the basis of compliance as a minimum with EU law for the benefit of third-party victims who would, in other circumstances, have a claim in damages against the negligent driver at fault (and thereby through the driver’s insurers).

It should be noted from the outset that the MVID was inspired by the first agreement between the MIB and the Minister of War Transport (now Secretary of State for Transport). The UK, therefore, having enacted the Road Traffic Act 1930 (RTA30), observed the potential deficiencies in the application of the RTA30. The Act did not protect third-party victims of drivers who lacked insurance or the means to satisfy judgments following their negligent driving. This aided the creation of the MIB and thereafter the first UDA and latterly the UtDA. Thus, the UK began its contracting on the basis of protecting a group in society for which no legal obligation previously existed. However, the EU, having been inspired by the agreement and the RTA30 when drafting the first MVID in 1972, continued through a further five iterations of the MVID with the UK, since its accession in 1973, trailing behind the expansive range of protection being developed by the EU. These conflicts between the UK’s Agreements and the requirements in the MVID (as presented in this paper) will demonstrate how the MIB and Secretary of State have been contracting in breach of the MVID for many years. This continues despite academic commentary, clear instruction in the source MVID and the jurisprudence of the CJEU. This leads to the conclusion that an active choice is being made when contracting between the MIB and Secretary of State to avoid some compulsory aspects of the MVID, and this adversely affects third-party protections. Perhaps the most recent agreements neglected to fulfil completely the provisions in the MVID because of the anti-EU sentiment of the dominant Conservative political party (in its coalition Government with the Liberal Democrat party) in respect of various social-policy measures; possibly this was exacerbated by the Brexit-vote of 2016 with a political mindset that the UK was withdrawing its membership of the EU and therefore had no strong compulsion to follow EU rules and the jurisprudence of the CJEU which were to be removed and ended (respectively) following enactment of the various iterations of the Withdrawal Bill (which was finalised and became the European Union (Withdrawal Agreement) Act 2020). Certainly from a doctrinal perspective, there was no real justification for the UK’s general misapplication and non-transposition of elements of the MVID in national law (despite judicial assertions to the contrary in the *Roadpeace v Secretary of State for Transport*<sup>11</sup> Judicial Review proceedings) and indeed even the Supreme Court as recently as 2019<sup>12</sup> was demonstrating a fundamental misunderstanding of national obligations in respect of the MVID. An argument might be established for the justification of the differences between national law and its EU parent by using critical legal theory as a more all-encompassing structure which could explain a judiciary failing to appreciate significant errors present in national legal and procedural measures. However, each of the above does not change the conclusion. UK law fails to adequately protect third-party victims due to technical failures and breaches present in the UDA and UtDA.

Why then, given that the problems surrounding the agreements between the MIB and the Secretary of State concern compliance with EU law, would there need to be consideration of the issue which will by necessity be resolved at the conclusion of the transitional period (at the end of the 2020 at the time of writing, the implications of COVID-19 notwithstanding)? Our suggestion is based on two possible scenarios that will impact the UK and the MIB in the

near future. First, the withdrawal from the EU might be seen as an opportunity for the MIB to contract with the Secretary of State in a much more positive and humanistic way. It could see its place as leading the way, as it did in 1946, of protecting vulnerable groups through innovative and thorough schemes of compensation which would reposition the MIB as a genuine compensatory body (as envisioned by the MVID)<sup>13</sup> and would also confirm the Conservative government's assertions about the benefits for the UK from leaving the EU and being able to establish its laws without the restrictions imposed by that body. Secondly, and perhaps more plausibly, is that the MIB should seize this opportunity to demonstrate its valuable existence ahead of the widespread adoption of Connected and Autonomous Vehicles (CAV). It is anticipated that CAVs, at level 3 and above, will be on UK roads by 2035. As these move towards level 5<sup>14</sup> (i.e. being fully autonomous and requiring no human intervention at all in the driving process) the traditional model of insurance is likely to be replaced through a system of product liability. Therefore, the MIB, as insurer of last resort, might find itself in a position of redundancy. In an attempt to reverse this (perhaps) inevitable consequence, the MIB could contract with the Secretary of State to provide a competitive advantage to road users, pedestrians and even, through the equivalent of the current Green Card Scheme, to foreign visitors who find themselves victims of untraced negligent drivers. Such positive positioning might convince the public, legislators and policymakers that the maintenance of a compulsory insurance scheme might be advantageous to all and ensure the continuation of the MIB as a national compensatory body.

This is where a TJ approach might serve as a particularly effective philosophy to guide future agreements beyond 2020. We were inspired to investigate the suitability of this aspect of TJ through the work of J. Kim Wright<sup>15</sup> and her development of conscious contracts.<sup>16</sup> Here, using plain English, a relational process allows the parties to determine the underlying purpose of the contract (to form a system of protection for the third-party victims of uninsured and/or untraced drivers), what the parties want to achieve and to obtain from the agreement (a system which enables protection of rights and values, respecting all parties), and to incorporate their values into a document which seeks to avoid adversarialism and rather pursue alternatives, such as mediation, to the traditional court system as a forum for dispute resolution. The need for developments in this respect are perhaps difficult to see in the abstract. Therefore, the next section of the paper presents examples of where the UtDA creates problems for vulnerable third-party victims from exercising rights supposedly guaranteed at law. It is readily evident how certain groups in society might be particularly vulnerable when either defending themselves in court cases or having to assert their rights. Minors,<sup>17</sup> persons with a mental illness,<sup>18</sup> the physically impaired,<sup>19</sup> the poor<sup>20</sup> and so on are just a few of the groups who may find themselves disadvantaged when entering the civil justice system. The vulnerable groups we are discussing in this paper, who might also find themselves in the aforementioned categories, are the third-party victims of road traffic accidents. Not only do they frequently suffer physical and economic losses associated with their post-accident injuries, but they find themselves being unable to secure the compensation from the tortfeasor had the driver been insured and/or traced. These are people who frequently experience life-changing injuries due to their road traffic accident<sup>21</sup> and may face difficulties in recovering compensation from the very body established and designed to offer this protection. Taken on this basis, it is possible to view the current UDtA as being anti-therapeutic on a number of bases.

### **3. THE UNTRACED DRIVERS' AGREEMENT 2017**

The UtDA 2017 is the most recent addition to the suite of agreements concluded between the MIB and the Secretary of State. It came into force on 1 March 2017 and affects any claim on or after this date where the victim has suffered injuries and loss following the actions of an untraced driver / vehicle. The 2017 agreement was preceded by the 2003 agreement which applies to accidents occurring between 2 February 2003 and 28 February 2017. Under the UtDA 2017 and 2003, the MIB is designated as the compensatory body and insurer of last resort as it is for cases invoking the other MIB Agreements. In respect of the previous Agreements, the MIB and the Secretary of State have frequently been criticised for the failure to draft a coherent and compliant document. Indeed, both Agreements (the UtDA and the UDA) fail to take into account the requirements of the MVIDs and to properly consult interested parties to ensure that the Agreements achieve their target of protecting innocent third-party victims of road traffic accidents.<sup>22</sup>

In this respect, and due to the 2003 Agreement's failure to meet the MVIDs' requirements, there was a small but vocal demand for changes to the 2003 Agreement.<sup>23</sup> The need for changes to rid the pitfalls of the 2003 Agreement led to the amended 2017 version. This new Agreement was signed, as with the other Agreements, aiming to remove any elements of uncertainty that may arise as a consequence of contradicting EU law (the MVID) and the Civil Procedure Rules (CPR). It does, however, remain that the law in this respect has struggled to achieve the minimum thresholds of protections as required under the MVIDs. Indeed, we would argue that it is fair to conclude that the exclusion clauses and procedural rules established under this Agreement, when thoroughly examined, cannot be deemed to provide any semblance of legal certainty. The 2017 Agreement is of the same quality in respect of compatibility with the MVID as was the Agreement in 2003. The UtDA 2017 is complicated and imposes unacceptable exclusions and unfair procedural rules that if not met, denies victims' access to their rights. However, following the judicial review in *RoadPeace*,<sup>24</sup> some of the worst unlawful exclusions, such as terrorism exclusions, property damage exclusions and some appeal processes related to arbitration, were removed. Regardless, the majority of the other breaches present in the 2003 Agreement were left unchanged.

### **3.1 THE SCOPE OF THE 2017 AGREEMENT**

The UtDA operates to plug the gap that exists in the national scheme of compulsory motor vehicle insurance. Whilst it is a requirement that owners of vehicles used on roads are covered by a policy of insurance, third-party victims, in the event that the negligent driver who caused the accident does not have insurance, or where the driver is not identified following the accident, enables the third-party to recover damages against the MIB as if they were suing the identified and insured driver at fault. Hence, the MIB's liability, under this Agreement, is that a claimant would have secured an award had his claim been made against an identified driver (the driver was traceable). An important exemption to be noted, from the outset, is that the UtDA does not apply to an accident where the driver was identified but cannot be traced.

Under cl 3(1) there are certain conditions imposed on an applicant to be met in order for the claim to proceed, the first of which being that the application must first fall within the scope of the Agreement. The Agreement applies only to cases where a) there is death, bodily injury or property damage; b) that takes place on a road or other public place; c) that arises out of the use of a vehicle insured according to the RTA88 requirements;<sup>25</sup> and d) where the accused driver is unidentified. The MIB reserves the right to reject any application without even investigation if a claim does not meet these criteria – on the basis that such claims do

not fall within its scope. Further, the MIB has the right to reject any claim falling within its scope if it believes that the claim does not qualify to be considered (and therefore processed and awarded). This is in addition to the other exclusions present under cll 4-10. The issue here is that the Agreement not only unlawfully excludes claims from its scope (such as those to do with geographical restrictions) but also gives permission to the MIB to, where possible, apply exclusions to the ones that fall within its scope which may lead to exclusions based on its interest regardless of the victims' circumstances. For example, the Agreement repeats the same mistakes that exist under the other Agreements when referring to the definitions of 'road,' 'other public place' and 'motor vehicle' as also apply in the RTA88.<sup>26</sup> These references reflect the reluctance of the MIB to ensure compliance with the MVID as such restrictions do not exist and are not allowed under the MVID. In other words, the claims of victims of hit and run accidents, cannot be actioned against the MIB unless the vehicle was intended for use on the road and the accident happened on a road or other public place. This leaves accidents happening on private land, where the public has no access, beyond the range of cover and with no route to compensation under this Agreement. The broad interpretation of *Vnuk*<sup>27</sup> leaves this Agreement, in this respect<sup>27</sup> at least, in breach of the MVID. The ruling in *Vnuk*<sup>28</sup> is clear that third-party victims must be compensated to the minimum required level by the MVID in any circumstances where an accident involving a vehicle and the use of it is consistent with the normal function of that vehicle. Furthermore, the requirement for insurance according to the MVID relies on the use of the vehicle, not where the vehicle is used. Therefore, the current national law scope of cover should be extended. The Government and its representative (the MIB) can no longer deny this state of affairs, particularly after the Court of Appeal ruling in *Lewis v MIB*.<sup>29</sup>

### **3.2. DISPUTE RESOLUTION THROUGH FORCED ARBITRATION**

The process of an applicant claiming damages through the MIB where the driver at fault cannot be identified involves the submission of evidence, the consideration of this to the MIB's satisfaction, and then the issuing of an award to the applicant. Where the applicant is not satisfied with this award, they may dispute it through a system of arbitration. The agreement between the MIB and Secretary of State compels the use of arbitration to resolve these disputes. The nature of the claims under the UtDA, and the imposition of compulsory arbitration, creates potential problems for the parties which the Agreement does not seem to ameliorate. To begin, claims are made by the third-party victim to the MIB on the basis of forms and within time-frames established by it.<sup>30</sup> The MIB is then tasked with assessing this claim, a system considered by the applicant in *Carswell*<sup>31</sup> as flawed<sup>32</sup> due to the lack of perceived independence of the MIB<sup>33</sup> in that it determines the issues, runs the investigation into the claim and makes the award of damages to the claimant.<sup>34</sup> Where the claimant is not satisfied with the decision of the MIB or the arbitration process, they may seek recourse to the courts. First, the claimant has only six weeks from the date of the MIB's decision to appeal the decision<sup>35</sup> and the arbitrator used in the case is selected from a panel of Queen's Counsel as chosen by the Secretary of State.<sup>36</sup> As identified above, it is possible to argue against the impartiality of this system and the nature of a scheme whereby the investigator to the claim also is the body which chooses the decision and establishes any quantum of damages. However, the main contention as to the anti-therapeutic element of arbitration in its current form is the difficulty the applicant has to have the decision of the arbitrator appealed to the courts. The Arbitration Act 1996, at s 69(3), provides

*leave to appeal shall be given only if the court is satisfied—(a)that the determination of the question will substantially affect the rights of one or more of the parties, (b)that*

*the question is one which the tribunal was asked to determine, (c) that, on the basis of the findings of fact in the award— (i) the decision of the tribunal on the question is obviously wrong, or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.*

Thus, the prospect of the applicant being able to demonstrate that a decision of fact is ‘obviously wrong’ is a particularly high test to meet. Indeed, the nature of claims under the UtDA means that it is a paper-based exercise, based almost exclusively on the facts of the matter rather than the application of legal principle. The negligent driver is not present to be questioned nor is there a mechanism through which evidence may be deduced from the tortfeasor. The MIB in such circumstances may largely conclude matters in isolation knowing that the only practical recourse the applicant has is to a system of dispute resolution which is based on rules it has established in a contract with the Secretary of State. The decisions of the arbitration process are unpublished which makes external scrutiny difficult, as is also the case in respect of a consistency of decision making and precedent formation.<sup>37</sup> For example, in *Harvey v MIB*,<sup>38</sup> the applicant appealed the MIB’s decision to reduce the compensation awarded under contributory negligence,<sup>39</sup> only to have the entire award rescinded by the arbitrator who concluded there was no evidence of negligence demonstrated. The attempted recourse to appeal to the courts was rejected on the basis that the decision was factual and had no basis as a point of law, nor was it a matter of sufficient public interest to warrant a court hearing. Consequently, most claims are settled at an early stage and do not proceed to court.

### **3.3. THE RIGHT TO APPEAL**

A claimant may under cl 15 have the right to appeal against a decision of the MIB. For instance, where a claimant believes that his claim does fall within the scope of the Agreement and the MIB disagree, or where the compensation awarded by the MIB does not include interest and legal costs and so on, an appeal process should exist to an independent body. Unlike the 2003 UtDA, under the 2017 Agreement, the MIB must take into account interest and legal costs when issuing an award, which is a positive step in reducing the negative effects on third-party victims seeking redress under the UtDA. It is nevertheless, limited. The right of appeal, under this Agreement, must be made to an arbitrator within the six weeks of the MIB’s notification of its decision. Failing to comply with this criterion may result in his right of appeal being rejected. Furthermore, the appeal is based on written submissions which means it may lack the effective consideration of other legal sources such as the MVID as well as the judgments of the CJEU. However, unlike the UDAs (1999 & 2015) or the previous UtDA 2003, either party (a claimant or the MIB) can request an oral hearing, and where it takes place, the MIB is charged, at its own cost, to arrange the hearing. Furthermore, a claimant can under this Agreement decide to be represented by a lawyer and call witnesses.<sup>40</sup>

However, the oral hearings may have some negative consequences that prevent a claimant from seeking this route of remedy. Although generally the arbitrator’s fee is to be paid by the MIB, the arbitrator has the right to permit the MIB to recover such fees from the claimant or his representative if, for instance, the arbitrator believes that written submissions were sufficient to decide on this matter (with no grounds for appeal). It is perhaps understandable to have such orders against the claimant in cases of fraud, but how and based on what matters the arbitrator can decide that the oral hearing or the appeal was unnecessary is contentious

and would not necessarily be readily obvious to a litigant in person who does not have access to legal advice. Further, the claimant has no automatic right to appeal against the arbitrator's decisions. Such practices contradict the MVID's aim to protect third-party victims as to require them to bear the cost of procedural matters when seeking justice. This may also breach the principle of equivalence and effectiveness as the case would be dealt with differently had the unidentified driver been identified and the claim brought against him (see *Moore v Secretary of State for Transport, MIB*).<sup>41</sup>

Furthermore, the arbitrator is not allowed to rely on the MVID in his judgment or any other sources such as the jurisprudence of the CJEU, rather he is restricted to determine the matter on the submissions of the parties. The claimant's lack of an automatic right to appeal to a court breaches the MVID to have access to a fair appeal.

### **3.4. EXCEPTIONS WITHIN THE 2017 AGREEMENT**

There are certain clauses incorporated into this Agreement on which the MIB can rely to totally or partially avoid its responsibility to satisfy the claim of an applicant made under the UtDA 2017. The main anti-therapeutic clauses include:

#### **3.4.1. DEDUCTIONS**

The 2017 Agreement permits the MIB to deduct, from any award it grants, any other payments that the claimant is entitled to receive or has received.<sup>42</sup> This is an unlawful practice (exclusions and deductions) that not only continues under this Agreement but also applied under the UDA 1999 and UtDA 2003, and continues too in the UDA 2015. The MIB is permitted to deduct an amount of money paid in relation to some road traffic accident claims. The question here is that if a person was unfortunate to get hit by an untraced motor vehicle, deductions from the payable compensation may be made by the MIB which would not be the case if the claim was handled by an insured and identified vehicle and driver. Therefore, how can a deduction be justified in such cases and claim at the same time that the victim was fairly compensated for his accident, where he in fact was compensated partially/fully by, for example claims made on the basis of his own health insurance policy? It is hard to understand the link between what the victim received in payment from his health insurance cover (for which he has been paying) and the justifiable deduction of this payment from any compensation which would have to be made by the MIB.

In this respect, the MIB usually stipulates prior to any liability that a claimant who expects payment from other sources to assign to the MIB the right to such payment.<sup>43</sup> Although such deductions are permitted under the MVID too, the MIB Agreement breaches the victim's right to have fair compensation for that particular accident. The issue of blame here is not to be levelled at the MIB alone, but the EU too. Article 10 of the MVID<sup>44</sup> requires victims of road traffic accidents to be compensated 'at least up to the limits of the insurance obligation,' which means that victims must not be paid less than a similar claim made against an insured driver within the Member State. Nevertheless, the MVID does not specify the source of compensation but seeks to ensure equivalence. For instance, in *Evans v Secretary of State for the Environment*,<sup>45</sup> the claimant was unable to recover his entitlement from the MIB. The claimant then pursued his claim through a different route, arguing state liability<sup>46</sup> against the UK. He claimed that the UtDA 2003 did not comply with the MVID. His challenge was based on a) the legal status of the MIB; b) the lack of provision for the award of costs and interest; and c) that arbitration under the 2003 Agreement failed to comply with the European

Convention on Human Rights (to have a fair and open hearing). The CJEU held that where there is an obligation for compensation, it is essential to consider interest alongside. The Court also accepted that the procedural rules of the arbitration system were not fair and contradict EU requirements. However, the Court dismissed the case based on the MIB's voluntary nature (it enters into a contract-like relationship with the State) and the case was referred back to the English High Court to decide if the conditions required under *Joined Cases C-6/90 and C-9/90 Francovich and Bonifaci and others v Italy*<sup>47</sup> were met in this case. This situation continues under the UtDA 2017. However, since the 2017 Agreement, and as noted above, interest payments have been added.

To conclude, even if a claimant was fully compensated by the MIB, the claimant would still receive a lesser payment than had his claim been made directly against the driver's insurer. This point was even acknowledged in *Cameron v Hussain*<sup>48</sup> where it was stated that 'the claimant might well regard a claim *under the UtDA as an inferior remedy* to a court action for damages and under Section 151 [of the RTA88]<sup>49</sup> (authors' emphasis). Furthermore, protecting third-party victims of road traffic accidents is a legal requirement. For example, if a person used or permitted others to use his vehicle on a road or other public place with no legal cover obtained according to Part VI of the RTA88,<sup>50</sup> he, in such an instance, commits a criminal offence<sup>51</sup> (see *Monk v Warbey*).<sup>52</sup> The aim of such legislation is to ensure that third-party victims will not be left uncompensated and thus when the MIB is permitted to fail to meet its obligations in this respect, it undermines not only the MVID but also the RTA88.

### **3.4.2. JOINT (BUT SEEMINGLY NOT SEVERAL) LIABILITY**

The MIB, under cl 23 of the Agreement, may refuse to meet its liability in full where death, injury or damage to property was caused by more than one person and one or more of them was identified. The MIB may proceed on the basis that as the drivers shared responsibility for the death or personal injury, they too shall share liability. The MIB in such cases reduces its liability to the ones who were unidentified and leaves the remaining responsibility to be met by the ones identified. Although such deductions might be permitted under the MVID as the MIB could argue that it is an insurer of last resort and only liable for untraced and uninsured drivers, it is, however, not clear under this Agreement how such claims would be settled in favour of the victims (to provide them the right compensation). Furthermore, the MIB's liability in such cases would be based on what proportion of loss that can be attributed to the unidentified person/s concerned, which may undermine the right of the victim to fair compensation according to the MVID as its (the MIB) award would be based on probabilities (disproportionately). Finally, what if the other liable person/s cannot meet their liability toward the victim? Victims' rights in such incidents would be definitely undermined under this Agreement which opposes the protective purpose of the MVID.

### **3.4.3. DEROGATED VEHICLES**

Article 3 of the Sixth MVID is perhaps the most important part in regard to the obligation imposed on Member States to ensure third-party victims of road traffic accidents are protected. Under this Article, Member States must ensure that civil liability, in regard of the use of a vehicle on their territory, is covered by a minimum of third-party cover to ensure victims suffering loss or injury in the use of vehicles have their fair compensation met. The MVID however, permits some exclusions under Article 5 under what is called 'derogation.' Here a Member State may derogate from the requirements for a vehicle to be subject to compulsory insurance (for example police vehicles and the NHS's vehicles in the UK).

Nonetheless, the derogation does not mean that this kind of vehicle does not need to be covered by insurance against third-party civil liability, rather it left it to local authorities or the Crown to satisfy claims based on its needs. In other words, claims arising out of the use of derogated vehicles will be met by the authority and not necessarily an insurer. Article 3 provides that insurers are liable and shall compensate third-party victims of road traffic accidents for any personal injuries arising out of the use of a vehicle, regardless of the degree of relation between passengers and the policyholder. However, this does not cover the owner of the vehicle when they are a passenger in their own vehicle.

The UtDA does not differentiate between accidents occurring by such vehicles while owned and possessed by the Authority/Crown and where, for instance, they have been unlawfully used by an unidentified person. Victims of accidents where these vehicles have been unlawfully taken are likely to be left without compensation as the MIB is able to deny responsibility in these circumstances.

#### **3.4.4. DAMAGE TO PROPERTY**

The 2017 Agreement stipulates that an award for property damage is conditional on a claimant suffering personal injury from the same accident. The injury must however be ‘*significant*’ and an award has been satisfied by the MIB in order for it to process the claim for property damage. Furthermore, the MIB does not process property damage claims unless the claims exceed £400. Such requirements might be considered to reflect less than good faith but the MIB would likely argue for the need to take these measures to prevent fraud as, in its absence, the result may be an uncontrollable number of claims being submitted. This, nevertheless, should not operate at the expense of innocent victims of untraced drivers but should be balanced (as ultimately it is the duty of the MIB to have the right measures to control for such issues, not the victims). Therefore, the MIB should not be in a position to exploit such incidents to undermine third-party victims’ rights of untraced drivers and thereby the MVID.

#### **3.4.5. PASSENGER CLAIMS AND BURDEN OF PROOF**

Under cl 8(1) of the UtDA 2017, the MIB has the right to deny any liability in respect of death, bodily injury or property damage arising out of the use of a vehicle where a claimant voluntarily let himself be a passenger in a vehicle he ‘*knew or ought to have known*’; a) was stolen or unlawfully taken, or b) uninsured according to the national requirement.<sup>53</sup> However, the use in the course or furtherance of a crime or to escape from lawful apprehension, which is applicable to any case falling into the scope of the 2003 Agreement, is removed from this Agreement. To some extent, there is no objection to the exclusion permitted under this Agreement as it is permitted by the MVID. However, the issue is that the 2017 Agreement applies constructive knowledge rather than actual knowledge – in a similar way to that provision in the UDAs 1999 and 2015. A passenger who voluntarily let himself in the vehicle which caused the personal injury or property damage, is excluded under the UtDA 2003 if he unreasonably failed to leave the vehicle when possible. Further issues include use of the term ‘*unlawfully taken,*’ which widens the number of claims that fall beyond the scope of the MIB’s liability as well as the restriction applied to only those vehicles insured under the RTA88 which excludes even more vehicles (and thereby claims available for victims). Furthermore, the limitation to the MIB’s liability relating to a ‘*vehicle used without a contract of insurance in relation to its use*’ may imply a knowledge in certain situations but it would be questionable how someone knew or ought to have known that the vehicle being

used was being so used in relation of its use according to the policy. However, that contradicts the clear statement of Article 10 of the MVID<sup>54</sup> as to permit exclusions only in the case of an ‘*uninsured*’ vehicle where the passenger ‘*knew*’ (and this can be proved) of this status. The Agreement widens this to include ‘*in relation to*’ its use.

Back to the removal of the exclusion clause ‘*in furtherance of a crime*’ the MIB successfully, in *McCracken v Smith and Ors*<sup>55</sup> for instance, argued that they were not liable for any damage suffered by the victim due to his criminal conduct (the victim was a passenger of a stolen vehicle). Despite the removal of the exclusion clause in UtDA 2017, it remains valid for the purposes of UtDA 2003 and can be used against the interests of third-party victims for incidents occurring prior to 2015 (see for instance, *Smith v Stratton & Anor*),<sup>56</sup> which reflects the unwillingness of the courts to take EU law into account when interpreting national law.

Under cl 8(3) of the 2017 Agreement, the burden of proof is to be satisfied by the MIB that the claimant had the knowledge required under this Agreement in order to permit the exclusion. However, that was the case under the UtDA 2003 too. In this respect, the MIB may prove that the claimant knew or had reason to believe that the vehicle concerned is uninsured, stolen or unlawfully taken by proving that 1) the claimant is the owner or the registered keeper of the vehicle concerned (or permitted its use), 2) the vehicle is being used by a person who is below the minimum age to have a licence and therefore is unable to be covered by a policy and 3) that he is disqualified from driving. If the MIB can prove that the claimant knew or had reasons to believe in any of such matters then it would be deemed to have discharged its duty in respect of knowledge. The knowledge requirements under this Agreement seem to be sufficiently wide to make it easy for the MIB to shift the burden of proof to the victim, which can be deemed to breach the clear and simple requirement applied under the MVID (see *Phillips v Rafiq*).<sup>57</sup>

Therefore, the term ‘*knew or had reason to believe*’ is vague and can be misused by the MIB to claim that knowledge is proved by, for instance, proving negligence whereas the MVID’s term used is ‘*knew*,’ which requires actual knowledge. Such conflict between the two terms is very clear that the Agreement term is unlawful and needs to be restrictively interpreted to be compliant with the MVID, if not to be removed and replaced entirely by that used in the Directive.

#### **3.4.6. OBLIGATIONS IMPOSED ON APPLICANTS**

Under this Agreement, the MIB necessitates a claimant comply with its requirements and submit a claim using its specific form. This system may be viewed as being constructed with the primary aim of deterring as many claims as possible. For example, at cl 24, the MIB requires all documents and claims to be issued to it via fax or recorded delivery.<sup>58</sup> Whilst it reserves the right for such delivery to be communicated in another way, this is at the discretion of the MIB and/or the applicant has to prove, conclusively, that the MIB had received the documents sent. This, it should be remembered, was included in an Agreement established in 2017 and, with the range of electronic communications systems available to individuals, businesses, legal professionals and professional bodies, to insist on the use of such dated mechanisms of communication seems not only surprising but deceptively complex and unnecessary.<sup>59</sup> Furthermore, the claimant shall send the forms and documents within a reasonable time once required by the MIB. Failing to comply with this requirement means that the MIB can reject the claim. However, although the previous obligation, that of reporting to the police the accident involving the unidentified driver, has been removed under

this Agreement, it was applicable under the 2003 Agreement and it is still to be met if the MIB requires the claimant to do so for claims still applicable under that Agreement. Under cl 10(5), the MIB requires a claimant to support his claim with satisfactory evidence and notification of costs, if applicable. Where a claim includes compensation for property damage, the claimant shall make the property available for inspection if required by the MIB. If the claimant fails to prove that there is such loss caused by a vehicle, supported by evidence of the cost to repair the damage caused by the vehicle concerned, he would be considered to have failed to comply with the Agreement's requirements, which would result in the rejection of his claim. The clause is, however, merely a copy-paste of the previous Agreement, which reflects nothing but the MIB's bad-faith in failing to develop this area of law.

The 2017 Agreement, under cl 23, imposes obligations on the claimant that he must take all necessary steps in order to secure a judgment against an identified person/s who may be liable (partially to entirely) for death or property damage arising out of the use of a vehicle. The new clause imposes the same obligation required under the previous Agreement. Furthermore, a claimant, under cl 10(7), must acquire, where he succeeded, transcripts of the judgment and assign it to the MIB where required. However, by virtue of cl 11(6) a claimant cannot take an action against the driver at fault by himself without reference to the MIB. He is required to notify the MIB as soon as reasonably possible, as necessary in the Agreement.

Finally, under cl 11 the MIB will only make an award in cases of death, bodily injury or damage to property arising out of the use of a vehicle if such an award would be issued had the person been identified. The award under this clause is based on the MIB's assessment to whether or not the claim can be made. The issue that may face a claimant is that his claim would be decided based on probability and entirely at the discretion of the MIB, which may undermine the victims' right to obtain fair compensation for his loss or bodily injury.

### ***3.4.7. PAYMENT AND VULNERABLE VICTIMS***

Under cl 13(1) of the UtDA 2017, and a remnant of the 2003 Agreement, the MIB is required to make payment within 14 days of the judgment once a claimant has accepted the MIB's award. However, in the case of absence of any notice in respect of acceptance (no reply received by the MIB or a notice of appeal), the MIB shall wait until the time specified for the appeal to lapse, then it (the MIB) shall release the payment within the following 14 days. In doing so, the MIB would be considered to meet its obligations towards the claimant under this Agreement. However, unlike the UtDA 2003 where the MIB deals with claims involving an applicant who lacks mental capacity<sup>60</sup> or is a minor<sup>61</sup> without giving them the protection of legal advice, the 2017 Agreement does provide some sort of protection to such victims when it takes into account the victims' ages or capacity to accept an offer made by the MIB. The 2017 Agreement offers protection to vulnerable victims through an arbitrator chosen by the Secretary of State to approve any award made to them by the MIB. Under this Agreement, the chosen arbitrator may request an oral hearing in order to approve an award made for incapable victims. However, the arbitrator has no power to decide on such disputes but only to approve what has been already decided by the MIB. If approval is refused by the appointed arbitrator then the MIB, under cl 14(12)(b), can request the appointment of a second arbitrator to submit to him its first proposal of the award (not to offer another one), which may make procedural approval questionable as to either be in favour of the MIB or to seek, under this clause, another arbitrator to approve what has been refused by the first. Furthermore, such a right to request another arbitrator to be appointed is not a luxury

afforded victims if, for instance, a victim was not satisfied with the MIB's award. However, such victims are often, naturally, unable to assess whether or not their entitlement is fair.

#### **4. A THERAPEUTIC WAY FORWARDS?**

Given the knock-out (exclusion) clauses, unnecessary procedural impositions, and unreasonably restrictive interpretative and decision-making elements contained in the UtDA 2017, in relation to both the MVID and the CPR, it can be seen how third-party victims would be in a poorer position when claiming through the UtDA than directly against the tortfeasor. This does not simply result in applicants receiving a slightly lesser sum in damages than they might have received in court (akin to a settlement agreement). Rather, victims whose injuries and damage may have significant negative effects on their financial position<sup>62</sup> and their physical health, may be excluded from their rightful compensation or the system involved may be so fraughtful and detrimental to their mental health<sup>63</sup> (and unnecessarily so) that it requires urgent action to remedy these defects.

Changes to the Agreements between the MIB and Secretary of State, especially in respect of the UK's withdrawal from the EU which will inevitably lead to substantial changes to those Agreements and the RTA88, have been considered recently. For instance, Channon<sup>64</sup> has explored whether there may be merit in the Agreements being established on a statutory footing. This would enable a higher level of scrutiny and regulation of the agreement between the parties than currently applies, especially necessary following the UK's withdrawal from the EU. We might suggest another, more therapeutically explicit method than this approach. Channon's suggestions as proposed are eminently sensible, pragmatic and realistic. For us, however, given that the proposals are established in light of the UK's withdrawal from the EU and the existing mechanisms to hold the MIB to account for the deficiencies in the transposition of the MVID will thereby be lost, imposing the necessity for a statutory measure capable of public scrutiny is unlikely to succeed. Agreements between the MIB and the Secretary of State in its various guises have been in place since the 1940s, and these have worked as intended between the parties with no concerns being raised by either side in terms of their content or their application. It seems unrealistic and unnecessary, at least from those parties' perspective, for a new form of legal regulation to be established - along with the potential problems of enforcement via third-parties this would bring. It is also evident that from the case law and submissions by the MIB and the Secretary of State, the main problem they experienced with the Agreements were those raised in the context of the EU or by affected third-parties who wished to extend the Agreements to better reflect the requirements for third-party protection provided by the Directives or CPR. Once the MVID have no further application in the UK, and given the powers to be granted to Ministers through the European Union (Withdrawal Agreement) Act 2020,<sup>65</sup> the regulation of compensation available to third-party victims of uninsured drivers and untraced vehicles will revert merely to the Agreement between the aforementioned parties and its compatibility with, at most, the CPR. Thus, it would seem odd that, whilst the intention of Channon is quite correct and would be beneficial to those victims, there would be little to be gained by the MIB or the Secretary of State who, as has been demonstrated in this paper, have had ample opportunity to remedy the deficiencies in the existing Agreements and steadfastly chose not to. This is a shame, yet it appears that with Brexit the protections fought so hard for through national courts in seminal cases such as *Byrne*,<sup>66</sup> *Delaney*,<sup>67</sup> *Factortame*,<sup>68</sup> *Foster*,<sup>69</sup> *Lewis*<sup>70</sup> and *Roadpeace*,<sup>71</sup> will be lost.

However, so as not to conclude a discussion on the future of motor vehicle insurance law on a depressingly negative note, there is a potential way forwards which not only maintains the status quo of the nature of the current structures used to conclude the Agreements between the parties but also provides a mechanism for ensuring a positive role for the MIB in securing rights for third-party victims. This approach, as advocated by Wright,<sup>72</sup> adopts a therapeutic jurisprudence approach through conscious contracts.

#### **4.1. WHAT DOES CONSCIOUS CONTRACTING ENTAIL?**

Conscious contracts envisage a shifting of the mindset engrained in traditional contracting and commercial, arms-length relationships. The traditional system sees conflict resolution being a matter for lawyers, the courts and, certainly in the UK and US, an adversarial endeavour with a winner and loser. Contracts underpinning these relationships are complex, dense, designed to protect the interests of the parties, to enable them to defend their positions and to be interpreted, where needed, by the judiciary. Rather than being established on the basis of trust, they are established with rules to govern behaviour and for the contracting parties to have included various exclusion and limitation clauses to better their interests in the event of conflict. The mindset is one of protecting their own interests, often at the expense of the other side, and of getting away with the ‘best deal.’

Law students are, too, taught primarily to understand these principles and to work to replicating them in their professional career. Therefore, trying to get lawyers and parties to move to a new paradigm of contracting is difficult, but without the first steps being taken the journey will never begin. Conscious contracting seeks to understand what the parties want from the relationship in a mutually beneficial way. The parties will each have an agenda as to their ultimate goal and the parties, through openness and honest communication can help each other to realise these. Thus, conflicts will be resolved through bespoke and positive means, customised for each contract and to enable a positive resolution. The contracts will use plain language, designed for the users of the contract (as for the third-party applicants for example) to ensure clarity in what are the expectations and the consequences in the event of non-compliance. The parties contract as partners, with a view to an on-going and sustainable relationship (rather than the present system which is terminable with simply one-years’ notice) with only the required legal content included so as to result in a lean, focused document (removing many of the technical knock-out clauses as currently exist). Trust is core to the relationship and rather than rules governing behaviour, values and a transparency to terms and conditions underline the relational and collaborative mindset.

For the MIB, there is an underlying rationale why the UtDA was drafted in a way to give the minimum protection to applicants, incorporating as they did knock-out and exclusion clauses, and seemingly draconian administrative provisions designed, it appeared, to make the submission of claims as difficult as possible or, at the least, giving the MIB an option to consider an application inadmissible for transgression of such rules. It is a private company, it represents an industry whose products are essential for anyone using a motor vehicle on public or private land, and it has to use funds sourced from the sales of these products to satisfy a guarantee fund where no tortfeasor may be sought to recover any payment made to a successful applicant. The EU requirements imposed on the UK, and which should have been transposed in these contracts under the remit of the other contracting party (the Secretary of State), were seen as an unfortunate barrier to it obtaining the best deal for itself. It is well known in the sector that the MIB drafted the UtDA (and its previous iterations) and the Secretary of State often simply accepted these rather than attempting to negotiate for the best

deal for the UK (possibly because the MIB did not consider itself as legally obliged to do more than the bare minimum in terms of protecting third-party victims and indeed, until 2019, had considered it no more than a contracting party and not an ‘emanation of the state’ for the purposes of EU law).<sup>73</sup> Consequently, the MIB’s contract would intend for it to win the best deal against the other parties (the Secretary of State and the applicants seeking compensation through the scheme).

It might seem fanciful to expect the MIB and Secretary of State, unencumbered by the irritation of EU regulation, to suddenly begin to contract in a manner that has escaped them for so many years and would have stopped the numerous claims which found the UK to be in breach of its national and EU obligations. However, an interruption to these old habits and moving away from the conventional mindset is possible without sacrificing power or the safety that is typically found in standard commercial contracts. Just in the same way as climate change is requiring businesses to be mindful of their negative environmental impact, and modern slavery and sustainability<sup>74</sup> are words and phrases that are entering the lexicon of consumers, individuals are expecting more of those businesses with which they contract and trade. Compulsory motor vehicle insurance is a legal requirement and there are only 24 firms<sup>75</sup> (establishing various subsidiary companies<sup>76</sup> admittedly) with which an owner/driver may secure such a policy of insurance. Yet the movement towards CAVs, a movement likely to be exacerbated by the effects and implications on the environment from the physical movement restrictions following the COVID-19 outbreak,<sup>77</sup> mean that the MIB and indeed the motor vehicle insurance industry could soon be at a crossroads – facing possible eradication and being replaced by a system of product liability. Therefore, and to remain viable and relevant in the sector, establishing a positive and protective resource which seeks to help and add value to road users and victims of negligent acts by the users of vehicles could prove to be instrumental in its continued feature in national motor vehicle insurance law and regulation.

#### **4.2. COULD CONSCIOUS CONTRACTING RECTIFY THE DEFECTS IN THE UtDA POST-2021?**

Instilling conscious contracting into new Agreements between the MIB and Secretary of State could be achieved using J. Kim Wright’s ‘Addressing Change and Engaging Disagreement’ model.<sup>78</sup> It is important to begin, having acknowledged the problems included in the UtDA – both in respect of the EU obligations and procedural rules in relation to the CPR – that we must move forwards by considering both the MIB and the Secretary of State are contracting in good faith. The MIB maintains that it operates in compliance with its EU obligations<sup>79</sup> and seems to have accepted, perhaps begrudgingly at first instance, the judicial decisions regarding its status and the correctness of the decisions of the CJEU. It is also worth remembering the origins of the MIB and the first MVID were based on the original agreement between the MIB and the (what is now) Secretary of State for Transport to rectify loopholes in the statutory provisions for vulnerable person protection. On this basis, a new Agreement should be a living document, ready to be changed and to be amended based on new circumstances and the needs of those people the Agreement seeks to protect – namely third-party victims of untraced drivers / vehicles. The UK’s future relationship with the EU or indeed other trading blocks will not be settled for many years and express recognition of this and provision for future trading block agreements to be incorporated quickly (or slowly), as necessary, would provide a significant advantage.

The underlying system of dispute resolution should be changed. The Agreement should not be based on a system of compulsory arbitration and appeals to the court as, has been shown, this creates a system fraught with problems and is the cause of much stress and inconvenience for individuals who are, by their nature, the victims of some form of physical injury and/or loss and are seeking to recover compensation to limit the negative effects of their situations. By mediating between the third-party claimant and the MIB, by instilling transparent policies which explain to the claimant how losses will be quantified, by enabling each claimant to legal advice, not simply limiting this to children or those identified as vulnerable under the Mental Capacity Act 2005 as is currently the case, and by following, as a minimum the same rules and processes as provided in the CPR, not only will the law be changed for the positive, but also a trained mediator can ensure that law is applied therapeutically (following Wexler's bottle and wine metaphor).<sup>80</sup> The adoption of the use of a neutral facilitator will prevent the perceived problems with impartiality, the mediator does not represent the interests of either party, nor do they give legal advice. Where mediation fails, a system of collaborative law where two specially trained lawyers, engaged to provide legal advice but also using problem-solving skills and facilitative techniques, could help the applicant and the MIB reach an amicable agreement. This system provides the legal expertise possibly needed for the resolution of some aspects of the Agreement, but also avoids the expense and time-consuming matter of the parties going to court to (finally) resolve the issues of concern.

The Agreement, whilst between the MIB and the Secretary of State, is ultimately for the protection of third-party victims. Therefore, by establishing the contract using plain English, it makes the provisions, requirements and remedies awarded easier for applicants to understand, it removes possible misunderstandings by applicants, and it enables the parties and lawyers to proceed with certainty, removing perceived unfairness and doubt. An express commitment to operating in good faith and to do so according to mutually agreed values and vision can instil a compassion to the relationship which has been hitherto absent (despite what is currently expressed on the MIB's website relating to its values).<sup>81</sup> Whilst the Agreement is bound by national laws and must align with legal norms, a commitment to litigation as a last resort, reserved for the most extreme cases, and subject to mediation and/or collaborative law as the primary sources of dispute resolution would send a message to all involved in the application process of the sincerity of the parties and their intentions to be a genuine insurer of last resort. The safety net that offers the care and protection needed by the most vulnerable.

## **5. CONCLUSION**

Under the UtDA 2017 claimants are confronted by many misleading and confusing notice requirements and unlawful exclusions. This has been exacerbated by the duality of national and EU regulatory requirements. It is difficult to reconcile how the UK has maintained its position of allowing the application of this extra-statutory provision when considered in light of both the MVID and the growing and extensive jurisprudence of the CJEU. It is particularly concerning that both the UDA and the UtDA are drafted by the MIB and then agreed to, without revision, by the Secretary of State. This state of affairs is likely to continue given the recent general election (December 2019) and the Conservative government which has presided over the MVID for the past 10 years. It is unlikely to be remedied through legislative or administrative action, and the courts appear sometimes to be willing to provide an EU-consistent interpretation of national provisions and at other times refuse to be swayed at any other conclusion than, holistically, national law satisfies the requirements of the

MVID.<sup>82</sup> What is required is an entirely new Agreement, underpinned by a TJ philosophy, which adopts the care and understanding of judges such as Jay J,<sup>83</sup> and seeks to engage the MIB and Secretary of State as partners who are working together for the betterment of those caught up in the aftermath of a road traffic accident against a tortfeasor who is uninsured or who is unidentified. In the looming realisation of the Brexit project, now is the most opportune time for a recalibration of the aims and values of the MIB, and for it to become the compensatory body that was envisioned in 1946.

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<sup>1</sup> Perlin, M. L. 2019. 'You That Build the Death Planes': Bob Dylan, War and International Affairs. Available at SSRN: <https://ssrn.com/abstract=3379255> or <http://dx.doi.org/10.2139/ssrn.3379255>

<sup>2</sup> Shuman, D. W. (1993) 'Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care' 46 *SMU L. Rev.* 409, <https://scholar.smu.edu/smulr/vol46/iss2/5>.

<sup>3</sup> Halder, D., and Shetty, A. (2018) 'Regulating Road Traffic Violation by Youth in India: A Therapeutic Jurisprudential Approach' Available at SSRN: <https://ssrn.com/abstract=3230604> or <http://dx.doi.org/10.2139/ssrn.3230604>

<sup>4</sup> (The First Directive) Council Directive 72/166/EEC [1972] OJ L103/1; (The) Second Council Directive 84/5/EEC [1984] OJ LL8/17; (The) Third Council Directive 90/232/EEC [1990] OJ L129/33; Directive 2000/26/EC (The Fourth Motor Insurance Directive) [2000] OJ L181/65; (The Fifth Directive) Directive 2005/14/EC [2005] OJ L149/14; and (The Sixth Directive) Directive 2009/103/EC [2009] OJ L263/11.

<sup>5</sup> For instance, in the event of so-called 'hit and run' accidents.

<sup>6</sup> For example, see Nicholas Bevan writing for the *New Law Journal* which includes: Motor Insurance Law Change. 2016. 166 *NLJ* 7703, 5; Putting Wrongs to Rights (Pt 2). 2016. 166 *NLJ* 7701, 13; Putting Wrongs to Rights (Pt 1). 2016. 166 *NLJ* 7700, 17; Redress Road. 2016. 166 *NLJ* 7700, 5; Still Driving Dangerously. 2016. 166 *NLJ* 7693, 18; A Call for (More) Reform. 2015. 165 *NLJ* 7661, 9; No Through Road. 2015. 165 *NLJ* 7648, 7; Delaney Sets a New Insurance Route. 2015. 165 *NLJ* 7644, 4; High Impact. 2014. 164 *NLJ* 7628, 5; Ignore at Your Peril. 2014. 164 *NLJ* 7628, 7; Bad Law. 2014. 164 *NLJ* 7624, 7; UK in Breach Over Uninsured Drivers. 2014. 164 *NLJ* 7610, 4; Untraced Drivers' Scheme is Car Crash. 2014. 164 *NLJ* 7598, 4; On the Right Road (Pt IV). 2013. 163 *NLJ* 193; On the Right Road? (Pt III). 2013. 163 *NLJ* 160; On the Right Road? (Pt II). 2013. 163 *NLJ* 130; On the Right Road? 2013. 163 *NLJ* 94; and Asleep at the Wheel? 2013. 163 *NLJ* 7556, 10. James Marson and Katy Ferris have published the following: Too Little, Too Late? Brexit Day, Transitional Periods and the Implications of *MIB v Lewis*. 2020. *European Law Review*. (In press); The Compatibility of English Law with the Motor Vehicle Insurance Directives: The Courts Giveth... But will Brexit Taketh Away. 2020. 136 *Law Quarterly Review*. 35; For the Want of Certainty: Vnuk, Juliana and Andrade and the Obligation to Insure. 2019. 82(6) *Modern Law Review*. 1132; Brexit means Brexit: What does it mean for the Protection of Third Party Victims and the Road Traffic Act? 2018. 39(2) *Statute Law Review*. 211; Motor Vehicle Insurance Law: Ignoring the Lessons from King Rex. 2017. 38(5) *Business Law Review*. 178; Misunderstanding and Misapplication of Motor Insurance Law. Will the Supreme Court come to the Rescue? 2017. 23 *European Journal of Current Legal Issues*. (2); The Uninsured Drivers' Agreement 2015 as a Legitimate Source of Authority. 2017. 38(2) *Statute Law Review*. 133; Delaney and the Motor Vehicle Insurance Directives: Lessons for the Teaching of EU law. 2017. 50 *Law Teacher*. 1; Which is the Applicable Law in Recovery of Losses from an Uninsured Driver? *Moreno v The Motor Insurers' Bureau* [2016] UKSC 52. 2016. 22 *European Journal of Current Legal Issues*, (3); and, with Alex Nicholson, Irreconcilable Differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives. 2017. 1 *Journal of Business Law*. 51.

<sup>7</sup> In *Evans v Secretary of State for the Environment, Transport and the Regions* [2004] RTR 32 the CJEU confirmed the requirement that national rules should not be less favourable than the ones (procedural rules) governing similar matters under EU law. The duty to check whether or not the procedural rules apply the EU principle of equivalence is on national courts, not the MIB or the Secretary of State. Further, terms, conditions and exclusion clauses agreed upon by contracting parties and any permitted exclusions under the MIB's Agreements must be restrictively formulated and interpreted in a way that does not contradict the purpose of the MVID, but gives effect to it. To ensure the effectiveness of the Directive, national procedural rules and provisions must not contradict the purpose of the MVID or make it more difficult to obtain the protection stated under the Directive.

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<sup>8</sup> For example, *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172 and see commentary in the national press on the case and the influence of EU law on the legal issues raised: <https://www.dailymail.co.uk/news/article-2647603/Drug-dealer-injured-crash-millions-compensation-Government-huge-block-cannabis-fell-jacket-pulled-wreckage.html> [all websites accessed on 29 April 2020 unless otherwise stated].

<sup>9</sup> However, the consequence of the COVID-19 outbreak shelved the UK and EU's negotiations for the UK's withdrawal from the EU following the transitional period up to 31 December 2020.

<sup>10</sup> Channon, M. 2020. The Nature of the Motor Insurers' Bureau and its Agreements: Time for a Radical New Approach? *European Journal of Comparative Law and Governance*. (In press).

<sup>11</sup> *Regina (RoadPeace Ltd) v Secretary of State for Transport* [2018] 1 WLR 1293.

<sup>12</sup> *R&S Pilling t/a Phoenix Engineering v UK Insurance Ltd* [2019] UKSC 16.

<sup>13</sup> It was in the Second MVID (The Second Council Directive 84/5/EEC [1984] OJ LL8/17) that the requirement for Member States to establish a national guarantee body (the MIB in the UK) was established.

<sup>14</sup> SAE International is the organisation formerly known as the Society of Automotive Engineers. It established a system which denoted the stages of driver assistance features on a vehicle. At level 0, human interaction is necessary for all driving functions (but might include assistance features such as blind spot warnings) and at level 5, no driver interaction in the driving of the vehicle is required (indeed, in some instances vehicles will not feature foot pedals or a steering wheel). The Society of Motor Manufacturers and Traders contend that level 5 cars are unlikely to be introduced in the UK before 2035 due to the requirements of the current technology to evolve so fully driverless vehicles can be used on roads alongside human drivers (and hence are capable of tackling all possible unusual driving situations and environments).

<sup>15</sup> <http://consciouscontracts.com>.

<sup>16</sup> See also Alvarez, L. G. 'Discovering Agreement: Contracts That Turn Conflict into Creativity' 2e, (Candescence Media, 2017).

<sup>17</sup> For instance see Costello, J. C. 2002. Why Have Hearings for Kids If You're Not Going to Listen?: A Therapeutic Jurisprudence Approach to Mental Disability Proceedings for Minors. 71. *University of Cincinnati Law Review*. Available at SSRN: <https://ssrn.com/abstract=390783> or <http://dx.doi.org/10.2139/ssrn.390783>.

<sup>18</sup> Goldstein, E. J. 1996. Asking the Impossible: The Negligence Liability of the Mentally Ill, 12 *Journal of Contemporary Health Law and Policy*. Available at: <https://scholarship.law.edu/jchlp/vol12/iss1/7>.

<sup>19</sup> Bloom, A. and Miller, P. S. 2011. Blindsight: How We See Disabilities in Tort Litigation. *Washington Law Review*. Available at SSRN: <https://ssrn.com/abstract=1971406>.

<sup>20</sup> For commentary see Cohen, N. 2018. In Britain Now, the Richer You Are, the Better Your Chance of Justice. *The Guardian*. Available at <https://www.theguardian.com/commentisfree/2018/apr/21/in-britain-the-richer-you-are-the-better-your-chance-of-justice>.

<sup>21</sup> For an example of the plethora of problems affecting victims of untraced drivers see the documented evidence in Bernstein, A. J. 2020. To the Driver Who Hit Me and Ran. *Outside*. Available at <https://www.outsideonline.com/2411290/cyclist-hit-by-car>.

<sup>22</sup> See Marson, J., Ferris, K., and Nicholson, A. 2017. Irreconcilable Differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives. 1 *Journal of Business Law*. 51.

<sup>23</sup> Largely led by the (extensive) work of Nick Bevan. <http://nicholasbevan.blogspot.com>.

<sup>24</sup> *Regina (RoadPeace Ltd) v Secretary of State for Transport* [2018] 1 WLR 1293.

<sup>25</sup> The Road Traffic Act 1988 Part VI.

<sup>26</sup> Starting with Case C-162/13 *Vnuk v Zavarovalnica Triglav dd*, EU:C:2014:2146; [2014] 9 WLUK 139, being confirmed in Case C-514/16 *Andrade v Salvador & ors*, EU:C:2017:908; [2018] 4 WLR 75, Case C-334/92 *Teodoro Wagner Miret v Fondo de Garantía Salarial* (1993) EU:C:1993:945; [1993] ECR I-6911 and Case C-80/17 *Fundo de Garantia Automovel v Juliana*, EU:C:2018:661; [2018] 1 WLR 5798. For commentary see Marson, J., and Ferris, K. 2019. For the Want of Certainty: Vnuk, Juliana and Andrade and the Obligation to Insure. 82(6) *Modern Law Review*. 1132; and Marson, J., and Ferris, K. 2020. The Compatibility of English Law with the Motor Vehicle Insurance Directives: The Courts Giveth... But Will Brexit Taketh Away? 136 *The Law Quarterly Review*. 35.

<sup>27</sup> *Damijan Vnuk v Zavarovalnica Triglav* (C-162/13) ECLI:EU:C:2014:2146; [2016] RTR 10.

<sup>28</sup> *ibid.*

<sup>29</sup> *Lewis v Tindale, Motor Insurers' Bureau and Secretary of State for Transport* [2018] EWHC 2376 (QB).

<sup>30</sup> An example of the general lack of protection for vulnerable claimants occurred under the UtDA 2003 in *Byrne v Motor Insurers' Bureau and another* [2009] QB 66. Here a child was injured by an unidentified driver and therefore the case was dealt by the MIB. The three-year-old claimant was denied his right of compensation by the MIB due to the (harsh) application of a time restriction for the submission of his application. It necessitated litigation to rule that the three-year time restriction as applicable in the UtDA 2003 breached the MVID and consequently the claimant could recover a damages payment.

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<sup>31</sup> *Carswell v Secretary of State for Transport* [2010] EWHC 3230 (QB).

<sup>32</sup> ‘... the MIB is not independent. As it comprises all motor insurers (who are companies run for profit), it is commercially interested in the outcome of any claim; and it is both investigator and the body liable to pay any award’ [27].

<sup>33</sup> Points albeit rejected by the Court given the nature of the claims against untraced drivers. They cannot be subject to comparable adversarial procedures [71] and the nature of the MIB as a body used by the UK Government to satisfy the requirements of the MVID was not determinative of its independence (or lack thereof) or abilities to carry out its functions correctly [72].

<sup>34</sup> The Untraced Drivers Agreement 2017, cl 11 provides ‘Subject to clauses 3 to 10, the MIB shall, by adopting the same method as a court in England, Wales or Scotland (as appropriate) would adopt, be obliged to make an award or interim payment only if it is satisfied, on the balance of probabilities, that the death, bodily injury or damage to property was caused in circumstances such that the unidentified person would (had he been identified) have been liable to pay damages to the claimant.’

<sup>35</sup> Clause 16(1).

<sup>36</sup> Clause 18.

<sup>37</sup> Many of these issues have been assessed and rejected in *Application for Permission Kennedy* [2001] EWHC Admin 851. The selection of the arbitrator (being the MIB’s chosen expert), the potential impartiality of the arbitrator, and the potential for breach of the claimant’s human rights (Article 6(1) European Convention on Human Rights) were all rejected as legitimate arguments against the system under the UtDA.

<sup>38</sup> *Harvey v MIB* [2011] 12 WLUK 752.

<sup>39</sup> Permissible under cl 11(2).

<sup>40</sup> Clause 19(12)(c & d).

<sup>41</sup> *Moore v Secretary of State for Transport, MIB* [2007] EWHC 879.

<sup>42</sup> Untraced Drivers Agreement 2017 cl 6(1) and (3).

<sup>43</sup> Untraced Drivers Agreement 2017 cl 10(7).

<sup>44</sup> EU Member States are, under Article 10 of the Consolidated Directive, required to set up a body with a fund that shall be always available for unsatisfied judgments. Its primary task, in other words, is to ensure that victims of uninsured or untraced drivers are compensated to the minimum (required) level of compensation that they might secure had the driver causing the accident been insured and the claim brought against his insurer. However, the chosen body has its liability limited to only those vehicles which fall under Article 3 of this Directive, which means that the body required under Article 10 is not responsible for claims caused by derogated vehicles. Nonetheless, this exception is not to be misinterpreted by Member States to avoid liability towards victims of such vehicles, but the States are required to provide another mechanism of compensation such as local authority insurers, securities or another compensation scheme. Initially, the compensatory body required under Article 10 is responsible for claims where there is no insurance in the first place (uninsured drivers), untraced drivers or where an insurer succeeds in avoiding its liability under the exclusion permitted by the Consolidated Directive. The compensatory body in such cases must provide compensation to victims at least up to the level paid by insurers had the vehicle causing the accident been insured according to the law. However, in either case, Member States must apply the principle of equivalence and effectiveness of EU law when compensating victims under the Consolidated Directive (or the aims of the Directive would be undermined). Member States are permitted to exclude liability to compensation where the victim voluntarily let himself be carried in an uninsured vehicle, the victim knew the vehicle concerned was uninsured and the compensatory body can prove this. All other exclusion clauses are prohibited. In Case C-300/10 *Almeida v Companhia de Seguros Fidelidade-Mundial SA* [2012] ECLI:EU:C:2012:656 for instance, the Portuguese Compensatory Body denied a passenger his right to recover compensation. The passenger in this case failed to wear a seat belt whilst traveling in the vehicle and, following a crash, he was thrown out of the vehicle, in which instance he suffered severe injury. Moreover, the vehicle was uninsured. The CJEU rejected the exclusion applied by the Portuguese Compensatory Body which deprived the third-party victim of his right of compensation and confirmed that no exclusions are permitted in respect of third-party victims, apart from those expressly provided for in the MVID.

<sup>45</sup> *Evans v Secretary of State for the Environment* [2001] EWCA Civ 1598.

<sup>46</sup> A damages action for the non-contractual liability of the State for losses incurred by an individual due to the State’s incorrect or non-transposition of EU law.

<sup>47</sup> Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci and others v Italy* [1991] ECR I-5357.

<sup>48</sup> *Cameron v Hussain & LV Insurance* [2017] EWCA Civ 2725.

<sup>49</sup> *ibid* at [57].

<sup>50</sup> Road Traffic Act 1988 s 143.

<sup>51</sup> *ibid*.

<sup>52</sup> *Monk v Warbey* [1935] 1 KB 75.

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<sup>53</sup> Road Traffic Act 1988 Pt VI.

<sup>54</sup> See fn 44.

<sup>55</sup> *McCracken v Smith and Ors* [2015] EWCA Civ 380.

<sup>56</sup> *Smith v Stratton & Anor* [2015] EWCA Civ 1413: Laws LJ held that the crime exception could be used against the claimant as the Agreement’s clause continued to apply to cases occurring prior to the 2015 Agreement’s enactment (which confirmed the lack of retrospective effect of the UDA and UtDA).

<sup>57</sup> *Phillips v Rafiq* [2007] EWCA Civ 74.

<sup>58</sup> A system which has been abolished as a form of communication in the UK.

<sup>59</sup> For some light-hearted commentary on the use (and approaching obsolescence) of fax machines from 2011, see Jackson, N. (2011) ‘The Age of the Fax Machine Is (Finally) Coming to an End’ *The Atlantic*. Available at: <https://www.theatlantic.com/technology/archive/2011/08/the-age-of-the-fax-machine-is-finally-coming-to-an-end/242660/>.

<sup>60</sup> As provided for under Mental Capacity Act 2005 s 2.

<sup>61</sup> Clause 14(1)(a) provides ‘the claimant is a minor being under the age of 18 years (where applying the law of England and Wales) or 16 years (where applying the law of Scotland)’.

<sup>62</sup> See Gorea, R. K. 2016. Financial Impact of Road Traffic Accidents on the Society. 2(1) *International Journal of Ethics, Trauma & Victimology*, DOI: <https://doi.org/10.18099/ijetv.v2i1.11129>.

<sup>63</sup> For example, victims of hit and run accidents may develop a condition referred to as ‘hit and run OCD’. See Penzel, F. 2015. Driven to Distraction: “Hit and Run OCD”. Available at <https://iocdf.org/expert-opinions/driven-to-distraction-hit-and-run-ocd/>. Generally, in terms of damage to mental health in this area which can lead to some form of post-traumatic stress, see Beck, J. G., and Coffey, S. F. 2007. Assessment and Treatment of PTSD after a Motor Vehicle Collision: Empirical Findings and Clinical Observations. 38(6) *Professional Psychology Research and Practice*. 629.

<sup>64</sup> See Channon fn 10.

<sup>65</sup> For commentary on the problems associated with these powers under the previous Withdrawal Agreement Bill, see Lee, J. 2020. Troubling and Unnecessary: The Problems of Precedent in Clause 26(1) in the Withdrawal Agreement Bill. Available at <https://blogs.lse.ac.uk/brexit/2020/01/14/troubling-and-unnecessary-the-problems-of-precedent-in-clause-261-in-the-withdrawal-agreement-bill/>.

<sup>66</sup> *Byrne v Motor Insurers' Bureau and another* [2009] QB 66.

<sup>67</sup> *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172.

<sup>68</sup> *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603.

<sup>69</sup> Case C-188/89 *Foster v British Gas* [1990] ECR I-3313.

<sup>70</sup> *MIB v Lewis* [2019] EWCA Civ 909; [2019] 6 WLUK 26.

<sup>71</sup> *Regina (RoadPeace Ltd) v Secretary of State for Transport* [2018] 1 WLR 1293.

<sup>72</sup> See fn 15 and Wright, J., K. 2019. ‘Reinventing Contracts’ Law Practice Today. Available at: <https://www.lawpracticetoday.org/article/reinventing-contracts/>.

<sup>73</sup> A position formally refuted in *MIB v Lewis* [2019] EWCA Civ 909; [2019] 6 WLUK 26 where the Court of Appeal confirmed the MIB to be an ‘emanation of the State’ and subject to the (vertical) direct effect of EU law.

<sup>74</sup> Rosmarin, R. 2020. Sustainability Sells: Why Consumers and Clothing Brands Alike are Turning to Sustainability as a Guiding Light. *Business Insider*. Available at <https://www.businessinsider.com/sustainability-as-a-value-is-changing-how-consumers-shop?r=US&IR=T>.

<sup>75</sup> <https://www.adrianflux.co.uk/blog/2007/08/who-owns-your-insurer.html>.

<sup>76</sup> Approximately 186 separate trading companies.

<sup>77</sup> Gardiner, B. 2020. Pollution made COVID-19 Worse. Now, Lockdowns are Clearing the Air. Available at: <https://www.nationalgeographic.com/science/2020/04/pollution-made-the-pandemic-worse-but-lockdowns-clean-the-sky/>.

<sup>78</sup> Wright, J., K. 2019. ‘Reinventing Contracts’ Law Practice Today. Available at: <https://www.lawpracticetoday.org/article/reinventing-contracts/>.

<sup>79</sup> <https://www.mib.org.uk/about-mib/mib-core-values/>.

<sup>80</sup> Wexler, D. 2014. New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence “Code” of Proposed Criminal Processes and Practices. 7 *Arizona Summit Law Review*. 463.

<sup>81</sup> <https://www.mib.org.uk/about-mib/mib-core-values/>.

<sup>82</sup> See the commentary in *Regina (RoadPeace Ltd) v Secretary of State for Transport* [2018] 1 WLR 1293.

<sup>83</sup> The judge in the *Delaney v Pickett* case and whose judgment and thinking was so positively referred to in *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172.