When is an insured vehicle an uninsured vehicle? In Colley v MIB the Court of Appeal continues its struggle with EU motor vehicle insurance law

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THE MODERN LAW REVIEW
Modern Law Review
DOI: 10.1111/1468-2230.12762

CASE NOTE

When is an insured vehicle an uninsured vehicle? In *Colley* v *MIB* the Court of Appeal continues its struggle with EU motor vehicle insurance law

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In *Colley* v *Motor Insurers' Bureau* the Motor Insurers' Bureau appealled against liability to satisfy a claim for damages for injuries suffered by a passenger in a motor vehicle accident. The driver was uninsured, but at the time of the accident the vehicle in which the victim was travelling was subject to a policy of motor insurance. By operation of national law, and in breach of the Motor Vehicle Insurance Directive (MVID), the insurer was allowed to recant the policy and leave the passenger a victim of an, ostensibly, uninsured vehicle. This note explains why the decision of the Court of Appeal was fundamentally flawed, how the Court continues to apply EU law incorrectly, and broader concerns the case presents for remaining EU law claims in the appeal courts. This is particularly the case for retained EU laws and the cases remaining to be heard under the MVID's application in national courts.

THE NATIONAL LAW AND EU LAW: ESTABLISHING THE RULES IN OPERATION

The national law governing motor vehicle insurance and use is the Road Traffic Act 1988 (RTA88) and it, among other obligations, requires the owners of vehicles to have, as a minimum, third party (liability) motor insurance for vehicles used on a road or other public place.[1] Such policies of motor vehicle insurance must be issued by a provider which is a member of the Motor Insurers' Bureau (MIB).

The national laws pertinent to this case are sections 151 and 152 of the RTA88.[2] Section 151 reads that an insurer, subject to conditions and exceptions, is under a duty to satisfy a judgment where a person, which it has not insured to drive the vehicle at fault, causes injury to a third-party, or damage to their property. Section 151(2)(b) continues that if the liability is such that it would be covered had the policy insured all persons, and judgment is granted against

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1 RTA88, s 143.
2 All sections noted refer to the RTA88 unless otherwise stated.

a person not insured under the policy, the insurer must satisfy the claim. Here the insurer becomes a statutory insurer (known as an RTA insurer). The insurer is entitled to seek recovery of any such payment against the driver at fault, but it must satisfy the claim insofar as the activity of the driver is one which is covered by the policy. Thus, and for a practical example, a father insures a car for social and domestic purposes and his son, not identified on the insurance policy, uses the vehicle in a similar manner and causes an accident. Here the insurer will, following section 151, adopt the position of an RTA insurer and settle the award of damages to the victim.

Section 152(2), however, provides exceptions to indemnity under section 151 (and in so doing breaches recital 15 of the sixth Motor Vehicle Insurance Directive (Consolidated MVID)[3] as it provides an insurer with permission, if it acts sufficiently promptly either before or after the accident,[4] to avoid the policy of insurance, through a declaration from a court, for the policyholder's non-disclosure or misrepresentation. Thus, the effect of section 152(2) is to enable an insurer to escape having to satisfy a claim under section 151. In this event Article 75 (of the MIB's Articles of Association) comes into effect. Article 75 is an intra-insurer protocol which provides a route to third-party victims of insufficiently insured drivers seeking access to compensation where the contractual insurer becomes a statutorily-required insurer. The insurer here operates under the MIB's Uninsured Drivers Agreement 1999 (UDA1999) (which is a more limited protective right for the victim as it only extends claims to uninsured losses).

The MVID placed obligations on Member States to ensure the compulsory insurance of vehicles. At Article 3,[5] Member States are (subject to Article 5) to take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. This insurance, with reference to Article 3 of the First MVID,[6] shall cover compulsorily both damage to property and personal injuries. Article 12(1) further defines this obligation with specific reference to cover liability for personal injuries to all passengers, other than the driver (as a special category of third-party victim). To ensure there was no shortfall in protection for injured third-party victims, the Second MVID[7] established a requirement for Member States to provide for a national compensatory body having responsibility for compensating the victims of uninsured or untraced drivers (essentially this guarantee fund was to act as 'insurer of last resort'). This obligation was replicated in Article 10(1) where the national body was tasked with providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries for which the insurance obligation provided for in Article 3 has not been satisfied.

3 Directive 2009/103/EC [2009] OJ L263/11.
4 It is important to note that from 1 November 2019, the post-event declaration procedure in RTA88, s 152 was repealed in Motor Vehicles (Compulsory Insurance) (Miscellaneous Amendments) Regulations 2019. RTA88, s 152 having been found to be in breach of the MVID, Arts 3(1) and 13(1).
5 All Articles refer to the Consolidated MVID unless otherwise stated.
6 Council Directive 72/166/EEC [1972] OJ L103/1.
7 Council Directive 84/5/EEC [1984] OJ LL8/17.

In the UK, this national compensatory body is fulfilled by the MIB through two extra-statutory arrangements (the UDA1999 and the Untraced Drivers Agreement) between the MIB and Secretary of State for Transport. The Agreements exist to compensate the victims of negligent uninsured motorists[8] and untraceable motorists.[9] Thus, together national and EU laws regulate the system of compulsory motor vehicle insurance. This regulation is broad and covers a range of obligations on insurers and the insured policyholders.

Finally, Article 10(2) provides Member States with an exception to the obligation on the compensatory body to satisfy a claim by a third-party victim in one specific circumstance, namely, where the third-party was a passenger who entered the vehicle in the knowledge that there was no insurance cover. This exception is included in clause 6(1)(e) of the UDA 1999.

CASE FACTS

In *Colley* v *Motor Insurers' Bureau*[10] (Stuart-Smith LJ giving the judgment of the Court) the Court of Appeal upheld the decision of Freedman J in *Colley* v *Shuker*.[11] In so doing, it applied the MVID and national law as confirming an obligation on the national compensatory body and guarantee fund – the MIB – to satisfy Colley's claim for damages. The case involved Colley who, as passenger in a car being driven negligently by Shuker, sustained catastrophic injuries following a motor vehicle accident. Shuker's father had taken out a policy of insurance, naming him (the father) as the policyholder and main driver, with his partner as a named other driver. Shuker was not a named driver on the policy, nor was he covered by the insurance policy, so was, at the time of the accident, an uninsured driver. Further, Colley knew before entering the vehicle that Shuker did not have a valid driving licence and was not insured to drive the vehicle.

Colley brought proceedings first against Shuker directly, and judgment was entered against him on 10 June 2020. However, Shuker was unable to satisfy the judgment. Before the proceedings were issued, but after the accident, the insurer obtained a declaration against Shuker's father, thereby avoiding the policy on the grounds of material misrepresentation. Despite the application of section 152(2), Colley continued his action with the insurer named as second defendant, arguing that the operation of the MVID prevented the court applying the relevant section of the RTA88. This line of argument had been rejected by O'Farrell J in *Colley* v *Shuker*[12] because the wording of section 152(2) was clear and provided to the insurer a complete defence. O'Farrell continued that

8 In the event of accident being caused by a driver who was uninsured at the time but who can be identified, the national guarantee fund may handle the claim for compensation from the victim.

9 This applies to victims of an accident where the driver deemed responsible for the accident leaves the scene without identifying themselves and cannot be traced. The national guarantee fund may consider claims of compensation in respect of damages to property and personal injury.

10 *Colley* v *Motor Insurers' Bureau* [2022] EWCA Civ 360.

11 *Colley* v *Shuker* [2020] EWHC 3433 (QB).

12 *Colley* v *Shuker* [2019] EWHC 781.

it was not available to the court to amend or disregard the RTA88 despite accepting that section 152(2) was incompatible with the MVID. The CJEU's jurisprudence on the (lack of) horizontal direct effect of Directives as applied, evidently, between private entities meant section 152(2) could not be replaced through the application of the MVID. In his judgment Stuart-Smith LJ, at paragraph 14, asserted that he did not disagree with this reasoning and confirmed that the current appeal was not based on this finding or sought to hear arguments against it. This is a point to which we return later. Colley also initiated a state liability claim against the Secretary of State (per *Andrea Francovich and Danila Bonifaci and others* v *Italian Republic*[13] (*Francovich*)) for the UK's breaches of the MVID, and an action against the MIB based on the incompatibility of the UDA1999 with the MVID. Colley's claim against the Secretary of State was stayed pending the result of his action against the MIB.

The UDA 1999 is one of two agreements the MIB has with the UK in occupying the position required in the Second MVID. As to this aspect of his claim, clause 6(1)(e) of the UDA 1999 excludes any liability of the MIB where the victim 'voluntarily allows himself to be carried in the vehicle … and knew … that the vehicle was being used without there being in force in relation to its use such a contract of insurance as would comply with Part VI of the Road Traffic Act 1988.' That the victim was so aware, held the Court, resulted in the halting of this aspect of Colley's application.

QUESTIONS FACING THE COURT

The questions on appeal were whether Articles 3, 10 and 12 of the MVID collectively impose a duty on the MIB to provide compensation to the victim of an accident involving a motor vehicle where there is no policy of insurance in place covering the vehicle. Specifically, the Court assessed the requirement for compulsory liability insurance for motor vehicles and their passengers (Articles 3 and 12); the obligation for a national compensatory body to be responsible for compensating injured victims (Article 10(1)) and the restriction of the scope of the compensatory body's responsibility where the injured party had knowledge before entering the vehicle that it was uninsured (Article 10(2)).

Alternatively, does the obligation extend to a case where there is a policy of insurance in being at the time of the incident giving rise to liability, but that policy is subsequently avoided *ab initio*? Essentially, did the MIB have a defence to the claim against it through Article 10(2) MVID or the 'passenger knowledge' defence? The MIB contended that the vehicle in which Colley was travelling was not uninsured within the meaning of the MVID and hence the facts of the present case did not fall within the scope of its obligation to provide compensation pursuant to the MVID.

13 Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others* v *Italian Republic* ECLI:EU:C:1991:428.

THE DECISION OF THE COURT

The Court of Appeal upheld the judgment that the MIB had an obligation from the Consolidated MVID to provide compensation in circumstances that involved a vehicle which had been subject to an insurance policy at the time of the accident, but one which subsequently had been avoided by the insurers. The MIB was an 'emanation of the State' following the decision in *MIB* v *Lewis*[14] and this allowed the (vertical) direct effect of the relevant Articles of the MVID.

As to the second question, Article 10(2) provides that 'Member States may exclude the payment of compensation by [the MIB] in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured.' The Court did not accept the MIB's arguments, seemingly established on the basis of syntax, that as Colley knew Shuker was uninsured, this exemption of responsibility applied in the present case. For the Court, the MVID uses the word 'it' at Article 10(2), which is a reference to knowledge of a vehicle being uninsured rather than the use of the word 'they' which would have denoted the insured-status of a driver. Hence, as Colley was not in any position to identify the insurance status of the vehicle before entering it, Article 10(2) could not apply.

DISCUSSION: MAKING THE LAW FIT THE NARRATIVE

It is beyond the scope of this note to explore some significant issues which were omitted from the appeal, but it strikes us as odd that throughout these proceedings, neither the parties nor the judges explored in any meaningful way the incidental, not horizontal, direct effect of the MVID which would have altered the findings in this matter. Notwithstanding all parties agreed that section 152(2) did not comply with the requirements of Articles 3(1) and 13(1) of the MVID, and this point being made at an earlier stage of the proceedings and not appealed, it lends itself to criticism that the focus of any attention, before being summarily dismissed, was on the horizontal direct effect of the MVID. Stuart-Smith LJ refers to the lack of horizontal direct effect of Directives applying to the current appeal as the contractual matters between Shuker and the insurer were a matter of private, national law, rather than EU law.[15] This seems to be a misunderstanding of direct effect in this particular case. It is accepted that the CJEU has denied the horizontal direct effect of Directives.[16] There are various reasons for this position,[17] but ultimately to allow for the horizontal application of Directives would typically be to place additional burdens on the parties beyond the national legislation of which they should be aware (and

14 *Motor Insurers' Bureau* v *Lewis* [2019] EWCA Civ 909, and see J. Marson, and K. Ferris, 'Too Little, Too Late? Brexit Day, Transitional Periods and the Implications of MIB v Lewis' (2020) 3 *European Law Review* 415.

15 *Motor Insurers' Bureau* v *Lewis ibid* at [13], [27] and [41].

16 Case C-91/92 *Paola Faccini Dori* v *Recreb Srl* ECLI:EU:C:1994:292.

17 See Paul Craig 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 *European Law Review* 349 for commentary.

follow). The MIB is not arguing that the MVID should be used to impose obligations on any party to these proceedings. It is arguing, as we understand its position, that section 152(2) should not have been applied, allowing the insurer to obtain the declaration. This issue requires substantially more detailed discussion than available in this note, but by providing considered reasoning this would have enabled a route to EU law which could have saved much of the textual acknowledgment, but denial, of the instructions in the MVID which were flouted by the UK in the RTA88 and accepted as 'a question of national law'[18] in Stuart-Smith's LJ reasoning. The power granted to legislate the provisions found in section 152(2) is expressly prohibited in Article 10, thus the UK breached its EU obligations. The CJEU had, in *CIA Security International SA* v *Signalson SA and Securitel*[19] (*CIA Security*) and *Unilever Italia SpA* v *Central Food SpA*[20] explained the availability of incidental direct effect where provisions of EU law could be invoked in situations between private parties. This, explained the CJEU, was not a backdoor to accessing the horizontal direct effect of Directives,[21] rather it allowed for the excluding of national law that might otherwise have been used in a dispute, not imposing direct effect on the parties. This adoption of the exclusionary, as opposed to the substitutionary effects of the law[22] reconciled incidental direct effect with the prohibition of horizontal direct effect (albeit noting the conceptual difficulties this distinction creates).[23] In essence, the Court determining the use and application of the MVID between private parties could have allowed Colley to use the MVID as a shield,[24] not a sword,[25] by preventing the use of section 152(2) as opposed to imposing direct obligations on the parties through application of the MVID. The present situation allows a private insurer to benefit from the UK's breach of EU law, and the incidental effect of using the MVID would not have created any obligation nor placed onto the insurer any burden, it would simply have prevented the use of a discretionary route to the avoidance of liability. Such discussion and application of these points in a case such as *Colley* v *Shuker* / *Colley* v *MIB* would have likely led to Colley's benefit, a clarifying of national law and assistance to the EU in its discussion of enforcement mechanisms. There could be no arguments to the lack of legal certainty that the adoption of incidental effect of the MVID creates, as the MVID has been clear about the prevention of recanting insurance cover due to misrepresentation.

Turning to the matter of the Article 10(2) exclusion of the MIB's liability in this case, it is a quirk of English law that insurance policies cover the driver rather than the actual vehicle. The exemption for the MIB therefore turns on the basis of Colley's actual knowledge that *the vehicle* was uninsured, which according to

18 *Colley* v *MIB* n 10 above at [27].
19 Case C-194/94 *CIA Security International SA* v *Signalson SA and Securitel SPRL* ECLI:EU:C:1996:172.
20 Case C-443/98 *Unilever Italia SpA* v *Central Food SpA* ECLI:EU:C:2000:496.
21 *ibid* at [35].
22 See M. Dougan 'When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy' (2007) 44 *Common Market Law Review* 931.
23 See for instance Craig, n 17 above.
24 Per *CIA Security* n 19 above.
25 Per Case C-129/94 *Ruiz Bernáldez* ECLI:EU:C:1996:143.

the facts he did not know. Colley understood that the driver did not possess a driving license, and therefore it follows that he could not be insured to drive the vehicle. Yet this does not apply to the vehicle or Colley's knowledge, therefore the exemption permitted in the MVID and clause 6(1)(e)(ii) of the UDA 1999 could not apply.

Does insurance disappear with a declaration? UK and EU perspectives

The position of both the High Court and Court of Appeal was, essentially, to acknowledge that national law at the time of Colley's accident was contrary to the MVID. However, for the insurer, it had taken a course of action which, at the relevant time, was permitted under national law. Whilst the MVID could not be relied on directly in the proceedings, what the courts could do is to ensure the victim was compensated by imposing the obligation to satisfy the claim on the national guarantee fund body as 'insurer of last resort.' Thereby EU law had been breached, but invoking an emanation of the State (the MIB)[26] in the proceedings had ensured that the victim was able to recover the compensation owed.

Paragraph 26 of *Colley* v *MIB* is worthy of detailed consideration:

> it is worth noting one feature which, if neglected, can lead to confusion. The scope of the Article 3 insurance obligation is a matter to be determined by the application of EU law. In contrast, it is now well established that questions of the validity and effect of particular policies of insurance … are a matter for the national law of the state in which they are issued, not EU law: see *Fidelidade* at [31]. This needs to be borne in mind when reading decisions of the CJEU, which are prone to make and repeat statements such as that 'a compulsory insurance contract may not provide that in certain cases … the insurer is not obliged to pay compensation for … personal injuries caused to third parties by the insured vehicle': see *Ruiz Bernaldez* … at [24]; or that Article 3 'precludes a company insuring against civil liability in respect of the use of motor vehicles from relying on statutory provisions or contractual clauses in order to refuse to compensate … victims for an accident caused by the insured vehicle': see *Churchill* at [33] …[27]

Paragraph 27 continues

> … when the CJEU says that an insurance contract 'may not provide' for an insurer to be relieved of liability pursuant to terms of the contract, or that the Directive 'precludes' a company from relying on statutory provisions or contractual clauses in order to refuse to compensate third party victims, or that national rules are 'precluded', it does not in fact prevent the existence of such provisions or clauses or affect their validity where the insurance provider is not an emanation of the state.[28]

26 See *Motor Insurers' Bureau* v *Lewis* n 14 above and J. Marson and K. Ferris 'The Compatibility of English Law with the Motor Vehicle Insurance Directives: The Courts Giveth … But will Brexit Taketh Away' (2020)136 *The Law Quarterly Review* 35 for commentary.
27 *Colley* v *MIB* n 10 above at [26].
28 *Ibid* at [27].

Stuart-Smith LJ refers to *Fidelidade-Companhia de Seguros SA* v *Caisse Suisse de Compensation and Others*[29] (*Fidelidade*) where matters of national legislation permitting the nullifying of contracts of insurance are governed by the laws of the Member State, not the EU. This he seems to use as justifying the continuing application of section 152(2). *Fidelidade* is a case involving a crash between a car and a motorcycle where the insurer settled the claim for damages and sought to recover this payment from the national compensatory body. The compensation body resisted the claim on the basis that there was in existence at the time of the accident a valid insurance contract in respect of the car. The insurer resisted on the grounds that the policy was invalid due to a material misrepresentation. The question to be determined by the CJEU was the application of the equivalent to Articles 3(1) and 13 of the MVID. Stuart-Smith LJ refers to the following paragraph of the CJEU judgment that the MVID 'precluded national legislation having the effect of allowing an insurer to invoke against third-party victims the nullity of a contract for motor vehicle insurance against civil liability [on the same factual basis as applies in the present case].'[30]

At paragraph 27 the CJEU continues

> … it must be held that the fact that the insurance company has concluded that contract on the basis of omissions or false statements on the part of the policyholder *does not enable the company to rely on statutory provisions* regarding the nullity of the contract or to invoke that nullity against a third-party victim so as to be released from its obligation under art.3(1) of the First Directive to compensate that victim for an accident caused by the insured vehicle (authors' emphasis).[31]

Despite the clarity of the CJEU's instruction through *Fidelidade* and its identification of the limits on contractual provisions between private parties, and notwithstanding its use being sanctioned through national provisions such as section 152(2), Stuart-Smith LJ explained 'I interpose that this was a question of EU law, not national law, and that caution needs to be exercised to avoid confusion.'[32] There is no confusion as to the exercise of the law. The CJEU was explaining, through its role as a court of reference, how Member States were to interpret the MVID in their national laws. Indeed, to allow the Member States to artificially separate national and EU provisions, where EU law had competence, would have been to invalidate the basis on which the EU operates and on which terms States agreed prior to their accession. At paragraph 66, Stuart-Smith LJ accepts the factual similarity between Colley's case and *Fidelidade*, and how the CJEU explains that the MVID 'must be interpreted as precluding national legislation' from allowing the insurer to avoid its policy on the grounds of misrepresentation. On this point, Stuart-Smith LJ concludes '[i]n normal English meaning it does not "preclude" the national legislation. What is meant is

29 Case C-287/16 *Fidelidade-Companhia de Seguros SA* v *Caisse Suisse de Compensation and Others* ECLI:EU:C:2017:575 at [31].
30 *Colley* v *MIB* n 10 above at [37].
31 *Fidelidade* n 29 above at [27].
32 *ibid* at [38].

that, according to EU law, the scope of the insurance cover required by Article 3 is not limited by excluding cases where a policy was in existence at the time of the accident but was entered into on the basis of a misrepresentation by the policy holder.'[33]

This, he justifies, on the basis that '[t]he most that can be said in such circumstances is that the national legislation is incompatible with the Codified Directive and that the Directive is directly enforceable against an emanation of the state: but that is different from saying (in normal English) that the Directive "precludes" the national legislation.'[34]

How such a conclusion can be drawn from the wealth of CJEU jurisprudence on the matter is quite extraordinary. Even if it is accepted that national law does allow the application of section 152(2), and in so doing ignoring the case authority and enforcement mechanisms available to give effect to the MVID, *Fidelidade* did not bestow onto the MIB, even as an emanation of the state, an obligation to provide the compensation to Colley in place of the insurer. What *Fidelidade* did was to prevent insurers from avoiding their responsibilities towards victims in the circumstances of *Colley* through relying on national laws which were in contradiction to the MVID. Simply because the MIB had been held an emanation of the state and had the resources available to satisfy the claim did not result in it having responsibility to remedy deficiencies in national law.

It was in *Ruiz Bernaldez*[35] (*Bernaldez*) where the CJEU held that Article 3(1) of the first MVID, in conjunction with the second and third MVIDs had to be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all the damage to property and personal injuries sustained by them. Significantly, this interpretation of the law operated to prevent an insurer from attempting to rely on statutory measures or clauses contained within the contracts of private parties to reject compensation claims of a third-party victim of an accident caused by an insured vehicle. Not only has the Court of Appeal previously misunderstood *Bernaldez* and held contrary to its precedent in *EUI Ltd* v *Bristol Alliance Ltd Partnership*[36] (*EUI*), it did so on the basis, *inter alia*, that *Bernaldez* was fact specific and did not establish any general application.[37] The jurisprudence from the CJEU continues the line of authority stemming from *Bernaldez* with *Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen* v *Vahinkovakuutusosakeyhti&ouml Pohjola and Jarno Ruokoranta*[38] (*Candolin*). Even if the argument could be made from *Bernaldez* that the obligation on Member States only falls to vehicles which had been insured, *Candolin*, when referring to *Bernaldez*, at paragraph 19 remarked how '… the first subparagraph of Article 2(1) of the Second Directive simply repeats that obligation with respect to provisions or clauses in a policy excluding from insurance the use or driving of vehicles in particular cases (*persons not authorised to drive the vehicle* …' (authors' emphasis).

33 *ibid* at [66].
34 *ibid* at [68].
35 *Ruiz Bernáldez* n 25 above.
36 *EUI Ltd* v *Bristol Alliance Ltd Partnership* [2012] EWCA Civ 1267.
37 *ibid* at [66] and [67].
38 Case C-537/03 *Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen* v *Vahinkovakuutusosakeyhti&ouml Pohjola and Jarno Ruokoranta* [2005] ECR I-5745.

Indeed, in *Churchill Insurance Company Limited* v *Benjamin Wilkinson and Tracy Evans* v *Equity Claims Limited*,[39] the Advocate-General opined 'The Court's case-law teaches us that, unless one of the exceptions laid down by the Directive is applicable, the victims of an accident are *always* entitled to be compensated by the insurer.'[40] A message to be taken from the opinion and judgments of the CJEU is that, as a matter of EU law, using a motor vehicle beyond the scope of the policy of insurance held by the assured does not create a scenario where the insurer, under a statutory duty to provide cover to a third-party victim, is allowed to abrogate its duties and place onto the MIB this responsibility.

It is worth reflecting on the instruction from the CJEU when establishing where Stuart-Smith LJ had difficulties when concluding as the Court did. *Candolin* involved a road traffic accident where the driver and the injured passengers were drunk, and the passengers must have been aware of the driver's drunken condition before entering the vehicle. The judgment of the Court summarised the relevant question as being 'whether the second subparagraph of Art.2(1) of the Second Directive and Art.1 of the Third Directive preclude a national law according to which compensation paid under compulsory motor vehicle insurance may be refused or limited on the basis of the passenger's contribution to the injury he has suffered …' The CJEU concluded

> 18. In view of the aim of protecting victims, the Court has held that Art.3(1) of the First Directive 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.
>
> 22. As the Advocate General rightly stated, at point 42 of his Opinion, any other interpretation would allow Member States to limit payment of compensation to third-party victims of road accidents… which is precisely what the directives are intended to avoid.
>
> 23. It follows that the second subparagraph of Art.2(1) of the Second Directive must be interpreted as meaning that a statutory provision or a contractual clause in an insurance policy which excludes the use or driving of vehicles from the insurance may be relied on against third party victims of a road accident only where the insurer can prove [the single exemption applies].[41]

This is clear instruction from the CJEU which prevents the application of national rules, including section 152(2), given Article 3 of the MVID and further calls into question the validity of the interpretation of the law issued by Stuart-Smith LJ.

Further, and adding to the overwhelming case authority from the CJEU challenging the conclusions drawn in Stuart-Smith LJ's judgment, is the use in *Colley* of the MIB to remedy a shortfall in national protections for the victims of motor vehicle accidents. Article 10 does require the national compensatory

39 Case C-442/10 *Churchill Insurance Company Limited* v *Benjamin Wilkinson and Tracy Evans* v *Equity Claims Limited* ECLI:EU:C:2011:548.
40 *ibid* at [27].
41 *Candolin* n 38 above at [16], [18], [22], [23].

body to stand in place for the insurer where the victim suffers injury or loss due to the actions of an uninsured vehicle, but *Gábor Csonka and others* v *Magyar Állam*[42] (*Csonka*) provides direction as to its application. Stuart-Smith LJ refers to *Csonka* at paragraphs 23, 25, 32–33, 36, 46, 54–55, 62, and 64–65 of the judgment and given its analysis of the use of Article 10, this is unsurprising. What is surprising, however, are the conclusions drawn by Stuart-Smith LJ particularly at paragraphs 64 and 65 of *Colley*. Here Stuart-Smith LJ considered *Csonka* to be devastating to the MIB's arguments that it should not be held responsible for Colley's losses. Apparently, the case 'provided no assistance to the MIB'[43] because all it decided was that the Article 3 insurance obligation did not extend to require the assumption of the risk of insurers' insolvency. It provided no guidance nor authority for a situation where a policy of insurance had been in existence at the time of the accident, but subsequently avoided by the insurer. It is difficult to agree with this interpretation of the precedent other than as a mechanism to avoid the uneasy consequence of national law breaching EU law and, having focused on the unavailability of the horizontal direct effect of the MVID, and ignoring its incidental effect, the Court of Appeal would have no option but to leave Colley without a remedy. It was in *Csonka* where the CJEU put to rest any issue of the appropriate use of the MIB (and other national compensatory bodies). The case involved the insolvency of the insurer, and the assured became personally liable for claims arising out of a road traffic accident. The victims argued that they should be able to recover from the equivalent of the MIB and a reference on this point was made to the CJEU for interpretation of Article 10. The CJEU explained how the national compensatory bodies' obligation was confined to recompense a victim of the use of 'a vehicle in respect of which no insurance policy exists.'[44] In *Csonka*, the policyholders had been subject to insurance cover at the time of the accident (as with Colley) and consequently the Kártalanítási Számlát Kezelő MABISZ GKI (the compensation fund of the consortium of Hungarian insurers) was not subject to any requirement to satisfy the judgment on behalf of the insolvent insurer. Indeed, the CJEU reiterated the position of the compensation body as being 'insurer of last resort.'[45] Consequently, as a matter of the application of national law, insurers subject to a contract at the time of the accident are obliged to fulfil the payment of damages, whether this is as a contractual or statutory (so nationally per section 151) insurer.

Where the Court does recognise, correctly, the significance of *Csonka* is at paragraph 65 where the operation of the MIB's Article 75 procedure[46] which functioned in *Delaney* v *Secretary of State for Transport*[47] and enabled insurers

42 Case C-409/11 *Gábor Csonka and others* v *Magyar Állam* ECLI:EU:C:2013:512.
43 *Colley* v *MIB* n 10 above at [64].
44 *Csonka* n 42 above at [31].
45 *ibid* at [31].
46 MIB, Art 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 criticised 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).
47 *Delaney* v *Secretary of State for Transport* [2015] EWCA Civ 172.

to exploit the inherent weaknesses of section 151 and the UDA 1999 (such as benefiting from the application of the MIB agreement and the clause 6(1)(e)(ii) escape from liability clause) was no longer good law. This is a point we made in an article published in 2017[48] and it is unfortunate that it required five years for the argument to be confirmed by the Court of Appeal.

The consequences for Colley

The decision of the Court of Appeal has, whilst wrong in law, given Colley access to recovery of compensation from the MIB. This, said the Court, '… ensuring compensate[ion] "at least up to the limits of the obligation" provided for in Article 3.'[49] However, we suggest this is not the case at all. The terms on which the MIB will handle Colley's compensation claim is not the same as if the insurer had been held responsible directly (as permitted in The European Communities (Rights against Insurers) Regulations 2002) and consequently the third-party victim suffers from access to poorer terms than would be available through claims against the insurer on a contractual basis. The Agreements between the MIB and the Secretary of State are drafted by the MIB which has been granted wide discretion as to its terms and various exemptions, over several amendments and iterations, which lessen the protection for third-party victims of untraced or uninsured drivers.[50] Article 75 insurers have no liability to meet subrogated claims[51] and, as demonstrated in *EUI* the distinction between the rights guaranteed under statute and those available under the UDA1999 are sufficiently different to place victims seeking redress under the latter arrangement at a disadvantage.[52]

CONCLUSION

This case is entirely misplaced and joins several other cases of national courts misunderstanding EU law and its relationship with national laws. It also avoids the most obvious question, why was an insurer allowed to use section 152(2) when *Fidelidade* had established this as a breach of EU law? It was in the two

48 James Marson, Katy Ferris and Alex Nicholson, 'Irreconcilable Differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives' (2017) 1 *Journal of Business Law* 51.

49 *Colley* v *MIB* n 10 above at [79].

50 See NicholasBevan, 'Why the Uninsured Drivers Agreement 1999 Needs to be Scrapped' (2011) 2 *Journal of Personal Injury Law* 123, and James Marson and Katy Ferris, 'The Uninsured Drivers' Agreement 2015 as a Legitimate Source of Authority' (2017) 38 *Statute Law Review* 133.

51 A subrogated claim is one where another party should have been responsible for settling.

52 For example, the MIB is permitted to deduct from a claimant's compensatory entitlement sums received from an insurer under an agreement or other arrangement and from any other source where the sums were paid in respect of injury loss or damage claimed in the proceedings. These exceed the permissible deductions outlined in MVID. Art 10(1). Such payments are subject to exclusions which are contrary to rights held at common law and the distinction between the rights available through a claim via the MIB Agreements and those at common law have been held unlawful – see *White* v *White* [2001] UKHL 9 at [34].

years following *Fidelidade* and its precedent that, under the European Communities Act 1972, the Secretary of State for Transport presented to parliament the Motor Vehicles (Compulsory Insurance) (Miscellaneous Amendments) Regulations 2019. The Regulations came into force on 1 November 2019 and whilst the law must be applied as of the time of the claim arising, thus allowing the insurer in *Colley* to use section 152(2), it was understood that the UK was in breach of EU law, hence the legislative amendment. It was very clearly understood through the CJEU's jurisprudence that Article 3 prevented the application of national clauses such as section 152(2), and what the Court of Appeal has provided in this judgment is confirmation that the UK fails to appreciate the nuance between EU obligations and national law.

Colley v *MIB* ultimately provides for protection as required through the MVID – the third-party victim of a motor vehicle accident is not allowed to fall between the two stools of no insurance applicable and the national compensatory body being allowed to refuse to compensate the passenger victim. Colley has access to compensation, but due to the rules applicable in the UK, on worse terms than if his claim was allowed to proceed directly against the insurer and not via the MIB. The Court of Appeal should have reversed the decision on appeal, allowed Colley to proceed with his claim for *Francovich* damages against the Secretary of State, and followed superior EU law rather than attempt to circumvent the obligations through a complete misreading of very clear precedent.