

For the want of certainty: Vnuk, Juliana and Andrade and the obligation to insure

MARSON, James <<http://orcid.org/0000-0001-9705-9671>> and FERRIS, Katy

Available from Sheffield Hallam University Research Archive (SHURA) at:

<https://shura.shu.ac.uk/24782/>

This document is the Accepted Version [AM]

Citation:

MARSON, James and FERRIS, Katy (2019). For the want of certainty: Vnuk, Juliana and Andrade and the obligation to insure. *Modern Law Review*. [Article]

Copyright and re-use policy

See <http://shura.shu.ac.uk/information.html>

For the want of certainty:
Vnuk, Juliana and Andrade and the obligation to insure

James Marson* and Katy Ferris**

ABSTRACT

In 2014, in the wake of the Court of Justice of the European Union (CJEU) ruling in Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav*, the law relating to compulsory motor vehicle insurance began to undergo significant change. Nationally, the requirement for the owner of a motor vehicle to possess insurance cover applies where the vehicle is used on a road or other public place; yet, *Vnuk* extended the obligation to vehicles on private land. However, beyond disquiet from some sectors as to this extension, there remains uncertainty at statutory and jurisprudential levels. According to Case C-80/17 *Fundo de Garantia Automóvel v Juliana*, immobilised vehicles stored on private land but which are capable of being driven are subject to compulsory motor vehicle insurance. In Case C-514/16 *Andrade v Crédito Agrícola Seguros*, the requirement for compulsory motor vehicle insurance applies only where the vehicle is used as a means of transport. *Andrade* appears overly restrictive and may operate to defeat the protection the Motor Vehicle Insurance Directives (MVID) have sought to achieve. The co-existence of *Juliana* and *Andrade* creates uncertainty. Clarification is needed, through a seventh MVID or direction from the CJEU, as to the continuation of *Andrade* as a source of authority and to when and in which circumstances motor vehicles must be insured.

Keywords: *Andrade v Crédito Agrícola Seguros* [2018], *Damijan Vnuk v Zavarovalnica Triglav* [2014], *Fundo de Garantia Automóvel v Juliana* [2018], motor vehicle insurance, Motor Vehicle Insurance Directives, the obligation to insure, Road Traffic Act 1988.

A. THE LEGAL FRAMEWORK

The Road Traffic Act 1988 (RTA) is the principal legislative provision for the regulation of the use of motor vehicles, offences, third party liabilities and insurance. In most cases it ensures the blameless victims of the negligent driving of motor vehicles have access to compensation. National law 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 Further, for the victims of uninsured or untraced drivers, the Second² Motor Vehicle Insurance Directive (MVID) imposed an obligation on each Member State to establish a guarantee fund to act as the insurer of last resort. In the UK, this position is occupied by the Motor Insurers' Bureau (MIB) through two extra-statutory arrangements (the Uninsured Drivers Agreement 2015 (along with the Supplementary Agreement concluded in 2017) and the Untraced Drivers Agreement 2017). The MIB and its Agreements established with the Secretary of

* Sheffield Hallam University.

** The University of Nottingham. The authors would like to thank the reviewers for their helpful comments and suggestions. Errors and omissions remain our own.

¹ RTA, s 143.

² (The) Second Council Directive 84/5/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1984] OJ LL8/17.

State for Transport exist to compensate the victims of negligent uninsured motorists,³ untraceable motorists⁴ and accidents caused by the negligent driving of ‘foreign’ motorists.⁵

Thus, 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 policy holders. Pertinent to this case note is the approach taken by each source of law to define the term ‘motor vehicle’ and to the physical extent of the obligation to possess insurance cover. We present an argument that the RTA, as the statute which establishes the extent of compulsory motor vehicle insurance, along with the extra-statutory agreements between the Secretary of State and the MIB, are too restrictive in scope and fail to adequately give effect to case law from the CJEU. Further, the Court of Appeal ruling in *MIB v Lewis*,⁶ that Articles 3 and 10 of the sixth MVID are directly effective⁷ and the MIB is an emanation of the State,⁸ further exacerbate the need for prompt action to clarify national and EU law on the scope of compulsory motor vehicle insurance.

B. Defining ‘motor vehicle,’ ‘use’ and the geographic scope of compulsory insurance

The obligation on the owner of a motor vehicle to hold third party insurance is provided in Part VI of the RTA. At section 143 of the RTA a person may not use (or cause to be used) a motor vehicle on a road or other public place unless there is in force in relation to the use of the vehicle insurance or security in respect of third party risks. An offence is committed for transgression of this obligation unless a statutory exclusion is applicable.⁹ Section 185 of the RTA defines a motor car as ‘a mechanically propelled vehicle, not being a motor cycle or an invalid carriage, which is constructed itself to carry a load or passengers...’

In *Vnuk*,¹⁰ in the CJEU, and at the Court of First Instance, Advocate-General Mengozzi, explained how the MVID had expanded the concept and definition of ‘motor vehicle.’ Referring to Art.1 of the first MVID, ‘vehicle’ for the purposes of that Directive ‘means any motor vehicle intended *for travel on land* and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled...’ (authors’ emphasis). There was no restriction for a vehicle to be used on a road to fall under the remit of compulsory insurance cover. The original drafting of the RTA confined compulsory motor insurance to motor vehicles used on a road. This disparity between EU and national law was raised in *Clarke v Kato and Cutter v Eagle Star Insurance Ltd*,¹¹ where the third party victims had

³ 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.

⁴ 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.

⁵ This is known as the ‘green card scheme’ and applies to accidents which have been caused through the negligent driving of non-national motorists (covering 47 countries including the 28 member states of the European Union and the countries in the European Economic Area).

⁶ *MIB v Lewis* [2019] EWCA Civ 909.

⁷ *ibid* at [66].

⁸ *ibid* at [75].

⁹ In the supplementary guidance notes included in the Agreements between the MIB and Secretary of State, local authorities, the National Health Service, and the police are examples of public bodies that will meet claims arising from the use of vehicles in their ownership or possession. They are, therefore, exempt from the requirement to hold insurance cover.

¹⁰ Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav* [2014] EUECJ C-162/13. [2016] RTR 10.

¹¹ *Clarke v Kato and Cutter v Eagle Star Insurance Ltd* [1998] All ER (D) 481.

suffered injury due to the actions of negligent drivers in a car park. The House of Lords had to determine whether a car park was a ‘road’ for the purposes of holding the insurers and/or the MIB liable to compensate the claimants due to the limited practical prospect of recovery from the drivers. The Lords refused to provide a purposive interpretation of the RTA, instead referring the matter to Parliament to rectify. Per Lord Clyde

One cannot but feel sympathy for the unfortunate victims of these two accidents but it must be for the Legislature to decide as matter of policy whether a remedy should be provided in such cases as these, and more particularly it must be for the Legislature to decide, if an alteration of the law is to be made, precisely how that alteration ought to be achieved.

The ruling in *Clarke* did lead to a statutory change to extend national compulsory insurance to vehicles located in some ‘other public place’,¹² but this falls short of the definition provided in Art. 1.

Vnuk was also instructive in determining where ‘the use of vehicles’ would require the imposition of third party insurance cover. The accident having occurred on farm land, by a vehicle used exclusively on private land and not being subject, according to the law of Slovenia, to motor insurance did not prevent the imposition of compulsory insurance cover. The EU requirement for compulsory motor insurance (Art. 3(1) of the first MVID) did not stipulate a relation to the use of vehicles on public roads. The MVID contained no reference to a ‘traffic accident’ (as per Slovenia’s national legislative instrument) for the need to hold insurance cover to become effective. Taking a broad view, Advocate-General Mengozzi noted not only the evolution of the MVID across its six iterations,¹³ but also the underpinning practical dimension to its creation. Whilst the MVID had evolved to provide protection to the third party victims of road traffic accidents,¹⁴ it had first been established to remove the hindrance to the free movement of persons and goods through the insurance checks carried out at the borders of each Member State. As explained in the opinion, the second MVID laid down the principle of compulsory cover for damage to property and personal injuries, set the minimum guaranteed amounts of compensation and required the setting-up of a body with the task of providing compensation for damage caused by unidentified or uninsured vehicles,¹⁵ and limited the exclusion clauses contained in insurance policies.¹⁶ The third MVID extended the cover to personal injuries to all passengers other than the driver¹⁷ and provided for the right of persons involved in an accident to information regarding the name of the insurance company concerned.¹⁸ The fourth MVID provided for the establishment of a new information centre¹⁹ and of a compensation body.²⁰ The fifth MVID restricted insurance cover exclusion clauses and extended that cover to personal injuries and damage to property suffered by

¹² The Motor Vehicles (Compulsory Insurance) Regulations 2000, SI 2000/726 art. 2(a) and 2(b) with effect from 3 April 2000.

¹³ (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.

¹⁴ at [37].

¹⁵ Article 1.

¹⁶ Article 2.

¹⁷ Article 1.

¹⁸ Article 5.

¹⁹ Article 5.

²⁰ Article 6.

pedestrians, cyclists and other road users, while prohibiting the application of excesses against injured parties and further extending their right to information.²¹

Indeed, when Advocate-General Mengozzi considered the application and interpretation of the MVID by Member States and the use of vehicles, there was little consistency present.²² He continued by addressing the expansive nature of the CJEU's jurisprudence. The CJEU purposively interpreted protective elements of the MVID broadly, whilst interpreting exclusions from compensation restrictively, thus demonstrating an interpretation of the law which was favourable to the victims of accidents.²³ Consequently, it followed a consistent interpretation of the MVID for protection of individuals to extend to accidents occurring on private land. Such a finding would also end the inconsistent national practices on the identification of the geographic scope of compulsory motor insurance. For example, the Court of Cassation (Luxembourg) adopted the broad approach.²⁴ Here a vehicle covered by insurance is, unless otherwise agreed, insured wherever it is, irrespective of whether or not the damage has been caused in a traffic incident. The restrictive approach was used by the Lietuvos vyriausiosios administracinės teisėms (Lithuanian Supreme Administrative Court) where the owner of a vehicle involved in an accident occurring in an enclosed area was not subject to the obligation to take out insurance.²⁵ It was clear that at the time of the *Vnuk* ruling, two broad approaches to the interpretation of the MVID existed. Member States would either adopt an expansive interpretation regarding any damage connected with the use or operation of a vehicle. The second approach was restricted to obligations to insure only in the event of road traffic accidents. Such inconsistency in approach was not helpful to a harmonised application of the MVID.

It was further evident from the evolution of the wording used in the MVIDs that a departure from a vehicle-centred approach to a person-centred one lent itself to an assessment that the MVID was no longer entrenched in the 'traffic accident' and 'use' paradigm. The application of phraseology including an 'accident caused... by a vehicle,'²⁶ and 'accidents caused by... vehicles,'²⁷ along with Point 10 of Annex A to Directive 73/239²⁸ where reference is made to civil liability '... arising out of the use of motor vehicles operating on the land' resulted in the interpretation of Directive 73/239 so as not to restrict the risk to be covered to road traffic incidents.

Thus, in the wake of *Vnuk*, 'Vehicle' includes any motor vehicle intended for travel on land (including agricultural machinery). The 'use of vehicles' includes any actions which are 'consistent with the normal function of that vehicle'²⁹ and this is not a matter that is to be determined by Member States. The geographic scope of the requirement for compulsory

²¹ Article 4.

²² Nuances of the terms 'use', 'circulation', and 'utilisation' were effected in the transposition of article 3(1) of the Directive by France, the UK, Slovenia, Bulgaria, Czech Republic, Estonia, Finland, Latvia, Malta, Slovakia, Denmark, Germany, Hungary, Lithuania, Romania and Sweden.

²³ Case C-129/94 *Rafael Ruiz Bernáldez* [1996] ECR I-1829 at [18], and Case C-442/10 *Churchill Insurance Company and Evans* [2011] ECR I-12639 at [30].

²⁴ Judgment No 65/12 of the Luxembourg Court of Cassation of 20 December 2012.

²⁵ Judgment No N575-1685/2011 delivered on 23 September 2011.

²⁶ First MVID, Article 5.

²⁷ Eighth recital in the preamble to the third MVID, Article 1(3) of the fourth MVID, recitals 5, 7 and 8 in the preamble to the fifth MVID and Article 4 of that Directive.

²⁸ First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life insurance.

²⁹ *Vnuk* n 10 above at [60].

motor vehicle insurance extends to private land. It is not restricted to a road or other public place.

A. THE CASE FACTS

Case C-80/17 *Fundo de Garantia Automóvel v Alina Antónia Destapado Pão Mole Juliana and Cristiana Micaela Caetano Juliana*³⁰ concerned Mrs Juliana, the owner of a car registered in Portugal. Given her deteriorating health she had stopped using the vehicle, had it immobilised and had parked it in the yard of her home, although it was in working order and capable of being driven. Consequently, she allowed the insurance coverage of the vehicle to lapse. Without her consent and knowledge, Mrs Juliana's son took the car, made it work and in the course of driving it with two friends, the vehicle travelled off road and crashed, killing all three occupants. The issue for the CJEU was whether Mrs Juliana had failed to comply with the law regarding the compulsory insurance of vehicles.

The EU has, since 1972, sought to harmonise the law regulating motor vehicle insurance. It has used the MVID to give effect to the free movement of goods and persons through establishing minimum standards of compulsory liability insurance. The MVID³¹ requires

Each Member State [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. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures.³²

In accordance with Portuguese law applied at the time of the accident

Every person who may have civil liability to pay compensation for financial damage and non-financial damage deriving from damage to property or personal injuries caused to third parties by any land-based motor vehicle... must, to enable the vehicle to be used, be covered... by insurance covering that liability. (Art. 1(1) of Decreto-Lei No 522/85 — Seguro Obrigatório de Responsabilidade Civil Automóvel (Decree Law No 522/85 concerning compulsory motor vehicle insurance against civil liability) of 31 December 1985).

This obligation fell on the owner of the vehicle. The Decree Law also provided, at Art. 21, for a compensatory body to satisfy claims of compensation caused by such vehicles and, at Art. 25, following the payment of compensation the compensation body is to be subrogated to the rights of the victim. Any person subject to the obligation to insure and who failed to take out coverage may be sued by the fund to recover a payment made.

Finally, Art. 503(1) of the Civil Code provided that every person with control of any land-based motor vehicle and who used this for their own needs was liable for the damage resulting from the risks inherent in the vehicle, whether or not the vehicle was in use.

Taken together, the Portuguese law required compulsory motor vehicle insurance to be held for any 'land-based motor vehicle.' EU law, as noted above, imposed an obligation on each

³⁰ Case C-80/17 *Fundo de Garantia Automóvel v Alina Antónia Destapado Pão Mole Juliana and Cristiana Micaela Caetano Juliana* [2018] ECLI:EU:C:2018:661.

³¹ The first MVID.

³² *ibid* Article 3(1).

Member State to establish a guarantee fund to act as the insurer of last resort³³ on the basis that, for example, a driver causing an accident involving a motor vehicle is uninsured or untraced. In Portugal the Fundo de Garantia Automóvel occupies the position of motor vehicle guarantee fund and it satisfied the claim for compensation associated with the accident. The Fundo de Garantia Automóvel considered that Mrs Juliana was subject to an obligation to insure her vehicle against civil liability and claimed the €437,345.85 it had paid in compensation to the passenger victims.³⁴ Mrs Juliana denied that she was liable for the accident or under an obligation to hold insurance for a vehicle parked on private land. The vehicle was not to be used in a public place and indeed was never to be used again due to her failing health.³⁵

The case was appealed to the Supreme Court of Portugal which referred two questions to the CJEU.³⁶

1. Must Article 3 of [the First Directive] be interpreted as meaning that the obligation to take out motor vehicle civil liability insurance extends even to situations in which the vehicle is, by the owner's choice, immobilised on private land, and not on public roads?

or

Must it be interpreted as meaning that in those circumstances, the owner of the vehicle is not under an obligation to insure, regardless of the liability of the Fund ... to third party victims, in particular in cases of unauthorised use of a motor vehicle?

2. Must Article 1(4) of [the Second Directive] be interpreted as meaning that the Fund ... which, because there was no... insurance contract, paid the relevant compensation to the third party victims of the traffic accident... has the right of subrogation against the vehicle's owner, regardless of whether that owner was responsible for the accident?

or

Must it be interpreted as meaning that the subrogation by the Fund ... in relation to the owner depends on the prerequisites of civil liability..., in particular the condition that, when the accident occurred, the owner had actual control of the vehicle?

In answer to the first question the CJEU held that Art. 3(1) was to be interpreted as meaning that for the use of a motor vehicle, insurance cover is obligatory when the vehicle is registered in a Member State and is capable of being driven but is parked on private land. A vehicle in this state is still a 'vehicle' for the purposes of the definition provided in the MVID. Indeed, were this not the case, then in the absence of a requirement of such a vehicle

³³ Established in the Second MVID.

³⁴ *Juliana* n 32 above at [17].

³⁵ *ibid* at [18].

³⁶ *ibid* at [31].

to be insured, the national guarantee fund body would be under no obligation to satisfy claims to protect third party victims.³⁷

Answering the second question, the court considered that Art. 1(4) of the Second Directive did not prevent a Member State from legislating to give effect to a compensating body to bring a claim to recover damages against a vehicle owner who had failed to have in place insurance cover on that vehicle.³⁸ Further, this did not prevent the compensatory body from seeking to recover monies from the person who caused the accident, in addition to, or in substitution of the person responsible for the accident. Member States would also not be precluded from taking this action even in the absence of any civil liability on the owner,³⁹ a point that the Supreme Court of Portugal considered ‘disproportionate.’

Juliana thus continued the general principle established in *Vnuk*. Motor vehicles on private land, even where they have been officially withdrawn from use (for example as in the UK through a Statutory Off Road Notification (SORN) declaration)⁴⁰ and are capable of being driven, are to be considered vehicles for the purposes of the MVID. Regardless of the owner’s intention (adopting the Advocate-General’s objective rather than subjective test) not to use the vehicle, and the fact that it is maintained on private land, the obligation for compulsory insurance persists. The CJEU also made reference to its jurisprudence in *Vnuk*, *Rodrigues de Andrade and another v Proença Salvador [Andrade]*⁴¹ and *Torreiro v AIG Europe Limited, Sucursal en España and Unión Española de Entidades Aseguradoras y Reaseguradoras (Unespa)*⁴² but excluded these from its deliberations as the cases related to situations following from an insured vehicle rather than whether the obligation to insure the vehicle in question existed.

The cases are instructive of the changing law on the duty to insure motor vehicles, although they differ as to the scope to which obligations to third party victims exist. *Andrade* involved Mrs Maria Alves who died in March 2006 following an accident at work. A tractor was being used to deliver herbicide at a vineyard. The vehicle was stationary and parked on a sloped terrace. Its weight, the vibration of the tractor’s motor as a pump to administer the spray and recent heavy rainfall led to a landslide where the vehicle crushed Alves. Alves’ widower sought damages against, among others, the insurer with whom the owner of the vehicle had a policy against liability in respect of the use of the vehicle. The insurer denied liability beyond material losses. The tractor had been insured in relation to occupational accidents. Under Portuguese law, claims against two of the defendants had to be dismissed because the tractor was not involved in a ‘traffic accident’ which was capable of being covered by insurance against civil liability. The accident had not occurred when the tractor was being used as a

³⁷ *ibid* at [46]. In the national context, in Clause 5 Uninsured Drivers Agreement 2015 (as amended), the MIB has no liability for any claim ‘arising out of the use of a vehicle which is not required to be covered by a contract of insurance unless the use is in fact covered by a contract of insurance.’

³⁸ *ibid* at [56].

³⁹ *ibid* at [57].

⁴⁰ However, given the effect of *Juliana*, SORN will no longer remove the obligation on the owner of a vehicle stored on private land to possess motor vehicle insurance.

⁴¹ Case C- 514/16 *Isabel Maria Pinheiro Vieira Rodrigues de Andrade, Fausto da Silva Rodrigues de Andrade v José Manuel Proença Salvador, Crédito Agrícola Seguros — Companhia de Seguros de Ramos Reais SA, Jorge Oliveira Pinto* [2018] 4 WLR 75, [2017] WLR(D) 788, ECLI:EU:C:2017:908, [2017] EUECJ C-514/16, EU:C:2017:908.

⁴² Case C-334/16 *José Luís Núñez Torreiro v AIG Europe Limited, Sucursal en España and Unión Española de Entidades Aseguradoras y Reaseguradoras (Unespa)* [2017] ECLI:EU:C:2017:1007, EU:C:2017:1007, [2017] EUECJ C-334/16.

means of travel.⁴³ Thereby the Tribunal da Relação de Guimarães (Court of Appeal, Guimarães, Portugal) referred questions to the CJEU in respect of the requirement for vehicles used on private land to be covered by insurance. The CJEU had held in *Vnuk* that all vehicles ‘whose use is consistent with the normal function of that vehicle’ were subject to insurance. In *Andrade*, the CJEU identified that ‘the circumstances of the case that gave rise to [*Vnuk*] are such that it may be concluded that the normal function of a vehicle is to be in motion.’⁴⁴ There was no distinction between the application of that requirement to vehicles on public or private land. In *Andrade* the tractor had been stationary at the time of the accident and the Tribunal da Relação de Guimarães asked the CJEU to clarify the wording used in the *Vnuk* judgment. The Portuguese court considered that the ‘normal function’ of a vehicle meant that it was in motion. The court requested clarification on the status on the ‘use of a vehicle’ which was being used as a machine for generating power (here the tractor was being used to power the spray in dispensing the herbicide) and not being used for the purpose of travel. The CJEU referred to *Vnuk* when identifying that the obligation to hold motor vehicle insurance was not dependent on whether a vehicle was moving or stationary, if its engine was running or turned off, or where the vehicle was being used (public or private land). It did concede that some vehicles can have different functions depending on the circumstances in which they are being used. Thus, a tractor for instance may be used as a means of transport, but it may also be used as a generator to power a herbicide sprayer. Depending on its particular use at the time of the accident would determine whether insurance cover was compulsory or not.

The CJEU held against the requirement for vehicles such as tractors being used in the capacity in *Andrade* to be subject to compulsory insurance. In terms of the ‘use of vehicles,’ the MVID does not, considered the CJEU, cover a situation where an agricultural vehicle has been involved in an accident when its principal function,⁴⁵ at the time of the accident, was not as a means of transport but rather for the carrying out of work.⁴⁶ This will require further guidance and detailed instruction to identify where the obligation begins and ends.

A. RECONCILING VNUK, JULIANA, ANDRADE AND ENGLISH LAW

The facts of *Vnuk* have been well documented since the CJEU judgment in 2014. In that case, a farmworker was injured whilst on a ladder in a barn. The ladder on which he was standing was struck by the driver of a tractor reversing a trailer. The tractor was not subject to insurance as, under the law of Slovenia, a vehicle used exclusively on private land was not so required. The CJEU pronounced on two main issues. The first was of the definition of a ‘motor vehicle’ for the purposes of the MVID.⁴⁷ Any vehicle which is intended for travel on land and propelled by mechanical power (although not running on rails), and any trailer, whether coupled to a vehicle or not, falls within the MVID’s⁴⁸ definition of vehicle.⁴⁹ The second point of law established related to the ‘use’ of that vehicle. Where a tractor (for the purposes of the *Vnuk* ruling) is being used consistently within the sense of the normal function of such a vehicle, it is within the scope of the MVID, regardless of the geographic range of that use. Thus, national law fails to be in conformity with the judgment. In RTA

⁴³ *Andrade* n 43 above at [15].

⁴⁴ *ibid* at [19].

⁴⁵ *ibid* at [41].

⁴⁶ *ibid* at [42].

⁴⁷ The sixth MVID.

⁴⁸ *ibid*.

⁴⁹ As provided in the first MVID, Article 1.

Section 185 the definition of vehicle provides: “*motor car*” means a mechanically propelled vehicle, not being a motor cycle or an invalid carriage, which is constructed itself to carry a load or passengers... The section of the Act continues its definition through reference to the weight of the vehicle depending on whether it is intended to carry passengers or goods. The UK definition is therefore significantly narrower (perhaps unnecessarily so) than that which exists for the MVID, and the MVID and RTA concepts of a ‘vehicle’ and its ‘use’ differ on substantive points.

The scope of the use of a vehicle and the extent to the requirements for its owner to carry liability insurance cover are also different. English law, in the RTA at least, requires that vehicles used on a ‘road or other public place’ are subject to compulsory insurance, but those used exclusively on private land are not. The Court of Appeal in *MIB v Lewis* ruled that the UK breached its EU obligations through the restrictive definition in national law. It gave judgment in favour of a third party victim who suffered injury on private land by the driver of an uninsured vehicle. The Court extended the scope of protection by holding the MIB to be an emanation of the State and followed the CJEU’s judgment in *Juliana* regarding compulsory insurance extending to vehicles used on private land. It is worthy of note, however, that as recently as March 2019 the Supreme Court, when asked whether a purposive interpretation of the RTA to give effect to the MVID was possible, it refused.⁵⁰ The ruling in *MIB v Lewis* does not, of course, change the RTA definition and until new Agreements are concluded between the MIB and Secretary of State, national law and the EU obligations remain substantially opposed.

In response to *Vnuk*, in June 2016, the EU Commission undertook a consultation exercise, its ‘Adaptation of the scope of Directive 2009/103/EC on motor insurance.’⁵¹ The consultation sought opinions on four options in light of the judgment. The first was for no action to be taken and Member States would simply have to implement the new direction provided by *Vnuk* in national law. Another option included for the amendment of the existing guarantee fund body to ensure additional resources were available to satisfy claims by third party victims of accidents on private land. The Commission suggested that certain vehicles could be subject to derogation from insurance requirements, but this would impose responsibility for the satisfaction of such claims to be undertaken by the guarantee fund, and its final option was for an amendment to the sixth MVID to possibly limit the effects of *Vnuk*.

National law, whilst being the inspiration for the first MVID, has frequently been at odds with the EU parent law. Whilst national courts, particularly the Court of Appeal, have held English law to comply with the spirit and overall aims of the MVID⁵² (and arguably erroneously on these points), there are notable cases where the UK has been held in breach of its obligations and subject to successful state liability claims for damage suffered as a result of its breach of the MVID.⁵³ Indeed, motor vehicle insurance law is one of the few areas of national jurisprudence where state liability has been a successful avenue for securing access to compensation for breach of EU law, if not in enabling access to those EU rights.

The *Andrade* judgment raises many issues which will have to be (re)considered by the CJEU and in the consultation process held by the EU Commission when establishing its seventh

⁵⁰ *R & S Pilling t/a Phoenix Engineering v UK Insurance* [2019] UKSC 16, [2019] 2 WLR 1015, per Lord Hodge JSC at [40].

⁵¹ http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_fisma_030_motor_insurance_en.pdf.

⁵² *RoadPeace v Secretary of State for Transport* [2017] EWHC 2725 (Admin).

⁵³ See *Byrne v Motor Insurers' Bureau* [2008] EWCA Civ 574 and *Delaney v Pickett* [2011] EWCA Civ 1532.

MVID. If the *Vnuk* ruling was unexpected, there was at least a sense of reason to its creation. Where a third party victim of a motor vehicle accident suffers loss, it is important that they are protected through the imposition of compulsory liability insurance. Even where such vehicles never leave the confines of private land, if individuals are permitted to visit and work in proximity with such vehicles, it is reasonable to foresee the potential for accidents to occur in the use of a motor vehicle. The *Andrade* judgment takes the journey started in *Vnuk* in a different, possibly hazardous, direction.

First, it seems odd that *Andrade* and *Juliana*, being the most recent pronouncements on the issue of compulsory motor insurance by the CJEU, can have such different approaches. Nowhere in the MVID exists instruction that compulsory motor insurance is confined to the use of vehicles for transport. *Andrade* seeks to change the imposition from *Vnuk* that motor vehicles must be insured where they are being used according to their normal function. It must be accepted that the powering of agricultural equipment forms part of the normal function of a tractor (in the same way as using such a vehicle to transport a trailer – per *Vnuk*). The further implications of the judgment includes the incidental effect that using vehicles may have. For instance, using a tractor (to continue the *Vnuk* / *Andrade* theme) to plough a field involves it being used for the purposes of work, yet it will be used as a means of transport to fulfil this task. Would *Andrade* hold any accident occurring during the course of this activity as exempt from the requirement of insurance? Will the CJEU consider the timing of the accident as determinative of the need for insurance? Perhaps the CJEU will adopt an incidental effect similar to the law relating to acts performed in the course of employment and thus attracting the vicarious liability of a principal. The judgment also has implications for cases being heard in the UK and for the potential liability in damages against the State. In June 2019 the Court of Appeal provided its judgment in *MIB v Lewis*. The case facts involved the Mr Lewis having suffered grievous injury following being struck, deliberately, by the (uninsured) driver of a four-wheel drive vehicle. The High Court ruled *inter alia*, and following the reasoning established in *Vnuk*, that whilst the injury involving the vehicle occurred on private land, the vehicle must be subject to compulsory insurance. However, the High Court did not seemingly concern itself with *Andrade* and its effect on such activity, while the Court of Appeal gave the case merely a cursory mention.⁵⁴ In *Lewis*, the driver of the vehicle was chasing two men he suspected of stealing scrap metal from his property, he pursued them along a private lane, drove through a barbed wire fence on to private land where he struck one of the men and caused the injury. There is no doubt that the vehicle was being used in the context of transport, yet this was incidental to it being used as an instrument to catch (and perhaps to apprehend) the fleeing (suspected) burglar. The issue of the use of a car as a means to injure a person has previously been considered by the Court of Appeal in *Keeley v Pashen & Anor*.⁵⁵ The driver of a mini-cab (Mr Pashen) deliberately drove his vehicle at four men, previous passengers in his vehicle, after, claimed the driver, he had been subject to an attack by them. It was accepted in the criminal trial associated with this event that the driver was in a state of panic at the time of the incident and he had merely intended to frighten the men. In this case, Brooke LJ used a somewhat convoluted method of enabling the widow of the victim (Mr Keeley) to recover damages from Mr Pashen’s insurer because, whilst Mr Pashen’s insurance only covered ‘social, domestic and pleasure’ use of the vehicle, these being the last customers of his shift, and albeit only 16 seconds had elapsed between the men leaving the mini-cab and the injury to Mr Keeley, the essential character of Mr Pashen’s journey was to drive home. He was no longer using the vehicle as a mini-cab.

⁵⁴ *MIB* n 6 above at [62] and [70].

⁵⁵ *Keeley v Pashen & Anor* [2004] EWCA Civ 1491.

The reversing up the road to engage the men (where the injury took place) was an incidental episode and should not be considered as a separate journey.⁵⁶ This point had already been established through the judgment delivered by Roskill and Megaw LJ in *Seddon v Binions*⁵⁷ where Megaw LJ explained

if there be such a primary purpose, or essential character, then the Courts should not be meticulous to seek some possible secondary purpose, or some inessential character, the result of which could be suggested to be that the use of the car fell outside the proper use for the purposes of which cover was given by the insurance policy.

What was the primary purpose of the driver's journey in *Lewis*? Was the motor vehicle being used as a 'means of transport' for the driver to reach the suspected burglars or was it intended to be used as a weapon with its transport function merely ancillary to this aim?

Thus, might *Andrade* have been used by the Court of Appeal to limit the effect of *Vnuk* and restrict its application in the UK? Also, the requirement to hold insurance for motor vehicles on private land attracted the attention of its extension to the criminal law applying in these hitherto unregulated areas. The Court of Appeal followed the *Vnuk/Juliana* jurisprudence relating to the requirement for the compulsory insurance of motor vehicles on private land but failed to consider the broader implications of the ruling in respect of criminal liability and its enforcement.

Andrade seems to mirror a situation that occurred in England through the 2015 Uninsured Drivers Agreement which had the potential for significant unintended consequences relating to the 'normal use of a vehicle.' In the 2015 Agreement, the MIB sought to exclude its liability in the event of the use of a vehicle for the purposes of terrorism (Clause 9).⁵⁸ It was arguable that here the MIB was attempting to exclude its liability for loss where a vehicle was used as, for example, a car bomb. This clearly would not have been the normal, expected use of such a vehicle. Therefore the Agreement was proactively seeking to prevent the MIB being called upon to settle any damages claims from third party victims when no insurance cover was applicable.⁵⁹ Unfortunately for it and the wording used in the Agreement, the attempted exclusion was so broad as to cover a multitude of scenarios which would not necessarily be thought of as terrorist-related but would have been included in the exclusion permitted in Clause 9.⁶⁰ This would, had it been tested, have breached the MVID which permitted an exclusion of liability by an insurer on one ground only, which is not an act of terrorism.⁶¹ This was not, we argue, what the MIB envisaged when creating Clause 9 of the Agreement but this is where a literal reading of the text led (the exclusion clause was

⁵⁶ *ibid* at [18].

⁵⁷ *Seddon v Binions* [1978] 1 Lloyd's Rep 381.

⁵⁸ The clause read: [The] MIB is not liable for any claim, or any part of a claim, where the death, bodily injury or damage to property was caused by, or in the course of, an act of terrorism within the meaning of Section 1 of the Terrorism Act 2000.

⁵⁹ See n 39.

⁶⁰ See J. Marson and K. Ferris, 'The Uninsured Drivers' Agreement 2015 as a Legitimate Source of Authority' (2017) 38(2) *Statute Law Review* 133.

⁶¹ The CJEU, in cases including Case C-129/94 *Rafael Ruiz Bernáldez* [1996] ECR I-1829, Case C-348/98 *Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correia Ferreira v Companhia de Seguros Mundial Confiança SA* [2000] ECR I-6711 and Case C-442/10 *Churchill Insurance Company Limited v Benjamin Wilkinson and Tracy Evans v Equity Claims Limited* [2011] ECR I-00000, had established the only permissible reason for the exclusion of a third party's claim against a policyholder's insurers. This was where that third party victim knew that the vehicle through which the accident had been caused was stolen.

subsequently removed in the Supplementary Agreement 2017). Precision in the drafting of Agreements, contracts and judgments is essential to avoid the unintended consequences of subsequent uncertainty.⁶² The ruling in *Andrade* requires further guidance and detailed instruction to identify the extent of the obligation to insure and its compatibility with the MVID. It would be more consistent with the tenor of the MVID and the *Vnuk/Juliana* judgments for the extension of the requirement for compulsory motor insurance to apply to all motor vehicles on private land. *Andrade* should be reversed to end conflicting jurisprudence which attempts to distinguish between different categories of motor vehicles for the purposes of compulsory insurance cover. *Vnuk*'s 'normal use of a vehicle' condition for the imposition of compulsory insurance is a common sense approach. Whilst it is recognised that certain types of vehicle (especially those used in agricultural ventures) may have more than one function, it must be remembered that the judiciary's journey of clarifying the extent of the MVID in *Vnuk* began with an accident involving a tractor. To attempt to differentiate between the application of insurance cover depending on the particular use of a vehicle at the exact time of an accident establishes a level of uncertainty for all parties which is unhelpful and fundamentally illogical. Particularly so given the trajectory of the jurisprudence on the issue.

CONCLUSIONS

The extension of the obligation on Member States to ensure motor vehicles used on private land were covered by insurance began with *Vnuk*. In such circumstances, the innocent third party victims of uninsured drivers would have, as a minimum, recourse to the national compensation body to recover damages. In the aftermath of the judgment, bodies including the MIB disagreed with this extension of the law and considered that the CJEU had erred in its interpretation of the sixth MVID. It was buoyed in its maintenance of this impression by the EU Commission undertaking a consultation exercise in light of the ruling, ahead of a seventh MVID. Further, *Andrade* seemed to offer a boundary to the extent of such liability. Here vehicles, particularly agricultural vehicles, were recognised as possessing multiple functions and the CJEU restricted compulsory insurance only where such a machine (which was capable of carrying out work) was used in its function as a vehicle. This creates a tension in the correct identification of the functioning of a vehicle. The tractor in *Andrade*, being used to dispense herbicide, was stationary at the time of the accident. The CJEU considered the 'normal use of the vehicle' (in adopting the terminology used in *Vnuk*) to be when it is principally being used as a means of transport. However, this is contrary to the finding of the Court in *Juliana* where it expressly identified that the MVID requires insurance to be held for vehicles whether they are moving or not. The only requirement is that the vehicle is capable of being moved (ie capable of being used as a means of transport). To hold otherwise would be to remove the requirement of insurance for these vehicles and thereby removing the protection afforded through the national compensation guarantee fund. Thus, the stationary car in *Juliana* is subject to compulsory insurance yet the stationary tractor in *Andrade* is not. Further, presumably, had the tractor in *Andrade* been moving to a new location (perhaps only a few feet) whilst on the terrace and had then slipped down the hill crushing the victim, the insurance would have come into effect as it was, at that moment, a vehicle rather than a machine.

⁶² On the issue of legal certainty in relation to motor vehicle insurance see J. Marson and K. Ferris, 'Motor Vehicle Insurance Law: Ignoring the Lessons from King Rex' (2017) 38(5) *Business Law Review* 178.

Ultimately, whilst the jurisprudence of the CJEU has clarified the instruction in the MVID relating to the geographic scope of where compulsory insurance exists, and offers greater protection to third party victims of accidents involving motor vehicles, the latest cases seem to differ on substantial points. Given the prevalence of agricultural, construction and industrial vehicles used exclusively on private land and thus more likely to be uninsured under the current insurance regime than those vehicles with access to a road and other public place, for *Andrade* to draw a distinction between their use as a machine and as a vehicle blurs the lines of where compulsory insurance takes effect. Further, that these cases are referred to by the EU Parliament in its proposal for amendment to the MVID without drawing the distinctions raised in this note is unhelpful.⁶³ Such uncertainty is not beneficial to anyone and the CJEU should, we consider, clarify this point of law by fully adopting its reasoning in *Juliana* and explicitly overruling *Andrade*.

⁶³ Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/103/EC. Brussels, 24.5.2018 COM(2018) 336 final 2018/0168 (COD).