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THE COMPATIBILITY OF ENGLISH LAW WITH THE MOTOR VEHICLE INSURANCE DIRECTIVES: THE COURTS GIVETH... AT LEAST UNTIL BREXIT DAY

In September 2018 the High Court delivered a judgment, approved by the Court of Appeal in June 2019, which has significant, albeit limited, implications for the third-party victims of motor vehicle accidents. In *Lewis v Tindale, Motor Insurers' Bureau and Secretary of State for Transport* [2018] EWHC 2376 (Q.B.); [2019] 1 W.L.R. 1785 and *MIB v Lewis* [2019] EWCA Civ 909; [2019] 6 WLUK 26 the courts heard a claim for damages relating to an incident involving a motor vehicle where the claimant suffered grievous injuries on private land. As the driver was uninsured the victim had to seek compensation from the body established to act as insurer of last resort – the Motor Insurers' Bureau (MIB). The MIB is the body established in the UK to satisfy claims where the negligent driver at fault lacks the means to satisfy an award. The MIB's responsibility relates to obligations established in a succession of agreements created between it and the Secretary of State for Transport, and these derive from obligations under a series of Motor Vehicle Insurance Directives (MVID). The issue for the courts was the compatibility between EU law and the transposing national legislation and administrative agreements.

This is a landmark judgment and its significance is four-fold. First, despite the MIB's contention as to the erroneousness of the Court of Justice of the European Union's decision in Case C-162/13 *Vnuk v Zavarovalnica Triglav dd* EU:C:2014:2146; [2014] 9 WLUK 139, compulsory motor vehicle insurance applies to private land. It is not restricted to "a road or other public place." Thus, this restrictive definition in the Road Traffic Act 1988 may now be considered bad law. Second, the MIB is an emanation of the State and this reverses previous national authority as to its status. This gives third-party victims a cause of action against the MIB directly rather than having to pursue a remedy through State liability against the UK and it provides for the vertical direct effect of any directly effective and incorrectly transposed provisions of the MVIDs. Third, both arts. 3 and 10 of the sixth MVID (Directive 2009/103/EC) have direct effect and are therefore enforceable against emanations of the State. Finally, given that the MVID and the implications of this ruling concern EU law, they are likely to end when the UK concludes its Brexit negotiations (and the transitional period where free movement principles will cease to apply). Thus, its effect may terminate following the UK's intended withdrawal from the EU on 31 October 2019.

On 9 June 2013 the claimant (Mr Lewis) suffered serious injuries when walking along private land where he was struck by an uninsured four-wheel-drive motor vehicle driven by Mr Tindale. Tindale drove the vehicle from his home, along a road and footpath, and continued deliberately through a barbed wire fence into a field. As he drove across this private land, he struck Lewis with his car, causing him injury. Significantly for the purposes of national law, the vehicle being driven by Tindale at the time of the accident was uninsured and the injuries of the victim were sustained on private land, not a road or other public place.

Tindale was debarred from defending the claim, whilst the second defendant, the MIB, argued that it too was not responsible for compensating Lewis for his injuries due to the application of the Uninsured Drivers Agreement (UDA) 1999 and the Road Traffic Act 1988 (RTA88) s. 145.

The MIB is a body empowered under a requirement of the (second) MVID (Council Directive 84/5/EEC) to ensure, subject to exclusions, that funds are available to compensate

the innocent victims of a motor vehicle accident due to an unsatisfied judgment. This applies regardless of the financial position of the driver at fault. The MIB and the Secretary of State together have established, over a number of years, two agreements which supplement the RTA88 and give effect to aspects of the MVID – the UDA and the Untraced Drivers' Agreement (UtDA). These Agreements have been modified and updated on several occasions, often due to incompatibilities and unreasonable and unlawful restrictions in their scope when compared with the UK's obligations under EU law. The current UDA was last updated in 2017 albeit *Lewis and MIB v Lewis* relate to the 1999 Agreement.

The first implication of the judgments is to the geographic scope of the requirement for the owner / user of a motor vehicle to hold insurance. The RTA88, the principal legislative provision for the regulation of the use of motor vehicles, at s. 143 provides that “a person must not use a motor vehicle on a road [or other public place] unless there is in force in relation to the use of the vehicle... such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act...” The RTA88, as originally drafted, at s. 145(3)(a) required the compulsory insurance of motor vehicles used on a “road.” In *Clarke v General Accident Fire and Life Assurance Corporation plc* [1998] 1 W.L.R. 1647; [1998] 4 All E.R. 417 a motor accident occurred in the car park of a supermarket and it was at the House of Lords where the geographic extent of the requirement for compulsory motor vehicle insurance was considered. The Third MVID (Council Directive 90/232/EEC) made no limitation for the compulsory insurance of motor vehicles on a road. Despite accepting the disparity between EU and national law, the Lords shied away from interpreting the RTA88 as extending beyond the word “road.” Soon after the decision, the UK enacted the Motor Vehicles (Compulsory Insurance) Regulations 2000 which amended s. 145 with the additions “... or other public place” to comply with the MVID.

In *Vnuk*, the Court of Justice of the European Union (CJEU) heard a reference from Slovenia regarding a man injured on a private farm by the driver of a tractor. Two issues were raised. One was in relation to the “use of vehicles” (within the meaning of art. 3(1) of the first MVID) and the second was where this injury occurred on private land. At the time Slovenian law imposed no requirement for an insurance policy to cover injuries concerned with accidents involving the use of vehicles on private land. The CJEU ultimately held that for the purposes of art. 3(1) the “use” of a vehicle could not be left to Member States to decide. Further, the term “vehicle” in that Article refers to “... any use... that is consistent with the normal function of that vehicle.” This approach was confirmed in Case C-514/16 *Andrade v Salvador & ors*, EU:C:2017:908; [2018] 4 W.L.R. 75 (at [34]). Despite this guidance, Soole J in *Lewis* was not prepared to adopt a venturesome *Marleasing* interpretation (Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* EU:C:1990:395; [1990] E.C.R. I-4135) so as to excise the words “on a road or other public place” from the RTA88 s. 145(3)(a). For Soole J, (at [58]) such an approach “clearly goes against the grain and thrust of legislation which provides that limitation.” This, he continued, would amount to an amendment and not an interpretation. Seemingly, the addition and deletion of words in a statute to provide a consistent interpretation with superior EU law was, for the judiciary in *Lewis* and *Clarke*, the exploration of areas too risky to envision. However, he did agree that the jurisprudence of the CJEU extended the provision of compulsory motor vehicle insurance to private land and this necessitated a consistent interpretation through national law.

Moving on to the issue of the status of the MIB, the sixth MVID provides at art. 10 for Member States to make “provision for a body to guarantee that the victim [of an accident involving a motor vehicle] will not remain without compensation where the vehicle which

caused the accident is uninsured or unidentified.” This body (operating the guarantee fund) in the UK is the MIB. The MIB is a private company which establishes agreements, not contracts, with the State. As such it has argued, and the UK had consistently held (for example in *Byrne v MIB* [2007] EWHC 1268 (QB); [2008] 2 W.L.R. 234 and *Mighell and ors v Reading*; [1999] Lloyds Rep IR 30; [1999] 1 CMLR 1251) in contradiction to other Member States including Ireland and the jurisprudence of the CJEU, that the MIB cannot be an emanation of the State. *Byrne* was interesting however in that it did at least, through the reasoning of Flaux J, accept Case C-334/92 *Teodoro Wagner Miret v Fondo de Garantía Salarial* (1993) EU:C:1993:945; [1993] E.C.R. I-6911 and the position that where the Member State had designated the MIB as the body to implement the requirements for a compensatory body under the MVID, provisions of the MVID could have direct effect against it. Further, in Case C-63/01 *Evans v Secretary of State and Motor Insurers’ Bureau* EU:C:2003:650; [2003] E.C.R. I-14447 the CJEU held that it was within a Member State’s authority to designate this responsibility and power to a pre-existing body (such as the MIB which has held the domestic role of compensating the victims of uninsured drivers since its initial agreement with the Minister (now Secretary of State) since 1946).

The responsibility for paying compensation where a third-party victim has suffered injury or loss due to the actions of an uninsured or untraced driver rests with the MIB. And, at least until *Lewis* clarified matters, the responsibility for paying compensation to individuals who were denied a remedy under the misapplication of the UDA lay with the State. It was held in *Byrne* that the MIB did not satisfy the test of an emanation of the State as provided for in the (tripartite) test established in Case C-188/89 *Foster v British Gas* EU:C:1990:313; [1991] 1 Q.B. 405 (at [20]):

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

Flaux J acknowledged that providing compensation to the victim of an uninsured driver was a public service, but, and through a very restrictive interpretation of the *Foster* tests, considered that the State did not provide any control over the way in which the MIB carried out its functions. However, in *MIB v Lewis* Flaux L.J. seemingly had a change of heart and agreed that, like the Motor Insurers’ Bureau of Ireland (MIBI) in Case C-413/15 *Farrell v Whitty (No 2)* EU:C:2017:745; [2018] Q.B. 1179 (at [74-75]) the MIB “possesses special powers by virtue of the provisions of the RTA... Accordingly, like the MIBI, the MIB is an emanation of the State against which Article 10 of the 2009 Directive can be enforced by the claimant, as it has direct effect.”

In *Farrell (No. 2)*, the Supreme Court of Ireland referred the question of the status of the MIBI to the CJEU and thus whether victims of uninsured drivers could claim directly against the MIBI or had to continue to pursue State liability claims for alleged breaches of EU law against Ireland. A motor vehicle accident occurred in 1996 where four passengers occupying the rear of a van, but one which did not have seats, were injured as part of the collision. Ann Marie Farrell was one of the occupants and died as a result of the accident. Her sister sought compensation through the MIBI but was denied due to the law in Ireland which allowed the insurer to escape liability where the vehicle involved in the accident was not designed and constructed with seating. The CJEU found Ireland in breach by allowing the exclusion of liability in this regard and Elaine Farrell received an undisclosed settlement and stopped her

claim for further damages. However, the issue then became a dispute between the MIBI and the Irish State as to who was to settle the payment. Thus, the conflict was whether the MIBI was an emanation of the State or whether the status quo, at least in relation to national jurisprudence, of a State liability claim being the only remedy available continued. At the High Court in Ireland, Birmingham J referred to commentary by Advocate-General Stix-Hackl in Case C-356/05 *Farrell v Whitty* EU:C:2007:229; [2007] E.C.R. I-3067 (*Farrell (No. 1)*) where agreement was made that the MIBI should be accepted as occupying the same role as the Irish State for the purposes of the direct enforcement of the provisions of the MVID. The CJEU had moved away from the restrictive and narrow interpretation of an emanation of the State as provided in *Foster* to one where the body in question was to be viewed as having been responsible for providing a public service. The essence of the MIBI as a body which fulfilled the functions of those authorised under the MVID, that the Irish State had control of the requirements of insurance which the MIBI had to cover in the event of an absence of insurance, and the statutory requirement for membership of the MIBI for those organisations offering services in the Irish motor vehicle insurance market, elevated the status of the MIBI above a mere private organisation entering an agreement with the State.

Similarly, in *Lewis* the High Court, using this jurisprudence held the MIB to be an emanation of the State. *Lewis* is important as a distinction exists between the MIB and the MIBI. The MIBI's agreement between it and the Irish State contained a caveat where, in certain circumstances, a Minister of the State was empowered to determine an issue in a dispute between the claimant and the MIBI. This authority of the State (and its control over the relationship with the MIBI) does not apply in the MIB agreements with the Secretary of State (but has become less important given the relaxation of the *Foster* tests). This was reassuring as it demonstrates an acceptance of the inevitable by national courts, but were this not the case, the UK would have been in breach of its responsibilities under the MVID since the inception of the obligation to establish a compensatory body. Thus, individuals who find the UK in breach of its EU obligations continue to have the option of bringing separate public law proceedings for damages under State liability. The significance of the *Lewis* ruling is that where the third-party victim finds inconsistencies between the MVID and the UDA (and presumably the UtDA), and there are many which continue in the most recent Agreement of 2017, that individual may seek to use the MVID, aspects of which have been held to be directly effective, against the MIB directly rather than having to pursue the (often secondary) remedy through a State liability action. This is particularly relevant given that in *R (RoadPeace) Ltd v Secretary of State for Transport* [2017] EWHC 2725 (Admin); [2018] 1 W.L.R. 1293 art. 3 of the sixth MVID was agreed to have direct effect as was art. 1 of the Third MVID in *Farrell v Whitty (No. 1)* (at [44]).

At the Court of Appeal, Soole J's assessment of the MIB as an emanation of the State and the provision of compulsory motor insurance applying to private land was accepted. The MIB conceded that the jurisprudence of the CJEU in *Vnuk* and subsequent cases (Case C-80/17 *Fundo de Garantia Automovel v Juliana* EU:C:2018:661; [2018] 1 W.L.R. 5798 and *Andrade v Salvador* established that the MVID's obligations extended to the use of vehicles on private land as well as a road or in a public place (at [38]). Article 3 of the MVID was, following the entire jurisprudence of the CJEU, sufficiently precise and unconditional to establish its direct effect (at [69]). Flaux L.J. concurred with Soole J that the UK had failed in its obligations under art. 3 of the sixth MVID (at [63]). He did so by identifying the need for compulsory motor insurance to extend to the use of motor vehicle on private land. This followed from *Vnuk* and *Andrade* and *Nunez Torrerio*. It further failed in its duty under art. 10 of the same Directive to assign responsibility for meeting that liability to the national compensation body.

Flaux L.J. further held that given arts. 3 and 10 of the sixth MVID are co-extensive, art. 10 by implication also has direct effect.

Conclusions

The decisions mark a transformation in the adherence of the national courts to substantial matters of EU jurisprudence. National law has been out of step with regards EU motor vehicle insurance law for decades. Sometimes the courts have demonstrated an understanding of the disparity and provided an appropriately compliant interpretation of the RTA88 and UDA (see *Allen v Mohammed and Allianz Insurance* [2016] 9 WLUK 176; [2017] Lloyd's Rep. I.R. 73). At others, and more frequently, they have arrived at conclusions which contradict the reasoning of the CJEU and the clarity contained in the MVID on a “holistic” comparison between the EU laws and the suite of national legislative provisions (see for example *Sahin v Havard and Riverstone Insurance (UK) Ltd* [2016] EWCA Civ 1202; [2017] 1 W.L.R. 1853). They have continued a denial of fundamental rights to third-party victims of accidents involving motor vehicles, despite clear instruction as to the deficiencies in national law.

The judgments are particularly important with regards ending the limited geographic scope of responsibility for insuring motor vehicles as contained in the RTA88, and it confirms the position of the MIB as an emanation of the State. That these issues had already been clarified by the CJEU is regrettable, as is the fact that this clarification of national law will apply only until the UK withdraws from the EU. However, it is a vindication for the arguments presented, preceding *Lewis*, which have highlighted breaches of EU obligations through the relationship between the MIB and the Secretary of State.