Too Little, Too Late? Brexit Day, Transitional Periods and the Implications of MIB v Lewis

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

Too Little, Too Late? Brexit Day, Transitional Periods and the Implications of MIB v Lewis

Abstract

For several decades the UK has been in breach of key aspects of the Motor Vehicle Insurance Directives (MVID). This has been observed through academic commentary and confirmed in successful state liability claims. There has also been a manifestly inconsistent approach taken by national courts at first instance and at appeal in the correct application of EU jurisprudence. In 2018 the High Court reversed years of inconsistent jurisprudence and changed key aspects of national protection for the third party victims of negligent uninsured drivers. In short, the 2018 High Court decision in Lewis v Tindale, as confirmed in MIB v Lewis [2019] at the Court of Appeal, extended the geographic scope of compulsory motor insurance, held the national compensatory body as an emanation of the state, and confirmed directly effective elements of the MVID. In relation to motor vehicle insurance, the importance of these decisions cannot be overstated. They represent a genuine sea-change in approach and acceptance nationally of established EU jurisprudence. Yet the victory is likely to be short-lived given the UK's imminent withdrawal from the EU and the intransigence of the government and the MIB to give effect to the rulings.

Keywords: Brexit; direct effect; liability on private land; Motor Insurers' Bureau; motor vehicle insurance directive; Road Traffic Act 1988; statutory interpretation.

Introduction

It is trite comment to say that the UK and the EU have had an often fractious relationship, especially when it comes to the UK's correct, full and timely implementation of EU law. Numerous examples exist of legal challenges against the UK because of differences in the laws which have disadvantaged individuals.[1] This conflict of laws has been played out in the insurance arena when considering the Motor Vehicle Insurance Directives (MVID) and the UK's transposition and implementation. Victories have been achieved through the use of state liability actions, yet disparities remain in national legislative and administrative provisions. Most notably, and as addressed in the Court of Appeal's recent decision in *MIB v Lewis* [2019] EWCA Civ 909, are the geographic scope to which the compulsory insurance of motor vehicles apply and the status of the Motor Insurers' Bureau (MIB) as an emanation of the state. Changes in these areas began in the High Court in September 2018. It was in *Lewis v Tindale, Motor Insurers' Bureau and Secretary of State for Transport* [2018] EWHC 2376 (QB) where the court heard a claim for damages relating to an incident involving a motor vehicle. In this case, the claimant, Mr Lewis, suffered grievous injuries due to the driving, on private land, of Mr Tindale. As Mr Tindale was uninsured, Mr Lewis had to seek damages from the national compensatory body, the MIB. The court at first instance had to determine if the MIB was required to meet a judgment in favour of the claimant under the Road Traffic Act 1988 (RTA88). The Uninsured Drivers Agreement 1999 (the relevant administrative agreement at the time) requires the MIB to satisfy any judgment against the driver where the judgment has not been settled within seven days. This is effective to

[1] See as recently as February 2019 with the Supreme Court judgment in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 involving an untraced driver. The judgment is wrong on a number of points, not least the application of EU law to national implementing measures. For commentary see N. Bevan "Principle v Process" (2019) 15 March *New Law Journal* 14.

judgments in respect of a liability to which compulsory insurance is applicable in the RTA88. The relevant section of the RTA88 is s. 145 which covers the death or injury to persons or property caused or arising out of the use of a vehicle on a road or other public place. Soole J concluded that the MIB was not required to satisfy the judgment under s. 145 as the accident here occurred on private land. Rather, it was obliged to compensate Mr Lewis due to the application of the MVID which was not so restricted in its geographic scope. The MIB was an emanation of the state, articles of the MVID had direct effect, and therefore the vertical application of those directives imposed the obligation on the MIB.

The High Court granted Mr Lewis the right to recover compensation from the MIB. In June 2019, in *MIB v Lewis*,[2] the Court of Appeal concurred, extending the ruling in respect of the direct effect of arts 3[3] and 10 of the MVID. These judgments have significant implications for the third-party victims of motor vehicle accidents and their protection. The judgment will only last until Brexit day (scheduled at the time of writing for 31 October 2019) or throughout any transitional period agreed between the UK and the EU if the UK has not already withdrawn its membership. Even the application of the European Union (Withdrawal) Act 2018, which at s. 7 provides for the retaining of EU laws in domestic law, and s. 6(3), which maintains the validity, meaning and effect of such laws in accordance with the general principles of EU law may not protect the rights of third-party victims. This, we argue, is for several reasons. First, due to the general hesitancy of national courts to apply a purposive interpretation of the jurisprudence of the Court of Justice of the European Union (CJEU). Further, there has been a lack of acceptance of the ruling in *MIB v Lewis* by the MIB. Finally, the lack of legislative action in light of this national ruling does not instil confidence that the implications of the judgment will be fully and consistently applied following the UK's withdrawal from the EU. However, and on a positive note, the cases establish landmark judgments which have implications for drivers, insurers, third party victims and extend to the criminal law. Contrary to the MIB's assertion that the CJEU decision in *Vnuk*[4] was wrong and that this was implicitly accepted through the EU Commission's subsequent consultation prior to the enactment of a seventh MVID, compulsory motor vehicle insurance extends to private land. It is not restricted to "a road or other public place" and this restrictive definition in the RTA88 s. 145 must now be considered bad law. Secondly, the MIB is an emanation of the state and this reverses previous national authority as to its status. This arms third party victims with a cause of action against the MIB directly. Thus, rather than having to pursue a public law remedy through state liability against the UK to recover compensation, the vertical direct effect of any directly effective and incorrectly transposed provisions of the MVIDs are available. This not only provides affected individuals with access to their rights rather than merely with the opportunity to recover damages lost through inaction on behalf of the state, but it also proactively changes national law through purposive statutory interpretation. Finally, as both arts 3 and 10 of the sixth MVID[5] have direct effect, they are consequently enforceable against emanations of the state.

The Facts

[2] *MIB v Lewis* [2019] EWCA Civ 909.

[3] Article 3 prescribes minimum standards of civil liability insurance necessary to provide comparable levels of compensation for third party victims of motor vehicle accident through the EU.

[4] *Damijan Vnuk v Zavarovalnica Triglav* (C-162/13) ECLI:EU:C:2014:2146; [2016] R.T.R. 10.

[5] Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability.

In June 2013, an accident occurred on private land leaving Mr Lewis with life changing injuries. It transpires that Mr Tindale thought that Mr Lewis and his associate were attempting to steal items from his premises. Mr Tindale entered his four-wheel drive Nissan vehicle and pursued Mr Lewis first along a road and footpath, and then, through a barbed wire fence, onto a field where his vehicle struck Mr Lewis. Mr Lewis suffered severe injuries to his spine and brain. For the purposes of national law, the vehicle being driven by Mr Tindale at the time of the accident was uninsured and the injuries were sustained on private land, not a road or other public place. Further, Mr Tindale lacked the means to satisfy any judgment. He was debarred from defending the claim, and the second defendant, the MIB, argued that it too was not responsible for compensating Mr Lewis, relying on RTA88 s. 145.[6] The MIB's obligation to satisfy a judgment, it claimed, only applies in respect of a "relevant liability" and due to the limitation of compulsory insurance only applying to motor vehicles on a "road or other public place," the accident here was beyond its remit.

The Relevant Law: the Road Traffic Act, the Uninsured Drivers' Agreement and the Motor Vehicles Insurance Directive

The RTA88 is the principal legislative provision for the regulation of the use of motor vehicles. At s. 143 it provides

> (1) Subject to the provisions of this Part of this Act – (a) 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 by that person 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…

Further, RTA88 s. 145 requires, for compliance with the Act

> (1) … a policy of insurance [satisfying] the following conditions. (2) The policy must be issued by an authorised insurer. (3) … the policy – must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person or damage to property caused by, or arising out of, the use of the vehicle on a road or other public place in Great Britain...

And, at RTA88 s. 95, an authorised insurer is an insurer which is a member of the MIB. Therefore collectively, these sections require that all motor vehicles used *on a road or other public place* must be subject to an insurance policy issued by an insurer which is a member of the MIB.

At the EU level, the first MVID, when enacted in 1972, required Member States to,

> take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in [their] territory [was] covered by insurance.[7]

---

[6] Which places requirements as to a valid policy of insurance.

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

That original MVID and its further amendments have subsequently been consolidated into a sixth Directive which provides in Chapter 4 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.

In the Second[8] MVID, member states were to establish a guarantee fund to act as the insurer of last resort to compensate the victims of negligent uninsured motorists, untraceable motorists and for losses resultant from the negligent driving of "foreign" motorists. In the UK, this position is occupied by the MIB through two extra-statutory arrangements, the UDA 2015 (and Supplementary Agreement concluded in 2017) and the Untraced Drivers Agreement 2017 (UtDA). In *Evans v Secretary of State and Motor Insurers Bureau*[9] the CJEU held that it was within a member state's authority to delegate 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 Role of the MIB

The MIB is a body empowered under a requirement of the MVID to ensure, subject to exclusions, that funds are available to compensate the innocent victims of a motor vehicle accident due to an unsatisfied judgment.[10] The MIB and the Secretary of State for Transport together have established, over a number of years and through a series of arrangements, two Agreements which supplement the RTA88 and give effect to aspects of the MVID – the UDA 2015 and the UtDA 2017. These Agreements have been modified on many occasions to give effect to the developing MVIDs and to remedy defects and incompatibilities with the national law and administrative arrangements with the EU Directives. This includes unreasonable and unlawful restrictions in the scope of the UDA and UtDA when compared with the UK's obligations under EU law.[11] The current UDA 2015 was last amended in 2017, albeit *Lewis*[12] relates to the 1999 Agreement.

The Implications of the Judgment 1: The MIB as an Emanation of the State

The issue at stake, and the significance of this case, is the acceptance by the High Court and the Court of Appeal of the MIB as fulfilling the requirements of an emanation of the State. This is important for liability under EU law and, as a private company and one which establishes agreements rather than contracts with the state, the UK has consistently held (as identified in *Byrne v MIB*[13]) 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 (who provided the

[8] 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.
[9] *Evans v Secretary of State and Motor Insurers Bureau* (C-63/01) ECLI:EU:C:2003:650.
[10] UDA 1999 cl 5 (now UDA 2015 cl 3).
[11] For commentary see J. Marson, and K. Ferris "The Uninsured Drivers' Agreement 2015 as a Legitimate Source of Authority" (2017) 38(2) *Statute Law Review* 133.
[12] *Lewis v Tindale, Motor Insurers' Bureau and Secretary of State for Transport* [2018] EWHC 2376 (QB).
[13] *Byrne v MIB* [2007] EWHC 1268 (QB).

sole judgment in *MIB v Lewis* at the Court of Appeal), accept *Wagner Miret*[14] 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.

It has been argued previously that the UK's position on the status of the MIB as (not being) an emanation of the state is incorrect and illogical.[15] Following the UK's accession to the European Economic Community (as was) in 1973 the UK surrendered its sovereignty in given areas and was subject to the new legal order that had been established since the 1960s.[16] The MIB is a private company limited by guarantee and operates to reduce the negative consequences for victims of road traffic accident caused by uninsured[17] or untraced[18] drivers in the UK (and of foreign drivers through the "green card scheme").[19] It does so by acting as an insurer of last resort whereby victims, who would otherwise be left without a remedy, have access to a compensatory fund from which to claim. The MIB exists due to a proportion of each motor insurance premium supplementing this fund. Further, every insurer which operates a business underwriting compulsory motor insurance is required to be a member of the MIB.[20]

Due to the agreements established between the MIB and the Secretary of State, national case law has held that in regards to it acting as a compensatory body to fulfil requirements under EU law, it is not an emanation of the state. This is due to the nature of the agreement between the parties whereby on the application of 12 months' notice,[21] the agreement and responsibilities of the MIB can be terminated. In such an event, the MIB would have no further liability for accidents or responsibility for the actions of the untraced and uninsured drivers referred to in those respective agreements as no duty exists in statute to fulfil this obligation.[22]

A distinction existed, prior to *Lewis*, regarding the responsibility for compensating third party victims who had suffered injury and loss due to the actions of an uninsured motorist or unidentified vehicle. This was, at first instance, the MIB as insurer of last resort. Where the issue was the misapplication of the UDA, the victim's claim rested with the state. Flaux J, in *Byrne* considered that the MIB did not satisfy the test of an emanation of the state as provided for in the test established in *Foster and others v British Gas plc*:[23]

---

[14] *Teodoro Wagner Miret v Fondo de Garantía Salarial* (C-334/92) ECLI:EU:C:1993:945, [1995] 2 C.M.L.R. 49.

[15] J. Marson, K. Ferris, and A. Nicholson "Irreconcilable Differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives" (2017) 1 *Journal of Business Law* 51.

[16] *Van Gend en Loos v Administratie der Belastingen* (C-26/62) ECLI:EU:C:1963:1.

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

[18] 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 MIB will consider claims of compensation in respect of damages to property and personal injury.

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

[20] See RTA88 ss.95, 143 and 145(2).

[21] The UDA 1999, cl.4(2).

[22] The UDA 1999, cl.4(1).

[23] *Foster v British Gas* (C-188/89) ECLI:EU:C:1990:313.

> a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond that which result from the normal rules applicable in relations between individuals...[24]

He did acknowledge 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, reasoned that the state did not provide any control over the way in which the MIB carried out its functions. Further, the MIB had no special powers conferred on it either through the RTA88 or the Agreements made between it and the Secretary of State. Similarly in *Mighell and ors v Reading*[25] the claimants, seeking to apply the doctrine of direct effect[26] of the Second MVID, failed to persuade the Court of Appeal that the MIB was an emanation of the State. *Byrne* and *Mighell* were joined, at least by the Advocate-General in *Evans v Secretary of State for the Environment, Transport and the Regions*[27] in the view that the MIB was not an emanation of the state. However the CJEU disagreed with the position of the UK and the Advocate-General. When considering the application of the MVID, the Directive did not refer to the legal status of the compensatory body and the "fact that the source of the obligation of the body in question lies in an agreement concluded between it and a public authority is immaterial…"[28] In *MIB v Lewis* Flaux LJ seemingly had a change of heart and agreed that, like the Motor Insurers' Bureau of Ireland (MIBI) in *Farrell v Whitty (No 2)*[29] the MIB,

> possesses special powers by virtue of the provisions of the RTA which oblige all authorised motor insurers to be members of the MIB and to contribute to its funding… 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.[30]

To further the broad interpretation of the definition of an emanation of the state, in *Rieser Internationale Transporte GmbH v Autobahnen-und Schnellstraßen-Finanzierungs-AG*[31] and *Sozialhilfeverband Rohrbach*[32] limited liability companies owned, in the first instance, by the Austrian State and by a local authority association (in the second case) were held as emanations of the state. More recently in this line of judicial reasoning, and most explicitly, the MIB of Hungary was held an emanation of the state in *Csonka*.[33] Here the CJEU was unequivocal as to the role of the MIB as insurer of last resort.[34]

---

[24] at [20].
[25] *Mighell and ors v Reading* [1999] 1 C.M.L.R. 1251.
[26] *Becker v Finanzamt Münster-Innenstadt* (C-8/81) ECLI:EU:C:1982:7 at [25]: *"... wherever the provisions of a Directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the Directive or insofar as the provisions define rights which individuals are able to assert against the State."*
[27] *Evans v Secretary of State for the Environment, Transport and the Regions* (C-63/01) ECLI:EU:C:2002:615; [2005] All E.R. (EC) 763.
[28] at [34].
[29] *Farrell v Whitty* (C-413/15) ECLI:EU:C:2017:745.
[30] at [74-75].
[31] *Rieser Internationale Transporte GmbH v Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)* (C-157/02) ECLI:EU:C:2004:76.
[32] *Sozialhilfeverband Rohrbach* (C297/03) ECLI:EU:C:2005:315.
[33] *Csonka v Magyar Allam* (C-409/11) ECLI:EU:C:2013:512; [2014] 1 C.M.L.R. 14.
[34] at [31].

Previously it was argued:

> If one also considers the public service function of the MIB, its requirement to follow the provisions of the MVID, to compensate victims of uninsured and untraced drivers, its duty to compensate for motor vehicle accidents abroad, and its relationship with the Department for Transport, it satisfies many of the necessary public service provisions… evidence of its control by the State can be seen in the agreements reached between the two, and the requirement for it to comply with the MVID. Finally, the MIB's ability to almost single-handedly legislate on behalf of the State… its powers to settle claims, its powers to compel disclosure and to deny access to compensation for infractions of procedural requirements, appear collectively to be strong indicators that it does possess the necessary special powers (under *Foster*), bestowed by the Secretary of State, far beyond those applicable between individuals.[35]

The most recent judgment on the issue, if another were needed, was as to the status of the MIBI in *Farrell (No. 2)*. Here the Supreme Court of Ireland was faced with determining the compatibility of EU law with national law in respect of compensation for injuries involving a motor vehicle and exclusion of liability. Four passengers were occupying the rear of a van, but one which did not have seats. They were injured following a collision and one of the occupants, Ann Marie Farrell, died as a result of the accident. The insurer denied responsibility for compensation due to the existence of an exclusion clause which allowed the insurer to escape liability where a vehicle involved in an accident was not designed and constructed with seating. Her sister pursued compensation through the MIBI[36] but this was refused on the basis of the application of that exclusion clause which effectively removed its responsibility too. When viewed in accordance with the MVID, this exclusion of liability breaches the very restrictive exclusions of liability permissible at EU law.[37] As such, the Supreme Court of Ireland referred to the CJEU a question seeking to determine the status of the MIBI. In essence, the response of the CJEU would determine 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. The CJEU held Ireland in breach by permitting the exclusion of liability in this regard and Elaine Farrell received an undisclosed settlement and stopped her claim for further damages. The legal matter then became a dispute between the MIBI and the Irish state as to who was to settle the payment. Was the MIBI an emanation of the state or did the status quo, at least in relation to national jurisprudence, of a state liability claim being the only remedy available continue? At the High Court in Ireland, Birmingham J referred to commentary by Advocate-General Stix-Hackl in *Farrell (No. 1)*[38] 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.[39] The jurisprudence of

---

[35] J. Marson, K. Ferris, and A. Nicholson "Irreconcilable Differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives" (2017) 1 *Journal of Business Law* 51, 58.

[36] Under the Road Traffic Act 1961 s. 78 of Ireland, all motor insurers had to be members of the MIBI (the same obligation as is required in the UK).

[37] Under art. 2(1) of the Second MVID (now art. 13 of the Sixth Directive) the only exclusion to an insurer's indemnity requirements is where the passenger voluntarily entered the vehicle causing the loss or damage in the knowledge that it was stolen and the insurer can prove this knowledge.

[38] *Farrell v Whitty* (C-356/05) ECLI:EU:C:2007:229; [2007] 2 C.M.L.R. 46.

[39] This is a somewhat moot point however, as Birmingham J considered that even were the three-stage test in *Foster* to have been applied here, the conclusion as to the status of the MIBI would have been the same.

cases in the UK, applying as they did a checklist of features of the body in question, was unnecessary and an emanation of the state could exist without it being under direct state control. The MIBI was held as a body which fulfilled the functions of those authorised under the MVID, 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.

Crucially when exploring the ability for a body to occupy the role of an emanation of the state, and in the case of the MIBI to undertake this public service, the Supreme Court of Ireland referred to the judgment given by the CJEU. When reviewing the *Foster* decision, it noted that the CJEU referred to bodies which were subject to the authority or control of the state or had special powers.[40] The use of the word "or" rather than "and" meant the *Foster* tripartite test was illustrative rather than exhaustive and further, that the direct effect of Directives was possible against such a body which did not satisfy the three *Foster* tests. Consequently, *Farrell (No. 2)* has broadened the concept of the "state" even further than the existing line of authoritative bodies[41] and permitted the direct effect of Directives against MIBs in the member states.

Given this concerted movement in other member states and through the reasoning provided by the CJEU, the High Court in *Lewis* held the MIB to be an emanation of the state. This was despite an important distinction between the MIB and the MIBI. The MIBI agreement with the state empowered the Minister of State, in certain circumstances, to determine an issue in dispute between the claimant and the MIBI. This power is not replicated in the UK with the MIB's Agreements with the Secretary of State, although given *MIB v Lewis* and the relaxation of the *Foster* tests, this facet may be a less significant feature now. Of course, had the Court of Appeal not held that the MIB was an emanation of the state, there would have been negative consequences for the UK. At the most basic level, the UK would have been in breach of its obligations under the MVID since the commencement of the obligation to establish a compensatory body.

The import of this ruling in holding the MIB as an emanation of the state should not be underestimated. It furnishes individuals who find the UK in breach of its EU obligations with the following options. They may continue to bring separate public law proceedings for damages under state liability (as per *Delaney*).[42] Further, and post-*Lewis*, where a third party victim finds inconsistencies between the MVID and the UDA (extending by implication to

[40] at [18].

[41] Not an exhaustive list but it includes former nationalised utility bodies (*Foster v British Gas* (C-188/89) ECLI:EU:C:1990:313 and *Griffin and others v South West Water Services Ltd* [1995] I.R.L.R. 15); the board of governors of a State school (*National Union of Teachers and others v Governing Body of St Mary's Church of England (Aided) Junior School and others* [1997] I.R.L.R. 242 CA); a regional authority (*Fratelli Costanzo SpA v Comune di Milano* (C-103/88) ECLI:EU:C:1989:256); a police force (*Johnston v Chief Constable of the RUC* (C-222/84) ECLI:EU:C:1986:206); a health authority (*Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* (C-152/84) ECLI:EU:C:1986:84); and a tax authority (Case 8/81 *Becker v Finanzamt Münster-Innenstadt* (C-8/81) ECLI:EU:C:1982:7). Further, this has extended to bodies legally distinct from the State, but to which administrative tasks have been delegated or assigned (Case C-424/97 *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein* (C-424/97) ECLI:EU:C:2000:357).

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

the UtDA),[43] that individual may seek to use the directly effective articles in the MVID[44] against the MIB directly. It also imposes on the MIB, a private organisation which has entered into an agreement with the Secretary of State, joint and several liability to compensate third party victims of accidents due to the failure of the UK to correctly transpose the MVID. This extends a potential liability on the MIB to satisfy judgments far beyond its current prescribed arrangement and calls into question the legitimacy of the exclusions of liability in the UDA and UtDA.

The Implications of the Judgment 2: The End of the Geographical Scope of Compulsory Insurance

The RTA88 s. 145(3)(a) originally required the compulsory insurance of motor vehicles used on a "road." In *Clarke v General Accident Fire and Life Assurance Corporation plc*[45] 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[46] at Art. 5 referred to parties involved in a "road traffic accident" but also made no similar limitation to the requirement of compulsory motor vehicle insurance applying only to those on a road. Despite accepting the disparity between EU and national law, the Lords refused to interpret 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 by including the additions "… or other public place" to comply with the MVID.

In 2014, a case which still resonates throughout the member states due to the changes it made to the geographic scope of compulsory motor vehicle insurance was decided. It was in *Vnuk*, where the CJEU, in a reference from Slovenia, held that, for the purposes of art. 3(1) of the MVID,[47] and to ensure consistency in interpretation and application of the law throughout the EU, compulsory insurance applied to vehicles used on private land. Thus the "use" of a vehicle could not be left to member states to decide. The interpretation of vehicle through art. 3(1) extended to "… any use of a vehicle that is consistent with the normal function of that vehicle."[48] Given that RTA88 s. 185 defines a motor vehicle as "a mechanically propelled vehicle intended or adapted for use on roads," art. 3(1) and s. 185 appear misaligned. The national law fails completely, including the national exclusions from insurance of a range of vehicles, to fulfil the requirements of art. 3 of the MVID. For instance, presently, and as noted in the supplementary guidance notes included in the Agreements (UDA and UtDA), bodies including local authorities, the National Health Service, and the police are exempt

[43] Many still exist even in the most recent Agreement of 2017, see J. Marson, and K. Ferris "Motor Vehicle Insurance Law: Ignoring the Lessons from King Rex" (2017) 38(5) *Business Law Review* 178.
[44] For instance in *R (RoadPeace) Ltd v Secretary of State for Transport* [2018] 1 W.L.R. 1293, the Secretary of State and the MIB acknowledged that art. 3 of the 2009 MVID was directly effective, and in *Farrell v Whitty* (n 38 above) the CJEU held that the art. 1 of the Third MVID (Council Directive 90/232/EEC [1990] OJ L129/33) "… allows both the obligation of the Member State and the beneficiaries to be identified, and its provisions are unconditional and sufficiently precise" [38] and accordingly had direct effect [44].
[45] *Clarke v General Accident Fire and Life Assurance Corporation plc* [1998] 1 W.L.R. 1647.
[46] Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles.
[47] 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.
[48] *Vnuk* (n 4 above) at [60].

from the requirement for compulsory insurance cover. *Lewis*, along with recent pronouncements from the CJEU, make this position untenable.

Vnuk was accompanied by *Andrade v Salvador & ors*[49] and *Torreiro v AIG Europe Ltd*[50] where the CJEU held the use of vehicles was not restricted to road use,

> that is to say, to travel on public roads, but that that concept covers any use of a vehicle that is consistent with the normal function of that vehicle.

Soole J in *Lewis* rejected the invitation to remove or add words to RTA88 s. 145(3)(a) to comply with this jurisprudence as to do so "clearly goes against the grain and thrust of legislation which provides that limitation"[51] which would amount to an amendment and not an interpretation. It further ran the risk of having the effect of imposing retrospective criminal liability for the use of uninsured vehicles on private land. He was not convinced that a defence to this situation lay within a principle of EU law.[52]

The result is an interpretation of RTA88 s. 185 which currently reads as too narrow and will have to be broadened in scope to include those motor vehicles currently exempted. The concept of "vehicle" will be subject to new interpretation and may include those which were never designed for use on the public road but which will now have to be insured against third party claims.

The Implications of the Judgment 3: The Court of Appeal and the Direct Effect of the MVID

Flaux LJ began the examination of the parties' submissions from para 38 of his judgment. The first issue contested was as to the direct effect of art. 3 of the sixth MVID. The MIB argued that as the Article expressly requires measures to be taken by the state, it is by its nature conditional. It was conceded by the MIB that the jurisprudence of the CJEU in *Vnuk* and the subsequent cases (although whilst *Juliana*[53] was given passing reference (paras. 51, 52, 62 and 71), *Andrade* only features in cursory form with a *Juliana* quotation in the judgment at para 71)[54] established that the obligation under that Article covered the use of vehicles on private land as well as a road or in a public place and was thus sufficiently precise.[55] Regarding the unconditional nature of the obligation, given the Article's requirement for the state to take [all appropriate] measures to ensure civil liability in respect of the use of vehicles is covered by insurance, the MIB identified that one of the requirements for the imposition of direct effect of the Directive was missing. Three scenarios were

---

[49] *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* (C-514/16) ECLI:EU:C:2017:908; [2018] 4 WLR 75 at [34].

[50] *José Luís Núñez Torreiro v AIG Europe Limited, Sucursal en España and Unión Española de Entidades Aseguradoras y Reaseguradoras (Unespa)* (C-334/16) ECLI:EU:C:2017:1007 at [28].

[51] *Lewis v Tindale* (n 12 above) at [58].

[52] As argued by the claimant: "In consequence, by virtue of the UDA 1999 which defines the MIB's obligation by reference to Part VI of the 1988 Act, the MIB would be bound to meet the claim. Such a consequence would be no different than that which followed from the 2000 amendment which inserted the words 'or other public place' into ss.143(1) and 145(3)." at [48].

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

[54] For discussion as to the disparities between the CJEU's jurisprudence on compulsory motor insurance on private land see J. Marson, and K. Ferris "For the Want of Certainty: Vnuk, Juliana and Andrade and the Obligation to Insure" (2019) *Modern Law Review* (In Press).

[55] at [38].

proposed to demonstrate the issue: (i) where no appropriate measures have been taken by the state; (ii) where partially appropriate measures have been taken and (iii) where the state's discretion as to what measures to take has been fully exercised.[56]

Example (i) demonstrates the lack of direct effect of the Directive, as established in *Francovich v Italian Republic*,[57] because of the non-transposition of the Directive. Further, the provisions of the Directive were not sufficiently precise and unconditional given the complete discretion afforded Member States.[58] Example (ii) would also fail as in *Wagner Miret* due to the incomplete transposition of the same Directive as in *Francovich*. The argument presented was by analogy to art. 10 MVID relating to the RTA88 and there being no compulsory insurance cover applied to vehicles so used. Given that accidents on private land were not covered by compulsory insurance in the RTA88, and therefore outside of the MIB Agreements, it was open to the UK to comply with the requirements of arts 3 and 10 MVID through some body other than the MIB and by some means other than the MIB Agreements.[59] Example (iii) was used to refute an argument presented by the claimant (with reference to *Riksskatteverket v Gharehveran*).[60] The MIB sought to distinguish *Riksskatteverket* from *Francovich* and *Wagner Miret* because, although in *Riksskatteverket* Sweden had not correctly implemented the provisions of Directive 80/987, the relevant discretion had been exercised as the state had designated itself as the person liable to meet claims guaranteed by the Directive.[61] The obligation to "take all appropriate measures" in art. 3 was to provide for a system of insurance, not to compensate the victims of motor accidents. This involved discretion as to how such an aim was to be achieved. Driving on private land, the MIB continued, was different to driving on a road or other public place (different risks, obligations, often different vehicles). Thus, art. 3 provided member states with discretion to require third parties (motor insurers) to provide compulsory motor insurance to private land, but this had not been implemented. Imposing a liability on the MIB in the current case would have been to establish it as a primary compensator rather than art. 10's intention of the national compensatory body possessing a residual function. Further, this residual function only became active in the event of a compulsory insurance obligation being present. On this last point the MIB attempted to distinguish *Farrell v Whitty* from the present case. It contended that in *Farrell*, the accident occurred on a road where a contract of insurance was required (albeit no insurance policy was held by the driver).[62] It further used the judgment in *Csonka* that the requirement for the national compensatory body to pay compensation on the "breakdown in the system"[63] of the member state failing to implement the Directive necessitated such a breakdown. It did not apply where there was no system at all relating to compulsory motor insurance for vehicles on private land.[64]

The first argument was countered by Mr Lewis on the basis that according to Irish law (the Irish 1961 Act), no insurance was needed in respect of passengers in unseated parts of a vehicle. Hence, whilst the MIBI satisfied the claim for compensation from Ms Farrell, to require the MIB to do the same in the present case affirmed rather than distinguished the

---

[56] at [39].
[57] *Francovich v Italian Republic* (C-6/90) ECLI:EU:C:1991:428.
[58] at [40].
[59] at [41].
[60] *Riksskatteverket v Gharehveran* (C-441/99) ECLI:EU:C:2001:551.
[61] at [42].
[62] at [53].
[63] *Csonka* (n 33 above) at [31] and [46].
[64] at [50].

precedent.[65] The second argument was dismissed as being "wholly artificial [and an argument] which will not bear scrutiny."[66] Such an argument required a very selective use of the *Csonka* ruling[67] and this was rejected in accordance with the entire jurisprudence on the matter of the CJEU. Indeed the gap between,

> insurance cover compulsorily required by the domestic legislation and a corresponding gap in the protection of the victims of motor accidents… is the very mischief that the Motor Insurance Directives are designed to avoid.[68]

The issue of discretion provided to the member states continued in the argument presented by Mr Lewis and distinguishing the rulings in *Francovich* and *Wagner Miret* with the present case. The Directive in *Francovich* and *Wagner Miret* referred to the plural "guarantee institutions' and consequently a member state did have discretion as to which fund it was to delegate responsibility in respect of parts of the Directive which had not been implemented. Article 10 MVID, in contrast, made reference to a "body" in the singular and therefore by delegating the obligation to the pre-existing MIB, the UK had fully used its discretion.[69] This, for the purposes of the obligation under EU law, had resulted in the entirety of that art. 10 requirement being delegated to the MIB. This point was accepted by Flaux LJ at para 65.

Flaux LJ concurred with Soole J that the UK had failed in its obligations under art. 3 of the sixth MVID.[70] He did so by identifying the need for compulsory motor insurance to extend to the *use* of motor vehicle on private land (authors' emphasis).[71] This followed from *Vnuk* and *Andrade* and *Nunez Torrerio*. Additionally, it failed in its duty under art. 10 of the same Directive to assign responsibility for meeting that liability to the national compensation body. Flaux LJ further held that art. 3 was unconditional and precise so as to be capable of direct effect and that given arts 3 and 10 of the sixth MVID are co-extensive, art. 10 by implication also has direct effect.

That the UK has accepted the direct effect of arts 3 and 10 MVID will profoundly affect the application of national law. In *White v White*[72] the House of Lords held that the MIB agreements were not susceptible to a *Marleasing*[73]-type purposive interpretation of national law. This position has been reversed. Coupled with the newly established status of the MIB, the application of the articles can be asserted directly against the MIB without the problem previously experienced of its horizontality in relation to insurers.[74]

Conclusions

Soole J addressed three questions in *Lewis*:

---

[65] at [54].
[66] at [68].
[67] at [31].
[68] at [69].
[69] at [56].
[70] at [63].
[71] It is to be hoped this is merely an oversight as the requirement for compulsory motor vehicle insurance, following the CJEU's jurisprudence in *Juliana*, applies to vehicles whether stationary or moving on private land. There is no requirement for the vehicle to be in use for the obligation to hold to insurance cover to apply.
[72] *White v White* [2001] UKHL 9.
[73] *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-106/89) ECLI:EU:C:1990:395.
[74] *Smith v Patrick Meade and Others* (C-122/17) ECLI:EU:C:2018:631.

(i) Whether any judgment Mr Lewis may obtain against Mr Tindale is a liability which is required to be insured against pursuant to Part VI of the 1988 Act;
(ii) If any judgment Mr Lewis may obtain against Mr Tindale is a liability which is not required to be insured against pursuant to Part VI of the 1988 Act, whether the MIB is otherwise obliged to satisfy such judgment pursuant to Directive 2009/103/EC; and
(iii) Whether the provisions of the relevant Directives have direct effect against the MIB.

He answered question one in the negative and questions two and three in the affirmative. That decision marked a sea-change 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.[75] 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 and administrative provisions.[76] 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.

This judgment is significant with regards 1) the broadening of the concept of vehicles; 2) the ending of the limited geographic scope of responsibility contained in the RTA88, and 3) the position of the MIB as a body which constitutes an emanation of the state. That these issues were already clearly identified by the CJEU is regrettable, as is the fact that the new clarification of the law will apply only until the UK withdraws from the EU. Given that the MIB applied to the Court of Appeal and then direct to the Supreme Court to appeal the decision, and that neither the UK nor the MIB have amended the offending elements of the legislation or Agreements do not bode well for a continuation of this level of protection. The European Union (Withdrawal) Act 2018 s. 6(3) may be some comfort as to the retention of existing EU laws pending legislative or judicial changes at a national level, yet the history of the UK's compliance in this area leaves little confidence in a change of governmental direction. The rulings are 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. If the UK does leave the EU as intended on October 31 2019, it is apt to mark a happy Halloween for the MIB and the victories gained in *Lewis* and *MIB v Lewis* are likely to be short-lived.

[75] *Allen v Mohammed and Allianz Insurance* (2016), Lawtel, LTL 25/10/2016
[76] See for example *Sahin v Havard and Riverstone Insurance (UK) Ltd* [2016] EWCA Civ 1202.