Is it Possible to Lose Status as a Driver and be Reclassified as a Passenger During a Journey? A Lacuna in the Motor Vehicle Insurance Directives to which Jurisprudence from the UK may Provide an Answer

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

Is it Possible to Lose Status as a Driver and be Reclassified as a Passenger During a Journey? A Lacuna in the Motor Vehicle Insurance Directives to which Jurisprudence from the UK may Provide an Answer

By James Marson and Katy Ferris

Can a driver of a vehicle transition to become its passenger during a journey if another passenger assumes control of the vehicle? Interestingly, the Motor Vehicle Insurance Directive (MVID) 2009/103/EC— the legislative framework governing compulsory motor insurance and civil liability across the EU—does not explicitly define the term "driver." Instead, its provisions and case law predominantly refer to the "use of a vehicle." This lack of definitional clarity leaves significant questions unanswered. Here we present the first analysis of this issue, highlighting that determining whether a driver becomes a passenger is primarily a factual and procedural matter for national courts within the EU. However, in light of the limited guidance from the MVID and its case law, here we argue that English domestic law offers valuable insights. The reasons why the UK's case law is chosen as a mechanism which may be instructive to the Court of Justice is, first, due to the UK's recent membership of the EU and much of the case law to which we refer was applicable in the UK during this time. Secondly, and perhaps of most relevance is that the UK is almost uniquely positioned in that its legal system, by virtue of a quirk of law, operates on the basis of insuring the driver rather than the vehicle. Given that many Member States operate on the basis of insuring the vehicle and the acknowledged lack of direction available from the MVID and its own jurisprudence, the Court of Justice may wish to avail itself of assistance from jurisdictions which have substantial experience in determining this issue. Hence the UK would be an obvious starting point for instruction, deliberation, and contrast. The question of the correct method to define a driver is timely due to the recent reference to the Court of Justice from the Netherlands. Here, the person behind the wheel was involved in a single-vehicle accident caused by a passenger unilaterally applying the handbrake. The "driver" argued in domestic courts that such a deliberate act, contrary to any invitation or instruction from him, removes his status of driver and ostensibly makes him a passenger. The Netherlands, like most other Member States, has a motor vehicle insurance system where the vehicle, not the driver is insured. It consequently lacks detailed analysis or instruction on how to determine the driver of the vehicle. This reference and the UK's long case history provides to the Court an opportunity to clarify this ambiguity.

I. Introduction and Case Facts

The case *Stichting Koskea v Nationale Nederlanden* involves a dispute regarding the classification of a "driver" versus a "passenger" in motor vehicle liability under the MVID. The incident occurred when a passenger (hereafter the "trainer-passenger") in a minibus carrying members of a football club, a vehicle lawfully insured for third-party and passenger accident liability only, suddenly applied the handbrake while the vehicle was travelling at 70 km/h. This caused a crash that ultimately led to the death of a passenger. Further, and of specific importance to the preliminary reference, a person referred to in the proceedings as "ED" was the driver of the vehicle who suffered severe injuries in the crash, later identified as being unable to work again. The insurer of the vehicle, Nationale Nederlanden, has argued that since the policy of insurance does not cover the "driver" in a liability-only policy of motor insurance, as permitted in Dutch law (Art. 4(1) WAM), and that ED was also at fault for not wearing a

seatbelt and being under the influence of alcohol at the time of the accident, it has no responsibility for satisfying ED's claims for damages.

As a result of ostensibly being uninsured, ED argued through the national courts that he was not the "driver" at the time of the crash, as the trainer-passenger's handbrake action controlled the vehicle – removing ED's role in this capacity. There were conflicting findings through various national courts until the national appellate court ruled ED's role as the driver did not change merely because the vehicle became uncontrollable. However, given this was a matter of EU law yet to be considered by the Court of Justice, in late 2024 the appellant court in the Netherlands referred the matter to the Court under the preliminary reference procedure.

The case raises a primary question for the Court of Justice: The first element of the question involves determining if it is possible for a person behind the wheel of a vehicle to lose their status as a driver (in these circumstances when a third-party passenger's actions caused an accident). The second element of the question, a subset of the first question, is the existence of factors in the MVID or the jurisprudence of the Court of Justice as to the available direction in determining such a reclassification. The outcome could impact the categorisation of drivers and passengers, affecting liability and protection frameworks across the EU. The case provides an opportunity to critically evaluate differences in legislative definitions, judicial interpretations, and the broader implications for ensuring fair and equitable victim protection in road traffic accidents.

For scholars of torts law and civil liability, the Court of Justice's interpretation of the MVID informs the harmonization of liability standards across jurisdictions, affecting cross-border disputes and insurance claims. Furthermore, it illustrates how national legal concepts are integrated and sometimes redefined within the EU legal order, offering valuable insights into the dynamics of legal pluralism and the balance between national sovereignty and supranational governance. This topic, therefore, not only enriches the discourse within EU law but also contributes to broader comparative legal studies, making it an essential point of reference for researchers in multiple legal fields.

II. The MVID's Focus on "Use of a Vehicle"

Given that throughout the EU, typically it is the vehicle which is subject to the policy of insurance, the MVID, perhaps understandably, has not sought the need to define "driver" or "driving" as can be seen through its historical development. The first five Directives, established between 1972-2005, culminating in a Sixth consolidating Directive, offered no definitions. Even as recently as 2021, with an amending Directive 2021/2118 to take into effect and clarify recent changes made to the understanding of the MVID through the jurisprudence of the Court of Justice, no instruction or definition of the terms "driver" and "driving" have been offered. Indeed, while the 2021/2118 amendment to the MVID introduced a revised understanding of "use of vehicles" it focused its attention on the concepts of transport and normal vehicle use, leaving the issue of identifying "who is a driver" unaddressed. Rather, the focus has remained on harmonizing the laws of Member States regarding insurance for civil liability arising from the use of motor vehicles and ensuring adherence to the obligation to maintain such insurance. Article 3 MVID provides:

> Each Member State shall, subject to Article 5, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based on 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 the measures referred to in the first paragraph. […] The insurance referred to in the first paragraph shall cover compulsorily both damage to property and personal injuries.

The Court of Justice has provided guidance on how the "use of vehicles" is to be interpreted under the MVID. This included ***Vnuk*** where the Court identified that for a motor vehicle to be within the scope of the MVID, its "normal use" must be as a means of transportation, but this even extends to when the vehicle is parked in a garage (given this feature remains an integral element to transportation). ***Juliana*** allowed the Court to expand on the understanding of what use of a vehicle is and ruled that vehicles do not need to be *in use* to invoke Art. 3, they simply need to be *capable of being put to use*. Further, and in order to clarify which vehicles are subject to the MVID's regime, in ***Andrade*** the Court drew a distinction between motor vehicles used for transport—where the MVID's compulsory insurance applies—and a vehicle used as a machine (in this case, a tractor), to which the MVID does not extend.

Therefore, even though case and statutory developments have been made over the lifespan of the MVID, these actions have confirmed the transport and normal use of a vehicle and have left the question of "who is a driver" unanswered.

III. Issues Facing the Court in the Reference

In many Member States in the EU, including the Netherlands, motor vehicle insurance regimes typically operate on the basis that it is the vehicle itself, rather than the driver, that is subject to the insurance policy. In contrast, the UK offers a potentially useful perspective due to a peculiarity in its legal framework where the UK insurance regime focuses on insuring the driver. UK courts have through a long history addressed questions not only in identifying the driver of a vehicle, but also distinguishing between a "driver" and a "passenger." The result is the development of criteria for making this determination—the very question largely unaddressed in the EU's legal framework. Therefore when faced with interpreting the MVID and in giving direction through the Court of Justice, and even for the referring court itself, the case law from the UK might offer several pertinent directions on this gap in the legisprudence and jurisprudence of the EU.

This experience of the courts in the UK has particular significance when determining the status of ED. The Court of Justice is faced with the situation of a vehicle (which, despite being a minibus qualifies as a "vehicle" for the MVID per *Vnuk*), as a single vehicle involved in an accident which caused injuries only to its occupants. The facts of the case identify ED as the driver, with the trainer-passenger being responsible for the accident by applying the handbrake – therein assuming control of the vehicle. The question posed by ED is whether, due to the actions of the trainer-passenger, that person has removed ED from his position as "driver" at the time of the accident. Further, if ED in such circumstances is removed as the vehicle's driver, does he automatically become a passenger? Similarly, does the trainer-passenger, by taking control of the handbrake, assume the role of driver, or does he remain a passenger? These distinctions are critical because the MVID designates passengers as a special category of victim, entitled to recover compensation under third-party liability insurance policies, whereas drivers are excluded from such coverage when the insurance policy is third-party (liability) only.

This is where, after identifying the main EU contributions to this question, we present an examination of the concept of "driver" and "driving" as an aid for insights in the reference to be determined by the Court later in 2025.

IV. How to Determine a "Driver"

The MVID provides definitions for "vehicle" and "injured party" at Art. 1 and yet while neither directly addresses the present issue, they do help to underscore the primary purpose of the MVID. This is protecting victims of road traffic accidents, ensuring that Member States and insurers within their jurisdiction do not engage in practices or include contractual clauses that hinder victims from recovering compensation or make the process excessively burdensome.

Significantly, while the MVID instils a strong regulatory burden with regard to the compulsory motor vehicle insurance across the Union, the Member States do retain some discretion to establish their own rules regarding compulsory insurance, including policies that cover only third-party victims. Therefore it is within the scope of the MVID for Member States to allow insurance policies that are "liability-only;" however, even on this basis third-parties and passengers must not be excluded from insurance cover. Consequently, a "driver" of a vehicle that is insured on a liability-only basis may be lawfully excluded from compulsory insurance cover or protection from the national guarantee regime (per Art. 10 MVID), while passengers are a special-category of victim who must (almost) always be protected in the event of injury following an accident.

Thus, as the EU Directives do not provide a definition of a "driver," it is possible to seek guidance from other jurisdictions where laws and case authorities can help identify common themes associated with the concept of driving. However, it is important to recognize that much of this law has its origins in criminal law, while the present discussion focuses on civil liability. As such, any conclusions drawn must account for this distinction. Nonetheless, certain key points regarding the definition of "driving" and "driver" may offer useful insights for Member States and the Court of Justice in resolving this issue.

Beginning with sources of legislation, the Vienna Convention on Road Traffic (1968) to which all EU Member States and Norway and Switzerland are signatories, provides the following definition, stipulating in Art. 8 that "every motor vehicle must have a single person responsible for its operation." This provision is particularly relevant in situations where control of the vehicle is temporarily delegated, such as when a passenger assumes control. Article 8 further clarifies that "temporary incapacitation or delegation of control does not necessarily absolve the original driver of their legal obligations." This guidance is significant in the present context, as it purports that temporary delegation of control does not alter the designation of driver and passenger, nor does it absolve the original driver of responsibility.

In the UK, Regulation 111 of the Motor Vehicles (Construction and Use) Regulations 1973 states: "No person while actually driving a motor vehicle on a road shall be in such a position that he cannot have proper control of that vehicle..." The primary legislation governing motor vehicles and their insurance in the UK, the Road Traffic Act 1988 (RTA88), also provides a definition of driving under s. 192. Here, a "driver" includes someone steering the vehicle and any other person engaged in driving. Importantly, this definition allows for the possibility that more than one person may simultaneously qualify as a "driver" under the law. Like many legislative definitions, the RTA88's definition requires judicial interpretation to provide greater clarity. While such case law tends to be highly fact-specific—similar to the case currently

before the Court of Justice—it is possible to extract broader themes and commonalities from these judgments. These insights may offer practical and general guidance for developing a more universally applicable definition of "driver."

A. In the Absence of a Clear Definition for "Driver," what is "Driving a Vehicle"?

The discussion now turns to the case law of the UK, which, until 2020, was a Member State of the EU and therefore much of the legislation previously mentioned and case law referenced here was established during the UK's membership, or continued to be regarded as good law during that period. As explained above, the Court of Justice, when attempting to establish a definition in motor vehicle insurance law which is lacking in both its legisprudence and jurisprudence will likely seek clarification from other sources and jurisdictions from which it may take inspiration. The UK is chosen here because of its well-developed jurisprudence, enabling *ratio* and factual details to be extracted from these case authorities Beyond any doctrinal findings available to the Court of Justice from this review of the cases, the practical benefits to the Court and the national courts across the EU will be of at least value in an *obiter* discussion. The key features of the rulings in the following cases are identified using italics.

In *R v Munning* [1961] 1 WLUK 16 the court dismissed a charge of driving while disqualified based on a *common-sense* interpretation of the law. In this case, pushing a vehicle (specifically, a motor scooter) could not be deemed to constitute "driving." However, this decision contrasts with *Gunnel v DPP* [1994] RTR 151, where Gunnel was astride a moped that had not been started but was being propelled along the road using his feet. He was stopped by the police, breathalysed, and subsequently charged with driving a motor vehicle after consuming alcohol. The court found that Gunnel's *control over the direction and movement of the moped*, combined with the fact that he had *set it in motion*, was sufficient to classify his actions as "driving."

Similarly, in *Tyler v Whatmore* [1976] RTR 83, a young woman caused a vehicle to leave the road, crash through a fence, and enter a field while she, sitting in the passenger seat, held both hands on the steering wheel. A man in the driver's seat operated the gears and foot pedals. The High Court ruled that controlling a vehicle's propulsion was not necessary to be considered its driver. The court also confirmed that, under the law, it is possible for *two individuals to be regarded as drivers simultaneously*, depending on the facts of the case.

Perhaps the most useful case for deciding who could be considered as the driver of a vehicle, particularly in the context of *Stichting Koskea*, is *DPP v Hastings* [1993] RTR 205 DC. This case involved a front-seat passenger who pulled the steering wheel to frighten a friend walking along the road. While the defendant did not intend to harm or injure his friend, his actions caused the vehicle to veer towards the pedestrian, resulting in the driver losing control and causing injury. On appeal, the court held that determining whether a person was "driving" a vehicle in the ordinary sense *is a matter of fact and degree*. The court further clarified that the defendant's actions—despite momentarily controlling the steering wheel—*constituted interference with the driving of the car rather than the act of driving itself*.

This case was compared with the earlier decision in *Jones v Pratt* [1983] RTR 54, where a passenger also took hold of the steering wheel, violently steering the vehicle away from the road in an impulsive reaction to an animal running in front of the moving car. Similarly, the court concluded that the passenger's actions did not amount to "driving" the vehicle. In both

cases, *a common-sense interpretation of the term "driving" was applied to distinguish acts of interference from acts of actual driving*.

The judge (Buckley J) in *DPP v Hastings* was mindful to include reference to previous authorities, and in so doing explained how in *R v MacDonagh* [1974] RTR 372, the Court of Appeal had remarked that the essence of driving rests in the *use of the driver's controls to direct the movement of the vehicle* (essentially irrespective of how that movement was produced – at [374E]). The Court also cautioned against allowing a broad meaning to the word "drive," and certainly that *it should not extend to activities that could not, at least under an ordinary use of the word, amount to driving*. For instance, *it could not extend to an individual who was making no use of the controls other than the occasional adjustment of the steering wheel* (at [376D-E]). Were this to be allowed, it would likely result in "absurdity" (at [374H]).

Buckley J continued that, and in particular with reference to what might be deemed borderline cases, *control of the vehicle is essential in designating a driver, but also is the duration of that person's control over the vehicle*. At para. 207G-H of the judgment, Buckley J confirms:

> Although it is plain that the defendant did for a moment seize the steering wheel and move it, it seems to me that that cannot in the ordinary way be said to have been an act of driving the car. He was certainly interfering with the driving of the car. He certainly caused the car to leave the road. But I find it impossible to say… that that can properly be described as driving a motor car.

From this jurisprudence several key features emerge. First, a common-sense (and often literal) interpretation of "driver" and "driving" should be applied. Second, case law highlights that control over the vehicle's direction and movement—such as steering or applying the brakes—is integral to the act of driving. Additionally, having set the vehicle in motion is indicative of being a driver. However, as established in *DPP v Hastings*, a passenger's momentary act of seizing the steering wheel, regardless of intent, is considered interference with driving rather than an act of driving itself. As long as the original driver has not relinquished control of the vehicle, the passenger cannot be regarded as the driver. It would be inconsistent to treat the act of seizing the steering wheel differently from applying the handbrake in similar circumstances. Accordingly, it is reasonable to conclude that, should the Court of Justice address whether ED was the driver at the time of the accident, it would likely align with the reasoning of UK case law and the Netherlands Court of Appeal. Both would support the view that ED remained the driver throughout the incident, despite the trainer-passenger's unlawful interference.

V. Passenger: A More Settled Area of EU Jurisprudence

The current definition of "driver" under the MVID and the jurisprudence of the Court of Justice lacks detailed analysis; in contrast, the concept of "passenger," or at least the protection to this classification of third-party victim, has been more thoroughly examined.

Two key elements warrant discussion in this context. First, Article 12 of the MVID establishes passengers as a special category of victims in accidents involving vehicles, prioritizing their protection. Second, Article 13 of the MVID regulates the exclusions permitted under national law and by insurers through contractual clauses, outlining the limits of protection available to passengers. These provisions collectively provide a more structured framework for understanding the legal treatment of passengers under the MVID.

A. Article 12 MVID

Article 12 of the MVID establishes that Member States, in fulfilling their obligations under Art. 3 to provide compulsory motor vehicle insurance, "shall cover liability for personal injuries to all passengers… arising out of the use of a vehicle." The Court has consistently interpreted the MVID to prevent national laws or contractual provisions from undermining its primary objective of victim protection. In *Bernaldez*, the Court ruled that Spanish legislation, in permitting the exempting of insurers from liability for compensating third-party victims of intoxicated drivers was incompatible with the MVID. Similarly, in *Candolin v Vahinkovakuutusosakeyhtio Pohjola*, the Court held that third-party victims who contributed to their injuries as passengers must still receive compensation for their losses. Referring to *Bernaldez*, the Court unequivocally stated that the MVID "precludes an insurer from relying on statutory provisions or contractual clauses in order to refuse to compensate third-party victims of an accident caused by the insured vehicle" (at [18]).

While not directly addressed in the Court's preliminary reference, this principle applies to the trainer-passenger in the present case. As a passenger, the trainer-passenger cannot be excluded from compensation, even if found responsible for the accident and the resulting losses. This principle highlights why ED wishes to be held as a passenger rather than the driver of the vehicle at the time of the accident, aiming to qualify for the protection afforded to this status. By contrast, as a driver, ED's losses could lawfully be excluded under the applicable statutory and contractual provisions.

VI. Permitted Exclusions: Article 13 MVID

Article 13 of the MVID governs the use of exclusions within the compulsory motor insurance regime for both Member States (at the legislative level) and within insurance contracts at the national level. Most notably for the reference in *Stichting Koskea,* at para. 3, attempts to use exclusion clauses in situations where the driver of a vehicle was intoxicated at the time of the accident, even if the passenger was aware of the driver's intoxication, are explicitly prohibited. Consequently, even if ED was found to have been driving under the influence of alcohol, this would not impact the right of a third-party victim (here a passenger-victim) to claim compensation.

VII. Can a Driver Transition to a Passenger During a Journey?

The Court of Justice is likely to conclude that, given the lack of explicit guidance in the MVID, the actions of the trainer-passenger are insufficient to designate him as the driver of the vehicle or to remove this designation from ED. In the present circumstances, it appears unlikely that a driver can be reclassified as a passenger. Drawing on UK case law, it is more plausible that the trainer-passenger and ED would, at most, be considered joint drivers at the time of the accident, rather than ED being deemed a passenger due to the trainer-passenger's interference, regardless of the severity of the consequences.

The Court of Justice, and latterly the referring court, may find useful direction from the UK authorities on the concept of a "driver" and "driving." These authorities offer practical guidance, and this is likely to be of value given that this issue is one of factual determination for the referring court. The referring court will need to evaluate ED's actions, including whether contributory negligence or potential alcohol use, as addressed under Art. 13 of the MVID, might apply. Similarly, the trainer-passenger's interference, which directly caused the

accident, raises questions of liability apportionment. Finally, the court must consider whether ED had a duty to prevent the trainer-passenger's interference, which could further inform the allocation of responsibility.

VIII. Conclusions

Stichting Koskea v. Nationale Nederlanden Schadeverzekering Maatschappij N.V. presents a complex legal challenge for the interpretation of the MVID. Central to this case is the question of whether a driver can be reclassified as a passenger during a journey, reflecting the definitional ambiguities surrounding the terms "driver" and "passenger" under EU law. This ambiguity highlights the procedural difficulties faced by national courts when adjudicating such novel and intricate disputes. The MVID, as the cornerstone of motor vehicle insurance across the EU, seeks to harmonize the protection of road traffic accident victims. However, as illustrated in *Stichting Koskea*, the MVID has a legislative gap which compels reliance on national legal frameworks and jurisprudence to resolve disputes. In this context, UK case law provides valuable guidance, but the case underscores the pressing need for greater legislative clarity within the EU's motor insurance framework. As vehicular contexts become increasingly complex, the distinction between drivers and passengers requires precise definition. Incorporating explicit definitions of "driver" and "passenger" into the MVID would address these ambiguities, ensuring consistency and fairness across Member States. Until such reforms are introduced, national courts and the Court of Justice must approach these challenges with caution, guided by common sense and the MVID's primary objective of victim protection.