The Missing Definition of Driver for the Motor Vehicle Insurance Directives. Is Direction Available from the UK?

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ABSTRACT

Will the driver of a vehicle become its passenger during a journey where another passenger assumes control of that vehicle? Perhaps surprisingly, given it is the legislative instrument which regulates the compulsory insurance and civil liability of motor vehicle use across the European Union (EU), the Motor Vehicle Insurance Directive (MVID) 2009/103/EC does not define who is the driver of a vehicle. The legislation and its case law typically refers to the "use of a vehicle," rather than its driver. In this paper, we offer the first assessment of this situation and conclude that whilst this is a largely factual and procedural assessment for the national courts of the EU given the lack of case law and instruction through the MVID, English domestic law may provide the very insight to assist the Court of Justice, pertinent due to a recent preliminary reference, on how it may answer this question.

Keywords: Definition of a driver; Motor Vehicle Insurance Directive; national guarantee fund; passenger; use of a vehicle.

1. INTRODUCTION

The definition of the driver of a motor vehicle would seem like an obvious matter – it is the person behind the wheel. Yet this is a matter which is not defined in EU case law or legislation, neither is it particularly clearly defined in UK[1] legislation. It is in the case law of the UK where the courts have had to explain the parameters of this term and provide features which are indicative of the designation of a person as the "driver" of a vehicle. This is not simply an important issue which has yet to be definitively ruled on by the Court of Justice of the European Union (Court of Justice), it is now a pressing concern given a preliminary reference submitted to the Court of Justice and a reference which we use in this paper to frame the broader discussion of the definition and qualities of the driver of a motor vehicle. Further, given the relative paucity of judicial direction provided, we consider that the critique of the UK's case authority might be of benefit to both the EU Member States and the Court of Justice when considering how to define the driver of a vehicle.

We begin with an outline of the case *Stichting Koskea, as administrator of ED v Nationale Nederlanden Schadeverzekering Maatschappij N.V., trading as Reaal Schadeverzekering N.V.*[2] It is one in which a dispute between the parties travelling together quickly escalated, and with devastating results. In 2016, a minibus insured for third-party liability and passenger accident insurance only (SVI) was involved in a crash. The appellant (ED) was driving a group from a football club when a passenger (the club's former trainer –

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[1] We use the term UK law in this paper because much for the discussion is between EU law and the law of England and Wales (which was a Member State as the United Kingdom). As we are aiming to help provide direction to case authorities that might be of assistance to the Court of Justice and the national referring court in their queries, UK law helps to identify the source material as relevant when the UK was a Member State of the EU.

[2] Case C-490/24, Stichting Koskea: Request for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) lodged on 12 July 2024 – *Stichting Koskea, as administrator of ED v Nationale Nederlanden Schadeverzekering Maatschappij N.V., trading as Reaal Schadeverzekering N.V.* ELI: http://data.europa.eu/eli/C/2024/6078/oj.

hereafter referred to as the "trainer-passenger") suddenly and purposively applied the handbrake while the vehicle was moving at 70 km/h. The result of this action caused the rear wheels to lock, the minibus to skid, spin out of control and collide with pillars of a railway viaduct along the side of the road. ED and another passenger were ejected from the vehicle, suffering serious injuries. ED sustained severe brain damage resulting in him being declared totally unfit for work, and the passenger later dying due to his injuries. The other teammate in the vehicle and the trainer-passenger suffered only minor injuries. ED currently receives benefits under the national IVA scheme (Income Provisions Scheme for Fully Occupationally Disabled People) and his assets have been placed under administration as he is no longer competent to manage his own finances. The SVI and Nationale Nederlanden had begun paying sums to ED based on liability and the insurance cover from 2016 to January 2020, however they ceased to do so following the police report on the facts of the accident. National Nederlanden's notification to ED cited that there was no cover available to the driver of a vehicle under the particular insurance policy (WAM) and the accident occurred after he had been using and being under the influence of alcohol (which precluded cover under the SVI). Further, ED was at fault too under the insurance cover due to his not wearing a seatbelt at the time of the accident.

The national law, the Motor Insurance Liability Act (WAM) at Art. 4(1) WAM reads "The insurance need not cover liability for damage caused to the driver of the motor vehicle causing the accident." Hence, it permits vehicles to be insured on a liability-only basis and consequently the damage suffered by the driver of the minibus was not covered by the insurance policy. ED's argued that although he was behind the wheel at the time of the accident, he could no longer be considered the driver within the meaning of the WAM because, in the act of applying the handbrake, the trainer-passenger was actually the driver of the vehicle.

The district court ruled (through a partial dispute order)[3] in ED's favour, allowing the argument that due to the actions of the trainer-passenger, ED could not be considered the driver of the minibus at the time of the accident and the Nationale Nederlanden was, in principle, obliged to compensate ED for his injuries. In reaching this conclusion, the court considered that having had the handbrake applied to the minibus, ED was not the driver in the sense that he "…could influence the direction of travel, speed and locomotion of the car."[4] The Nationale Nederlanden appealed the decision to the court of appeal which ruled in its favour, setting aside the partial dispute order.[5] It is cited in the particulars of the preliminary reference[6] that the court of appeal could not accept ED was no longer the driver of the vehicle simply because the movement of the vehicle has become uncontrollable.

Given the appeals on this matter, the question as to whether the MVID at Art. 12 identify a group called "passenger" and how is a driver to be distinguished from other passengers, the referring court is seeking clarification on the following. Whether it is possible for the driver, in this case the victim, who was behind the wheel in a serious motor vehicle accident, to cease to have the capacity as driver because a passenger suddenly applied the handbrake while the vehicle was moving, thus causing the accident. If this question is answered in the affirmative, do certain requirements arise from EU law that the national court must take into account when determining whether a driver, within the meaning of Art. 12(1) MVID, has lost the capacity of driver in the circumstances of the case and is entitled to claim passenger protection under the general rule?

Thus, the legal issues surrounding the classification of a "driver" and "passenger" in the context of motor vehicle liability as highlighted in *Stichting Koskea v. Nationale*

[3] Rechtbank Noord-Nederland 22 October 2020, ECLI:NL:RBNNE:2020:3725.
[4] Paragraph 2.4 of the reference.
[5] Gerechtshof Arnhem-Leeuwarden 13 December 2022, ECLI:NL:GHARL:2022:10711.
[6] At [4.8].

Nederlanden present an opportunity to contrast the EU's framework under the MVID with the UK's motor vehicle insurance law. Each of the jurisdictions share an overarching commitment to ensuring the protection of road traffic accident victims, especially passenger-victims, while maintaining a focus on assigning liability in a fair and equitable manner. However, given there are notable differences in the legislative scope, definitional clarity, and judicial approaches to the classification of a person as "driver" and "passenger," and the interesting question as to whether it is possible for such a person to move between these classifications during a journey and based on the activities of a third-party passenger, a critical assessment of the laws and legal directions available should provide an impactful contribution to the scholarship on these matters.

2. MVID – NOT DRIVING, RATHER USE OF A VEHICLE

The first five MVIDs,[7] culminating in the Sixth Consolidating MVID,[8] along with the latest amending Directive 2021/2118,[9] offer no definition of the act of "driving." Throughout these Directives, and given the MVID focus 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, it is typically the use of the vehicle which is at issue rather than the person deemed to have been driving.[10]

It is at Art. 3 MVID where

> Each Member State shall, subject to Article 5, take all appropriate measures to insure 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 both damage to property and personal injuries.

In its jurisprudence, the Court of Justice has explained how the "use of vehicles" is to be understood. In *Vnuk*,[11] the Court interpreted it as extending the previous understanding of a motor vehicle regarding its "normal" use – transporting - to requiring compulsory insurance on public and private land. In *Juliana*,[12] even a vehicle not in use but capable of being put to use was held to be a "use of a vehicle." Further, in *Andrade*[13] the Court distinguished between a motor vehicle used for transport (with the application of the MVID's compulsory insurance) and when the vehicle is used as a machine (in *Andrade*[14] the vehicle was a tractor) to which

[7] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al22028.
[8] 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 (codified version).
[9] Directive (EU) 2021/2118 of the European Parliament and of the Council of 24 November 2021 amending Directive 2009/103/EC 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.
[10] For a discussion of the concept of "use of a vehicle" see James Marson & Katy Ferris "Extra-contractual Rules and Third-party Rights of Direct Action: The Court of Justice Defines Claimants' Rights and Insurers' Obligations in Motor Vehicle Agreements" (2023) 48(4) *European Law Review*, 480.
[11] Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav* [2014] ECLI:EU:C:2014:2146.
[12] Case C-80/17 *Fundo de Garantia Automóvel v Alina Antónia Destapado Pão Mole Juliana and Cristiana Micaela Caetano Juliana* ECLI:EU:C:2018:661.
[13] Case C-514/16 *Isabel Maria Pinheiro Vieira Rodrigues de Andrade, Fausto da Silva Rodrigues de Andrade v José Manuel Proença Salvador, Crédito Agrícola Seguros — Companhia de Seguros de Ramos Reais SA, Jorge Oliveira Pinto* ECLI:EU:C:2017:908.
[14] *Ibid*.

the MVID's reach does not extend. The Court of Justice has also held[15] a parked vehicle as "use of a vehicle" to invoke the MVID given its inherent aspect of vehicle use. Thus, the Court of Justice has adopted a broad view of the use of a vehicle, and even where the MVID was amended in 2021[16] to incorporate a new understanding of "use of vehicles"[17] in response to the expansive understanding produced in the caselaw just mentioned, it merely confirms the transport and normal use of the vehicle – leaving the question of "who is a driver" unanswered.

3. ISSUES FOR THE COURT OF JUSTICE TO DETERMINE

Across the EU, the insurance regime typically operates on the basis that it is the motor vehicle, not the driver, which is subject to the policy of insurance. In this respect, the UK is potentially helpful here as, due to a quirk of law, its insurance regime is based on insurance of the driver.[18] Hence, whilst the question as to the identification of the "driver" of the vehicle has been largely unaddressed throughout the EU's laws, the UK courts have had to make such determinations and have, consequently, established criteria/features of a driver compared with a passenger. It is also important to note from the outset that this is not a matter of the usual owner or driver of the vehicle. Such questions are easily addressed through the use of national databases.[19] The question for the Court is whether, taking ED as the driver of the only vehicle involved in a crash and causing injury to its occupants, ED might be considered a passenger for the purposes of the MVID when the trainer-passenger takes control of the handbrake in the vehicle, leading to the accident which caused the injuries. Then there is the trainer-passenger himself. Does he become the driver when taking this action with the handbrake or will he remain a passenger? Given passengers are considered a special category of victim for the MVID, the designation of passenger for both ED and the trainer-passenger are very relevant to the recovery of any compensation against the insurer (as the insurance of the vehicle and the MVID do not provide damages for injuries to drivers where the policy of insurance is third-party/liability only).

Therefore, our analysis begins with the concept of "driver" and what direction can be taken from the MVID and the jurisprudence of the Court of Justice, before seeking more detailed guidance from the UK.

4. THE "DRIVER" OF THE VEHICLE

[15] Case C-648/17 *BTA Baltic Insurance Company* [2018] EU:C:2018:917, at [48].

[16] For commentary on the extent of the changes which Directive 2021/2118 created, and in particular the motorsport exemptions, see James Marson & Katy Ferris "A Sledgehammer to Crack a Nut? Directive 2021/2118 and Exclusions as Antidotes to Vnuk" (2023) 29(2) *European Public Law*, 57; with respect to the influence and effect of the *Vnuk* ruling and Directive 2021/2118's response to this see James Marson & Katy Ferris "The Problem of Vnuk and the EU Response. A Critique of the Law on Compulsory Motor Vehicle Insurance" (2023) 8 *Journal of Business Law* 639; for a comparative approach between the European Commission's initial proposals and Directive 2021/2118's effects on Directive 2009/103/EC see James Marson & Katy Ferris "Changing Lanes and Removing Rights: Quashing the Judicial Activism of the Court of Justice through Directive 2021/2118" (2023) 47 *European Law Review* 773; and for a complete examination of the holistic insurance implications of the changes introduced by Directive 2021/2118, including the UK's jurisprudence and the potential interpretation and consequences for the amended MVID see James Marson & Katy Ferris "The Motor Insurance Directive 2021/2118: An Attempt to Right Judicial Wrongs, but do Transposition Woes Reflect Deeper Concerns?" (*forthcoming*).

[17] Directive 2021/2118 Art. 1a. "'use of a vehicle' means any use of a vehicle that is consistent with the vehicle's function as a means of transport at the time of the accident, irrespective of the vehicle's characteristics and irrespective of the terrain on which the motor vehicle is used and of whether it is stationary or in motion."

[18] "Insure the Car not the Driver" (2005) *Insurance Times*, https://www.insurancetimes.co.uk/insure-the-car-not-the-driver/1332020.article.

[19] For instance in the UK, see https://www.gov.uk/request-information-from-dvla.

At Art. 1 MVID, the definitions of a "vehicle" and "injured party" are provided. Neither is particularly helpful in the current circumstances but they at least point to the nature of the MVID which is the protection of victims of road traffic accidents and the obligations on Member States and insurers within their jurisdictions to avoid activities and contractual clauses which seek to prevent recovery of compensation for victims or make the securing of such compensation unduly difficult. Member States are entitled to maintain their own rules regarding compulsory insurance,[20] and this allows for policies which only cover third-party victims, not the first parties or their vehicles for loss and damages for accidents which were the responsibility of the insured. These are points to which we return, but at present, and in finding an answer to the question of finding the "driver" of a vehicle, we consider caselaw from the UK where, over many decades, courts have collectively identified features which can be applied on a factual basis by the national courts throughout the EU.

4.1. *In the Absence of an EU Definition for "Driver," What Might be "Driving a Vehicle"?*

As outlined above, the EU Directives do not define who or what is a "driver" of a vehicle, rather the Directives and the caselaw refer to the "use of a vehicle." This lacuna is problematic when determining how the Netherlands might interpret ED's claim and argument for inclusion under the MVID's protection. Yet assistance may be available from other jurisdictions and therefore it might be pertinent to examine laws and case authorities available to identify common themes associated with driving. It is also worth noting at this stage that much of the case authority established within Member States on aspects of motor insurance often derive from the criminal jurisdiction, and in the present discussion civil liability is the jurisdiction under consideration. Therefore, any conclusions to be drawn must acknowledge this direction from those case authorities. Nevertheless, some salient points regarding the definition of driving and driver may still be helpful for all Member States and the Court of Justice when determining an answer to this question. Also, whilst the issue of attempting to use laws in the criminal domain to inform or even to form the basis of the inspiration for the enforcement of rules outside of its remit is not unique, the Polish Supreme Court, for example, has both rejected and approved the use of criminal law concepts in competition law cases, depending on the specific context.[21] This is particularly in situations where it has "… approved references by analogy to the solutions taken from the Criminal Code in the absence of similar provisions in [civil law]."[22] Given we are not attempting to use the jurisprudence from criminal cases as a sword, although not necessarily as a shield to continue the metaphor, we feel it is appropriate in the search for a definition of "driver" to use judicial understandings on motor vehicle insurance law even where they have been used to determine the person responsible in criminal proceedings. In such instances, it was not the criminal law *per se* that was being developed, rather it was the courts attempting to correctly identify *the person* in the proceedings who should be answerable for the criminal charges advanced.

The term "driver" is not clearly defined in the UK's Road Traffic Act 1988 (as will be seen later, it is the act of driving which is defined) nor is there assistance as to its meaning under a national freedom of information request to the Department for Transport.[23] The Vienna

[20] See the MVID at preamble 10 "Each Member State should be able to act in derogation from the general obligation to take out compulsory insurance in respect of vehicles belonging to certain natural or legal persons, public or private."
[21] Grzegorz Materna "Criminal Law as a Source of Inspiration in Competition and Consumer Protection Law" (2023) *Studia Iuridica* 189.
[22] *Ibid* at [190].
[23] https://www.whatdotheyknow.com/request/definition_of_driver. Accessed 9 January 2025.

Convention on Road Traffic (1968) has a definition of "driver" and at Art. 8 of that Convention, "every motor vehicle must have a single person responsible for its operation." As will be seen later, this aspect of the Convention differs from the understanding in national law of the UK, but it is helpful that in the convention a person must be held as the driver of the vehicle, and this involves its operation. Further assistance is provided in the next sentence of Art. 8. "Temporary incapacitation or delegation of control does not necessarily absolve the original driver of their legal obligations." Again, this is helpful given the circumstances of another person/passenger taking temporary control of the vehicle. According to the operation of Art. 8, this does not absolve the driver of their legal obligations, nor does it change the designation of the driver for passenger (and vice versa).

The discussion now proceeds to the UK, which, until 2020, was a Member State of the EU,[24] with much of the legislation and case authorities identified in this section being established either during the UK's membership or at the very least still regarded as good law during this membership. UK national law has in at least two legislative instruments attempted to define driving for the purposes of insurance and criminal law. First, Reg. 111 of the Motor Vehicles (Construction and Use) Regulations 1973 provides "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 ..." In the UK, the principal legislation covering motor vehicles and their insurance is the Road Traffic Act 1988 (RTA88) and this legislation provides a definition of driver at s. 192. Here, a driver is someone who steers the vehicle as well as any other person engaged in driving, and this is relevant because according to this definition, it is quite possible that more than one person at any one time could be driving the vehicle for the purposes of the law.[25] Like so many legislative definitions, the one offered through the RTA88 requires case authority to establish greater detail and direction. Once again, we wish to submit a slight disclaimer at the outset. Many of these cases, like that which is currently being considered by the Court of Justice, will ultimately be very fact specific and broader points of law may be difficult to extract from a very factual assessment of a case. However, this does not prevent themes from these judgments to be extracted and assessed, and thereby identified for commonalities which may be of more general and practical assistance in providing a suitable definition.

Beginning with *R v Munning*[26] a person charged with the offence of driving whilst disqualified had the charge dismissed due to the common-sense application of the law – pushing a vehicle (here it was a motor-scooter) could not be considered as "driving" the vehicle. However, this case must be contrasted with *Gunnel v DPP*[27] where Gunnel was sitting astride a moped, yet the vehicle was not yet started, rather Gunnel was using his feet to propel the vehicle along the road. He was stopped by the police and breathalysed, latterly being charged with driving a motor vehicle after consuming alcohol. Here the court considered that as Gunnel had control over the direction and movement of the moped, along with the fact that he had set the vehicle in motion, all pointed to its satisfaction that Gunnel was to be considered as having being "driving" the vehicle. At appeal, it was confirmed that the essence of "driving," and the court at first instance having applied the correct test, was the use of the driver's controls to direct the movement of the vehicle. Therefore, that the vehicle's engine is not engaged is not instructive to the fact of driving. Similarly, in *Tyler v Whatmore*[28] a young woman who was charged under Reg. 111 of the Motor Vehicles (Construction and Use) Regulations 1973 for

[24] January 31 2020. For the timeline of the UK's withdrawal see https://www.consilium.europa.eu/en/policies/the-eu-uk-withdrawal-agreement/timeline-eu-uk-withdrawal-agreement/.
[25] Although it must be noted that such a definition does *not* apply in cases of a defendant being charged with the offence of having caused death by dangerous driving.
[26] *R v Munning* [1961] 1 WLUK 16.
[27] *Gunnel v DPP* [1994] RTR 151.
[28] *Tyler v Whatmore* [1976] RTR 83.

causing the vehicle to leave the road and crash through a wired fence and into a field as she, from the passenger seat of a motor car, had both hands on the steering wheel whilst a man sat in the driver's seat and controlled the gears and foot pedals. Tyler was deemed at first instance to have been driving the car as she was in such a position to have proper control over the vehicle.[29] The High Court, dismissing her appeal, held that the law did not require a person to control the propulsion of a vehicle to be its driver, and even in accordance with the law it was not impossible for two people to be held as driver according to the facts of the case.[30]

Coasting downhill in a vehicle can be held as driving,[31] as can a person who steers and applies the brakes of a vehicle which is being towed has also been held as an act of driving the vehicle.[32] This extended to a person depressing the accelerator in the mistaken belief that this was the brake pedal who was held as the driver of the vehicle.[33] However, merely releasing the brake of a vehicle and it coasting downhill[34] or a passenger who awoke to find the driver had disappeared and had to assume the steering of the vehicle until it came to a stop[35] were not "drivers" or driving the vehicle for the purposes of English law.

One of the most instructive cases with regards determining the driver of a vehicle in respect of *Stichting Koskea* is *DPP v Hastings*[36] which involved the passenger in the front seat of the motor vehicle pulling the steering wheel in an attempt to frighten his friend who was walking along the road. It was accepted the defendant had no intention to hurt or injure his friend, but the actions of Hastings caused the vehicle to veer towards his pedestrian friend, the driver lost control of the car, consequently causing injury to the pedestrian. Hastings was charged with reckless driving according to RTA88 s. 2[37] which, of course, necessitated Hastings to be identified as the "driver" of the vehicle. Hastings was initially charged and convicted of the offence which led to his appeal. Hastings was successful at appeal and the prosecutor appealed that decision. The court explained that, in dismissing the prosecutor's appeal, whether a person was driving a vehicle, in the ordinary sense of the word, was a question of fact and degree. It continued that whatever the defendant's motive for his action in taking control of the steering wheel, his actions amounted to nothing more than an act of interfering with the driving of the car rather than the act of driving. *DPP v Hastings*[38] was compared with an earlier case of *Jones v Pratt*[39] where a passenger again took hold of the steering wheel in a car, violently steering the vehicle away from the road, but here it was an impulsive reaction to an animal running in front of the moving vehicle. It was held that the passenger's action could not be construed as "driving" the vehicle, once more using a common-sense interpretation of the ordinary sense of the word. In *DPP v Hastings*,[40] the appellant attempted to argue that it was the intention of the passenger in each case which was instructive as to their designation as driver. In *Jones*, the passenger clearly had no prior intention to take control of the vehicle – it was an instinctive reaction to perceived imminent danger. In *DPP v Hastings*,[41] they continued, it was a deliberate and conceived intention to take control and this was the determining factor as to whether the passenger becomes a driver. The question for the

[29] *Ibid* at [83G].
[30] Supra note 28 at [83K].
[31] *Saycell v Bool* [1948] 2 All ER 83, DC.
[32] *McQuaid v Anderton* [1981] 3 All ER 540; and *R (Traves) v DPP* [2005] EWHC 1582.
[33] *Att.-Gen.'s Reference (No. 4 of 2000)* [2001] 2 Cr.App.R. 22, CA.
[34] *R v Roberts (No 2)* [1965] 1 QB 85.
[35] *R v Kitson* (1955) 1 Cr App R 66.
[36] *DPP v Hastings* [1993] RTR 205 DC.
[37] The section provides "A person who drives a motor vehicle on a road recklessly is guilty of an offence."
[38] *Supra* note 36.
[39] *Jones v Pratt* [1983] RTR 54.
[40] *Supra* note 36.
[41] *Ibid*.

court was whether a person momentarily taking hold of the steering wheel of a motor vehicle in which he was the passenger, and with the intent of steering the vehicle towards another person, could be said to be driving recklessly within the definition of s. 2 RTA88. Further, given the stated intent of frightening the pedestrian he aimed the vehicle towards, and that this was a deliberate and premeditated act, could this case be distinguished from the previous authorities - and in particular those where the intention of the passenger taking control of the steering wheel was in the avoidance of perceived danger?

Buckley J in *DPP v Hastings*[42] referred to previous authorities of English law with which he commented as, perhaps marginally, being incorrect as a matter of law.[43] The first was the contention that where a person deliberately interferes with the steering of a vehicle whilst a car is in movement, and they consequently assume a degree of control over it, then such a person is considered the driver. Under the ordinary sense of the word "drives" in English, this person may be said to be driving the vehicle. In *R v MacDonagh*,[44] the court at first instance heard a case involving a man who was instructed by police officers to move his vehicle which was causing an obstruction in the road. He did so by putting his shoulder to the pillar of the vehicle, maintaining his feet on the ground outside of the vehicle and placing his hand on the steering wheel to direct its movement. During this exercise MacDonagh was arrested, charged and ultimately convicted of an offence of driving whilst disqualified (an offence per RTA1972 s. 99). The jury was directed that, even if it agreed with the facts as presented by MacDonagh, he could properly be described as driving and was, therefore, guilty of the offence. This was because for the court, MacDonagh was in a substantial sense controlling the movement and direction of the car.[45] On appeal, MacDonagh's conviction was quashed. For the Court of Appeal, the essence of driving was the use of the driver's controls in order to direct the movement, however that movement was produced.[46] Further, whilst the term "drive" was to be given a wide meaning, it did not include activities which could not be said to be driving a motor vehicle in any ordinary use of the word in English[47] and the ordinary meaning of "drive" could not extend to the appellant who… was making no use of the controls apart from an occasional adjustment of the steering wheel.[48] Indeed, the Court of Appeal cautioned that "although the word 'drive' must be given a wide meaning, the courts must be alert to see that the net is not thrown so widely that it includes activities which cannot be said to be driving a motor vehicle in any ordinary use of that word in the English language. Unless this is done, absurdity may result."[49]

When commenting on the case of *R v MacDonagh*[50] and the other authorities in that judgment, Buckley J remarked that control of the vehicle is important when ascertaining if a person is the driver of it, but it is relevant as to the duration of this person's control over the vehicle as to this designation. Referring to these authorities and their contention that it matters not for what length of time such a person assumes such a function, Buckley J considered that, especially in borderline cases, the length of time the vehicle is under the control of the person may be very important.[51] The crucial part of the judgment comes at 207G-H where Buckley J confirms

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[42] *Ibid*.
[43] Per *Jones v Pratt* [1983] RTR 54, 58E-J.
[44] *R v MacDonagh* [1974J RTR 372.
[45] *Ibid* at [372E-F].
[46] *Supra* note 44 at [374E].
[47] *Supra* note 44 at [374H].
[48] *Supra* note 44 at [376D-E].
[49] *Supra* note 44 at [374H].
[50] *Supra* note 44.
[51] *Supra* note 36 at [207F-J].

> Although it is plain that the defendant did for a moment seize the steering wheel and move it, it seems to me that they 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.

To conclude this assessment of UK case authorities, there appears salient features which indicate both the act of driving and the designation of driver. First, a common-sense (perhaps even literal) interpretation and understanding of the words should be used. Secondly, the case authorities identify control of the direction of the vehicle and its movement, referring to the legislative definitions of steering along with applying of the brakes are each involved in the act of driving. Further, having set the vehicle in motion is also instructive of being a driver. However, and when applying the most authoritative case *DPP v Hastings*,[52] it is clear that the momentary seizing of the steering wheel of a car by a passenger, regardless of the good or bad intentions of that person, will be held on those facts to be an act of interference with driving and, where the driver has not relinquished control of the vehicle, the passenger cannot be considered as to have been "driving." It would be quite odd if the seizing of a steering wheel would be considered legally or factually as sufficiently distinct from applying the handbrake as to arrive at a different conclusion. Thus, common-sense would dictate that the Court of Justice, if it ventures into a discussion on whether ED was the driver of the vehicle at the time of the accident, would likely hold as have the UK case authorities, and as has the Netherlands' court of appeal that ED remained the driver throughout the accident, albeit for the trainer-passenger's unlawful interference.

5. PASSENGER

Given that the present definition of driver, in the MVID and from the jurisprudence of the Court of Justice is lacking in detailed analysis – each seemingly content with emphasising a functional and situational analysis – perhaps more might be gleaned at this stage from the direction on who is a passenger. This is a subject rich with analysis and judicial commentary, but we focus our discussion on those case pertinent to the situation of ED and the trainer-passenger.

There are two elements for discussion here. The first is Art. 12 MVID which establishes passengers as a special category of victim of accidents involving vehicles. The second is Art. 13 MVID which regulates the exclusions from protection available to Member States (at the statutory level) and insurers operating in that Member State (through the application of contractual clauses in insurance policies).

5.1. *Article 12 MVID*

The Court of Justice has addressed the role of passengers in its jurisprudence, primarily in the context of motor vehicle insurance under the MVID and whilst it has not explicitly defined "passenger" in a universal sense, it has provided guidance on the status, rights, and obligations of passengers within specific legal contexts.

Article 12 begins by establishing that Member States, in satisfying the obligation at Art. 3 and its requirement of compulsory motor vehicle insurance, "shall cover liability for personal injuries to all passengers… arising out of the use of a vehicle." The MVID does not distinguish negatively between passengers, rather it has over its iterations formally expanded the cover to

[52] *Supra* note 36.

include, for example, passengers who are also family members and the Article concludes noting "This Article shall be without prejudice either to civil liability or to the quantum of damages." This progressive approach towards passenger inclusion and protection through the MVID has been mirrored in the jurisprudence of the Court of Justice. The Court has consistently interpreted the MVID to ensure that neither national laws nor contractual clauses may undermine its fundamental objective. In *Bernaldez*,[53] the Court held that Spanish legislation absolving insurers from liability to compensate victims of intoxicated drivers contravened the purpose of the MVID. Similarly, in *Correia Ferreira v Companhia de Seguros Mundial Confiança SA*,[54] Portuguese laws excluding family members of the policyholder from being considered "passengers" were found incompatible with the Directive, the Court reaffirming this position in *Candolin v Vahinkovakuutusosakeyhtio Pohjola*,[55] ruling that third-party victims who contributed to their injuries as passengers must still be compensated for their losses.[56] Referencing *Bernaldez*, the Court of Justice 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."[57] Hence, while not a question to the Court in its preliminary reference, the trainer-passenger, as a passenger, is not to be exempted from compensation (even where held factually responsible for the accident and, through the chain of causation, the losses and damages sustained). More pertinently to the reference, this is also why ED is attempting to be held as a passenger at the time of the accident to qualify for the protection afforded this status of victim, while as a driver it is permissible under statute and the contract to exclude his losses under the present circumstances.

Further, in *Churchill Insurance v Wilkinson* and *Tracey Evans*,[58] the Court was asked to rule on a reference from the UK where the domestic legislation, the RTA88 s. 151(8), permitted insurers to seek indemnity from insured persons allowing uninsured drivers to use their vehicles. Insurers purported that passengers such as Wilkinson and Evans should not qualify as third-party victims under the MVID.[59] In rejecting the argument,[60] the Court reaffirmed that the MVID protects *all* passengers, noting the MVID "requires the legal position of the owner of the vehicle, present in the vehicle at the time of the accident as a passenger, to be the same as that of any other passenger who is a victim of the accident."[61]

The Court of Justice has consistently framed passengers as third parties who are entitled to protection under the MVID and while it has not provided a singular, codified definition, its rulings strongly imply that passengers are individuals being transported in a vehicle who do not exercise control over its operation. This inclusive interpretation serves to safeguard their rights and ensures comprehensive insurance coverage. The cases above emphasize how the trainer-passenger's previous relationship with the driver and occupants of the vehicle, his taking control and being responsible (in full or partially) for the accident and subsequent losses, and his knowledge or lack thereof of the driver being under the influence of alcohol during the

[53] Case C-129/94, *Rafael Ruiz Bernáldez,* ECLI:EU:C:1996:143.
[54] Case C-348/98, *Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correia Ferreira v Companhia de Seguros Mundial Confiança AS,* ECLI:EU:C:2000:442.
[55] Case C-537/03, *Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen v Vahinkovakuutusosakeyhti&ouml Pohjola and Jarno Ruokoranta,* ECLI:EU:C:2005:417.
[56] *Ibid* at [27].
[57] *Supra* note 54 at [18].
[58] Case C-442/10 *Churchill Insurance Company Limited v Benjamin Wilkinson and Tracy Evans v Equity Claims Limited,* ECLI:EU:C:2011:799.
[59] *Ibid* at [25].
[60] See, in particular, para. 32 where the Court confirmed that merely due to a passenger being insured to drive the vehicle does not preclude their designation as a passenger.
[61] *Supra* note 58 at [30].

journey, and if this might seemingly invalidate a policy of insurance, will not prevent either his status of passenger or his right to recover damages from the insurer.

6. ARTICLE 13 MVID

Article 13 MVID regulates the exclusions permissible in the compulsory insurance regime. Paragraph 1 mandates that Member States must ensure statutory and contractual clauses seeking to exclude third-party victims from insurance protection are deemed void. Any such clauses are to be treated at the national level as if they never existed. The following is a list of outlawed practices or exclusions applicable to the driving of vehicles by:

> (a) persons who do not have express or implied authorisation to do so;
> (b) persons who do not hold a licence permitting them to drive the vehicle concerned; and
> (c) persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned.

Member States may deviate from the obligation in (a) only where a third-party victim knowingly (requiring actual, not constructive knowledge, as clarified in *Delaney*)[62] consented to be a passenger in a vehicle they knew to be stolen. This exception is exhaustive, not illustrative, and establishes the strict boundaries within which exclusions may operate. Further, where a vehicle obtained through violence or is stolen causes injury to a third-party victim, the Member State may require the national guarantee fund body, established in Art. 10 MVID, to provide compensation. Whether ED could seek to examine the seizing of control of the vehicle by the trainer-passenger amounted to that person having obtained the vehicle through violence (given there certainly was some altercation and general discord within the vehicle leading to the accident) remains to be a factual assessment for the courts – although this would be an unlikely cause of action.

Additionally, paragraph 3 of Art. 13 reinforces these restrictions, extending the prohibition of exclusion clauses to scenarios where the driver of the vehicle was intoxicated at the time of the accident, even where the passenger was aware of this intoxication. Thus, and as acknowledged under case authority explained in the previous section of this paper, even if ED was accused of driving whilst under the influence of alcohol, this would not affect any compensation claim by a third-party victim.

Paragraph 1 further provides Member States the option to diverge from the requirements of Art. 13(1) if victims can secure compensation from a designated social security body. Importantly, this body is distinct from the national guarantee fund identified in Art. 10. If no such designated body exists to fulfil this specific function, the provisions of Art. 13, including its exclusions and restrictions, remain fully applicable to Member States.

7. ARTICLE 10 MVID: ANY ROLE FOR THE NATIONAL GUARANTEE FUND BODY?

Article 10 outlines the obligation for Member States to establish a national guarantee fund. This fund acts as an insurer of last resort,[63] compensating victims for damage or injury caused by uninsured or untraced vehicles. The text specifies:

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[62] *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172.
[63] *Gábor Csonka and others v Magyar Állam*, C-409/11, ECLI:EU:C:2013:512 at [31].

> Each Member State must establish or authorise a body tasked with providing compensation, at least up to the insurance limits, for property damage or personal injury caused by:
> An unidentified vehicle.
> A vehicle for which the compulsory insurance obligation under Article 3 has not been met.

The national guarantee fund assumes responsibility for compensating victims only when compulsory insurance obligations have not been satisfied. Given that Art. 3 explicitly delineates and restricts the circumstances in which an insurer may revoke a policy, the guarantee fund's role is limited to these specific instances. This restricted mandate underscores why the fund is often referred to as an "insurer of last resort" across Member States.

Paragraph 2 of Art. 10 adds that Member States may choose to exclude recovery from the guarantee fund, but only if the fund can demonstrate that the victim knew the vehicle in which they were travelling at the time of the accident was uninsured. That the vehicle in question was subject to a valid policy of insurance renders this exclusion inapplicable.

Having reviewed the relevant MVID provisions, the Court of Justice referenced its jurisprudence concerning the protection of third-party victims and the Directive's scope. In *Liberty Seguros*,[64] the Court underscored the EU's progressive objective of ensuring robust protection for accident victims. Following this, the Court in *Delgado Mendes*,[65] emphasized limiting national measures that unduly restrict the definition of a passenger covered by compulsory insurance. Further, in *Fidelidade-Companhia de Seguros*,[66] the Court reiterated that the fact a policyholder is not the usual driver of the insured vehicle does not diminish the applicability of Art. 13.[67] Thus, in the unlikely event that the Court of Justice held the trainer-passenger to have momentarily switched roles with ED, him becoming the vehicle's driver, albeit not the usual driver, would not prevent the other passengers'' use of protection from Art. 13. However, it must be remembered that the Court reaffirmed in *Liberty Seguros* the limited scope of exclusions under Art. 13, particularly concerning knowledge of a stolen vehicle.[68]

This section is included simply to confirm that the national guarantee fund body, established under Art. 10 MVID will not be in a position to offer any assistance with this case. Whilst it exists in each Member State to ensure that third-party victims of a motor vehicle accident have a source from which to recover damages where the party at fault is either uninsured or untraced, the fund body is limited in its scope to these specific instances. Indeed, in *Matmut*,[69] the Court of Justice summed up the position of the body, reiterating that "the payment of compensation by a national body is considered to be a measure of last resort, provided for only in cases in which the vehicle that caused the injury or damage is uninsured, unidentified, or has not satisfied the insurance requirements referred to in Article 3(1) of the First Directive."[70]

However, as a possible source of a claim, were ED's argument that he became a passenger due to the intervention of the trainer-passenger to fail, at least in respect of the UK's

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[64] Case C-375/20, *Liberty Seguros, Compañia de Seguros y Reaseguros, SA – Sucursal em Portugal v DR*, ECLI:EU:C:2021:861, at [61].
[65] Case C-503/16, *Luís Isidro Delgado Mendes v Crédito Agrícola Seguros - Companhia de Seguros de Ramos Reais, SA*, ECLI:EU:C:2017:681, at [42].
[66] Case C-287/16, *Fidelidade-Companhia de Seguros SA v Caisse Suisse de Compensation and Others,* ECLI:EU:C:2017:575, at [28].
[67] *Ibid*.
[68] *Supra* note 64 at [63].
[69] Case C-236/23, *Mutuelle assurance des travailleurs mutualistes (Matmut) v TN and Others*, ECLI:EU:C:2024:761.
[70] *Ibid* at [41-42].

national guarantee fund body (the Motor Insurers' Bureau), it may be worthy of seeking the assistance of the national guarantee fund body of the Netherlands with a claim. The UK's APIL Guide to MIB Claims explains how the MIB "frequently considers making an ex-gratia payment when a victim has been injured by the actions of a negligent passenger."[71] Whilst not establishing a definitive legal route to compensation, it is a possible source of practical help to ED in seeking recovery of compensation if other routes fail.

8. LEGAL IMPLICATIONS WHEN A PASSENGER CAUSED THE ACCIDENT

If the facts as presented in the reference are correct and the trainer-passenger applied the handbrake, thereby causing the accident (and the Court of Justice follows the UK's jurisprudence by accepting that the reason for this action – good or bad – is immaterial) then the consequence is that the trainer-passenger will be liable for the damages sustained by ED, even in the absence of insurance cover. However, evidently, the rationale for insurance is to protect the third-party and without substantial funds available to the trainer-passenger, it is quite likely that the trainer-passenger will be unable to satisfy the claim from ED and ED will need to seek recovery from some other social fund that may be available through the Netherlands' State system. Such a scenario is far from ideal, yet unless the Court of Justice takes the unexpected step of holding the trainer-passenger as the momentary driver and ED as passenger at the same time when the handbrake was applied, the MVID only protects passengers under the compulsory insurance and the Art. 10 national guarantee fund only is invoked as insurer of last resort in instances of uninsured drivers. Neither is applicable to ED's situation. Where the trainer-passenger's direct actions were intentional, where they directly led to the accident, where ED did not acquiesce[72] to the trainer-passenger's actions of applying the handbrake and he could not have expected the trainer-passenger to act in such a manner, then the trainer-passenger can be held liable for the injuries sustained by ED (ED's contribution to this with the lack of wearing a seatbelt and possibly operating a vehicle following the consumption of alcohol notwithstanding).[73]

9. CAN A DRIVER BECOME A PASSENGER DURING A JOURNEY? FOR THE EU THIS IS LIKELY TO BE A FACTUAL QUESTION, NOT ONE OF DOCTRINE

The ultimate conclusion for the Court of Justice will likely be that given the lack of direction available in the MVID, and the actions of the trainer-passenger being unlikely to be sufficient to either make him the driver of the vehicle or to remove this designation from ED, at least in the current circumstances a driver cannot be transformed into a passenger. Indeed, from the case authorities from UK courts, it is more likely that the trainer-passenger and ED would jointly be held as drivers at the time of the accident than ED to be held as a passenger because of the interference of the trainer-passenger, regardless of how devastating the consequences of this action was. Despite the lack of assistance on the concept of driver from EU legisprudence and jurisprudence, as demonstrated above, caselaw from the UK has established some directed guidance on how to determine a driver, and this will therefore be a matter of factual findings for the referring court. Ultimately, and in the context of motor insurance, a "driver" is typically

[71] APIL Guide to MIB Claims: Uninsured and Untraced Drivers/Chapter 3 The Passenger's Liability/Introduction. https://lexisweb.co.uk/sources/apil-guide-to-mib-claims-uninsured-and-untraced-drivers.

[72] In which case the UK has held such a voluntary encouragement of the passenger taking the control of the vehicle from the driver to be an act of negligence on the part of the driver – see *Ricketts v Thos Tilling Ltd* (1915) 1 KB 644.

[73] Vadim Mantrov "A Victim of a Road Traffic Accident not Fastened by a Seat Belt and Contributory Negligence in the EU Motor Insurance Law." (2014) 5 *European Journal of Risk Regulation*, 115.

defined as the person who has control over the operation of the vehicle. A "passenger," in contrast, is an individual present in the vehicle who is not exercising control over its operation. Yet, where an occupant wrestles control of the vehicle from the driver, the roles are unlikely to dynamically shift, rather it will merely be held as an act of interference unless the facts of such interference establish a much more significant control over the vehicle.

10. CONCLUSIONS

The legal conundrum presented by the case of *Stichting Koskea v. Nationale Nederlanden Schadeverzekering Maatschappij N.V.*[74] raises significant questions about the intersection of procedural law, substantive liability, and the interpretation of key provisions within the EU's MVID. At its core, the question of whether a driver may be reclassified as a passenger in the context of a journey reflects both the definitional ambiguities of "driver" and, to a lesser extent "passenger," under EU law and the broader procedural challenges national courts face when addressing such complex and unprecedented cases.

The MVID, as the cornerstone of motor vehicle insurance across the EU, aims to harmonise the protection of victims of road traffic accidents. However, as demonstrated in *Stichting Koskea*,[75] the MVID's emphasis on the "use of vehicles" rather than the identity or role of the driver has resulted in a legislative lacuna. The absence of an explicit definition of "driver" necessitates reliance on national legal frameworks and caselaw to resolve disputes. In this context, the jurisprudence of the UK—despite its departure from the EU—offers valuable insights. UK caselaw consistently emphasises control as the determinative factor in identifying the driver of a vehicle, but it stops short of allowing momentary interference by a passenger to redefine their legal role as the driver.

The critical analysis of UK authorities such as *DPP v Hastings*[76] and *R v MacDonagh*[77] underscores the importance of continuity and the degree of control exercised over the vehicle. These principles suggest that a transient act of interference, such as the trainer-passenger's application of the handbrake, cannot suffice to reclassify the driver as a passenger. Instead, such actions are better understood as interference with the driving of the vehicle rather than the assumption of the driver's role. This nuanced understanding reinforces the Court of Justice's probable determination that ED remained the driver, notwithstanding the actions of the trainer-passenger.

From the perspective of passenger protection under the MVID, the distinction between driver and passenger carries significant implications. Passengers are afforded enhanced protections as a special category of victim, and the broad, inclusive interpretations adopted by the Court of Justice—such as in *Bernaldez*[78] and *Candolin*[79]—underscore this intent. The statutory framework strictly limits exclusions that might deny passengers their rights to compensation, demonstrating the EU's commitment to ensuring robust victim protection. However, this progressive approach does not extend to drivers, especially under liability-only insurance regimes, where statutory exclusions for first-party claims remain permissible. Thus, ED's strategic argument to be classified as a passenger, rather than the driver, is both logical and aligned with the broader objectives of the MVID.

Yet, the trainer-passenger's deliberate and reckless interference complicates the liability apportionment. While their actions may establish tortious liability, the practical

[74] *Supra* note 2.
[75] *Ibid*.
[76] *Supra* note 36.
[77] *Supra* note 44.
[78] *Supra* note 53.
[79] *Supra* note 55.

recovery of damages from an uninsured individual poses challenges that highlight gaps in the existing compensation framework. The national guarantee fund under Art. 10 MVID, intended as an insurer of last resort, does not apply in cases where the vehicle is insured, as it was here. Thus, ED's recourse may be limited to social security mechanisms, leaving a compensatory gap that undermines the protective ethos of the MVID.

Ultimately, the resolution of this case will rest on the referring court's factual findings and the nuanced application of EU and national law. While the Court of Justice may draw on UK jurisprudence and EU principles to provide guidance, it is likely to refrain from offering a definitive doctrinal stance on whether a driver can transform into a passenger during a journey. Instead, the decision will hinge on the situational dynamics of control, intention, and the substantive provisions of the MVID.

This case exemplifies the broader need for legislative clarity within the EU's motor insurance framework. As the roles of drivers and passengers evolve in increasingly complex vehicular contexts, the boundaries between these categories must be more precisely delineated. A more explicit definition of "driver" and "passenger" within the MVID could mitigate ambiguities and ensure equitable treatment across Member States. Until such reforms are realised, national courts and the Court of Justice must navigate these definitional challenges with prudence, guided by common sense and the overarching objective of victim protection.