
Submitted by Nicholas Bevan to the University of Exeter, as a paper submitted for the degree of Doctor of Philosophy by Publication in Law in November 2016.

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Nicholas Bevan
Abstract

The United Kingdom (UK)’s transposition of the European Directive on motor insurance1 (the Directive) is shot through with provisions that fall below the minimum standard of compensatory protection for accident victims prescribed under this superior law. These expose third party victims to the risk of being left undercompensated, or recovering nothing at all.

The author’s research has demonstrated that the handful of cases that had previously been perceived as isolated anomalies in the UK’s transposition of this European law are in fact symptomatic of a more extensive and deep-rooted nonconformity. His published articles over the past five years were the first to reveal the prevalence of this problem and the resulting lack of legal certainty. He has been the first to offer detailed proposals for reform, as well as fresh insights into legal remedies potentially available to private citizens affected by these irregularities.

Sections 2 and 3 of this paper are a summary of the author’s views covered in his various articles and research into the causes and effects of this disparity. They explain that whilst both the UK and European Union’s legislature share a policy objective the different approaches to achieving that end have resulted in different standards of compensatory protection.

Section 4 recounts the author’s empirical approach that led him to undertake the first comprehensive comparative law analysis in this field.

Section 5 explains the original, if sometimes controversial, nature of the author’s case commentaries, articles and official reports proposing reform.

Section 6 sets out the author’s contribution to legal knowledge and practice in this area. This includes his opinion, contrary to long established precedent, that the Directive is capable of having direct effect against the Motor Insurers’ Bureau.

1 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, sometimes referred to as the sixth directive on motor insurance
“When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean — neither more nor less.’

‘The question is,’ said Alice, ‘whether you can make words mean so many different things.’

‘The question is,’ said Humpty Dumpty, ‘which is to be master — that’s all.”

Through the Looking Glass and What Alice Found There, Lewis Carroll, 1871

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2 Illustration by Sir John Tenniel (b 1820, d 1914). This is copyright expired
3 The excerpt quoted above was written is by Charles Lutwidge Dodgson (b 1832, d 1898), whose nom de plume was as Lewis Carroll. It is also copyright expired
4 Leggatt LJ may have been the first judge to quip, in the context of a commercial dispute, with a quote from Charles Dodgson’s children’s classic, in Investors Compensation Scheme Ltd v West Bromwich Building Society, and others [1998] 1 BCLC 493 at 528
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Introduction

Our national law provision for guaranteeing that motor accident victims actually recover their full compensatory entitlement is defective. It is peppered with flaws that diminish or deny the protection it is supposed to confer.

All too often, the ordinary literal meaning of these provisions fail to reliably convey their true legal effect; they often say one thing but are capable of producing a different result if properly construed. This is because some of the domestic statutory provision relating to compulsory third party motor insurance, as well as the two collateral extra-statutory compensation schemes, do not conform to the more generous European law minimum standards that it is supposed to implement.

This paper explains why our national law in this area must always be construed consistently with this governing European law. Although it is possible to cure many (but not all) of these inconsistencies in implementation by contenting for a European law consistent construction, that process presupposes an understanding of basic comparative European law principles that is beyond the appreciation of most well educated individuals and, more to the point, it also seems to be beyond many personal injury practitioners. In short, our domestic provision in this area lacks legal certainty.

The disparity between the literal meaning and the actual effect of our national law in this area is a central theme of this paper and the author’s published articles to which it refers.

5 See APPENDIX item 9, On the Right Road 1, February 2013 under the heading Interpreting Community law
6 This term is used in both its domestic and European law context. In the former case, we have Lord Bingham’s first of eight principles of the rule of law from his 2010 lecture on the rule of law presented at the Bingham Centre for the Rule of law: ‘(1) The law must be accessible and, so far as possible, be intelligible, clear and predictable’, see also Bingham T, ‘The Rule of Law’ Penguin, (2011). In a European law context this principle requires a consistent implementation of European Union law, as developed by the CJEU, throughout the member states, see Tridimas T, ‘The General Principles of EU law’, 2nd edn Oxford University Press (2006) pages 242 – 297 and Schonberg N, ‘legal Certainty and Revocation of Administrative Decisions: A comparative Study of English French and EC Law’ (1990-00) 19 YEL 257. In the context of the UK’s transposition of the Directive see (Case C-63/01) Evans v Secretary of State for Transport and MIB [2003] ECR I-14447, para 48 and also Bevan N, Good Law?, New Law Journal (NLJ), 18 July 2013 [Not reproduced in the Appendix]
Sections 2 and 3 of this paper cover much the same ground as the first half of *Mind The Gap*, albeit in reverse order. The rearrangement is deliberate. *Mind The Gap* was written to emphasise the pre-eminence of European law in this area, so it seemed apposite to open with an exposition of that primary law before undertaking a comparative analysis of the UK’s transposition.

This paper seeks to demonstrate why the author’s contribution to knowledge is original. Consequently, a chronological approach is called for: one that explains the conventional perceptions and practices that this author’s published articles confront. This begins with the British legislation of 1930 that introduced the concept of compulsory third party motor cover.

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UK social policy

This section examines the causes of the UK’s failure to properly implement the Directive. These originate in the common law origins and architecture of the UK’s pre-accession national law provision for third party motor accident victims.

First steps

The UK introduced compulsory third party motor insurance under Part II of the Road Traffic Act 1930 (the RTA 1930). The impetus for this initiative was the hazard posed to the public by the increasing prevalence of motorised transport. The parliamentary intention was simple: to ensure that motor accident victims were not deprived of their proper compensatory entitlement because of the inability of the responsible driver or owner to pay. This was to be achieved through mutualising the financial hazard posed by motor vehicle road use and by funding this through mandatory insurance.

Part II of the RTA 1930 was neither a self-contained nor a holistic endeavour. It was an empirically derived construct that built on existing common law principles and which depended, for its administration, on the good offices of a nascent motor insurance sector. With one notable exception, the RTA 1930 did not interfere with the common law principle of contractual privity. Its scope was largely

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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, sometimes referred to as the sixth directive on motor insurance
9 See Merkin R and Hemsworth M, ‘The Law of Motor Insurance’ (2nd edn Sweet & Maxwell 2016), pages 1 – 26, for an extensive account of the background and development of motor insurance law
10 This was augmented by the Third Parties (Rights Against Insurers) Act 1930 that transfers the contractual right to indemnity of insolvent policyholders to entitled third parties, to prevent their claims from being lumped in with the insured’s assets for distribution amongst the general creditors. It also entitles the third party to bring an action directly against the insurer but this right is only triggered by the insured party’s insolvency
11 Section 38 of the RTA Act 1930 nullifies the effect of certain contingent exclusions of liability triggered after the event giving rise to the claim but only in so far as they affect a third party’s entitlement. Even here, the same provision goes on to provide a statutory right for an insurer to recover its outlay from meeting such a claim from its policyholder. This recoupment provision survives as Section 148(6) of the Road Traffic Act 1988 (RTA 1988)
12 A term often used synonymously with ‘the third party rule’. For a detailed exposition of the third party rule see Law Commission, ‘Privity of Contract: Contracts For The Benefit of Third Parties’ (Law Cm no 3329, 1996) pages 1-38 available online from http://www.lawcom.gov.uk/wp-content/uploads/2017/02/lc242_privity-of-contract-contracts-for-
confined to ensuring that individuals using a motor vehicle on a road had third party cover motor insurance. A wide degree of contractual autonomy was conferred. Motor insurers enjoyed considerable latitude to qualify or circumscribe their exposure to this risk in almost any way they chose provided that, in the event that a contractual liability was triggered, the policies covered in full any civil liability for death or personal injury caused to a third party

The contractual terms of cover were regulated only to the extent of the terms of cover stipulated by Section 36(1)(b). This prescribes a policy that ‘insures 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 caused by or arising out of the use of the vehicle on a road:’...

It is worth noting Hailsham LC’s observation in Gardner v Moore and others to the effect that the certificate of cover issued under this legislation involves an element of trade’s description: since at some basic level the cover provided needs to be fit for purpose.


13 In the words of Harman LJ’s analysis of Section 1(4) in Post Office v Norwich Union Fire Insurance Society Ltd [1967] 2 QB 363, 376, a third party ‘cannot pick out the plums and leave the duff behind.’

14 This survives in a largely altered form as Section 145(3)(a) of the RTA 1988 but the cover now includes damage to property and extends to use in any public place in Great Britain

15 The same provision goes on to list three scenarios that are excluded from such cover: first, an incident where the liability arose out of and in the course of the victim’s employment; secondly where it resulted from the carriage of paying passengers or the transportation of employees and thirdly, where any contractual liability applied

17 A view not shared by Ward LJ in EUI Ltd v Bristol Alliance Ltd Partnership [2012] EWCA Civ 1267, [2013] 2 WLR 1029, see APPENDIX item 5, Marking The Boundary, Journal of Personal Injury Law (JPIL), [2013] issue 3 under The Court of Appeal’s judgment in EUI
A qualified success

This *laissez faire* approach allowed insurers to rely on any breach of condition or warranty perpetrated by their policyholders to avoid liability. Furthermore, the RTA 1930 conferred only an indirect or subrogated entitlement on third parties\(^\text{18}\). It was also only a qualified right: the nature and extent of a third party victim’s entitlement to compensatory protection depended on the contractual terms of a policy previously agreed between the insurer and its policyholder.

Consequently, whilst the introduction of compulsory third party motor insurance significantly improved the prospect that motor victims might ultimately recover their full compensatory entitlement regardless of the tortfeasor’s financial means, it did not guarantee that outcome. These statutory rights were enjoyed vicariously and they were dependent on a variety of factors over which the victim, being a stranger to the contract, had no ability to influence or control. It also left victims exposed to the fickle and forgetful: those who failed to comply with the statutory duty to insure imposed by Section 35(1) of the Road Traffic Act 1934 (RTA 1934)\(^\text{19}\).

The only statutory intervention affecting the contractual terms was confined by Section 38 of the RTA 1930 to protecting a third party from the effects of a breach of contract perpetrated after the event giving rise the claim. It also conferred on the insurer a reciprocal statutory right to recover its outlay in this regard from its policyholder.

The limitations of this statutory measure became apparent all too soon. For example, insurers were able to rely on material misrepresentations or non-disclosures in the proposal forms to treat the policy as void *ab initio*, even where these matters had no bearing on the event giving rise to the materialisation of the risk. Others relied on contractual restrictions in use or other limitations in the terms of cover to repudiate liability. Yet others sought to delay payment where the policyholder had sustained a critical injury, in the expectation of being absolved from liability by the application of the common law principle of *actio personalis moritur cum persona*\(^\text{20}\).

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\(^{18}\) A feature made explicit in the sibling legislation under Section 1(4) of the Third Parties Rights Act 1930 in its restatement of the relevant common law principles

\(^{19}\) This survives in altered form as Section 143 RTA 1988

\(^{20}\) By which principle a right of action in tort expires on the death of the tortfeasor
Declassified Cabinet Office records reveal that in early 1934 the Minister of Transport was concerned by the vagaries in cover provided under the RTA 1930. He wanted to bolster the compensatory protection of road accident victims by extending the concept of a direct right of action beyond insolvency and restricting the ability of insurers to rely on a policyholder’s misrepresentations or non-disclosures against third party victims.

A policy compromised

1934 was a pivotal year. The government could have opted to make a victim’s entitlement a free-standing one: effectively ring fencing the third party’s vicarious entitlement from any contractual dispute between the principal parties. Insurers would still have retained their ability to impose price and risk differentiation through the simple expedient of extending the statutory recoupment provisions of section 38 RTA 1930. Instead, the government appears to have been persuaded by the concerns of a fledgling industry as to the impact this might have on the cost of motor insurance premiums and so, it opted it for a compromise.

The RTA 1934 supplemented rather than replaced the ‘principal Act’. Section 12 was confined to nullifying the effect against a third party victim of eight different categories of policy exclusion. This survives in much the same form in section 148 (1) and (2) of the Road Traffic Act 1988 (RTA 1988): a necessary implication of such a provision being that any exclusion, restriction or precondition of liability not so nullified by statute remained fully effective.

Section 10 of the RTA 1934 conferred a direct right of action on third party victims to recover an outstanding judgment from the defendant’s insurer. It also restricted insurers’ ability to evade this statutory liability (whether by cancelling their policies or exercising their right to treat a policy as void for misrepresentation

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21 The author acknowledges the kind assistance of Matthew Channon, researcher at the University of Exeter, for unearthing the relevant Cabinet Office papers, reference C.P.4 (34) of 11 January 1934 and for his generous consent to their being referred to in this paper

22 These included restrictions as to the age or mental state of the driver and various technical and mechanical restrictions relating to the vehicle, its load or the number of passengers

23 According to Sir Felix Cassell, Report of the Committee on Compulsory Insurance, July 1937, Cmd. 5528, these contractual restrictions and exclusions had all been previously upheld against third party victims

24 A point made by Ward LJ in his judgment in EUI Ltd v Bristol Alliance Ltd Partnership [2012] EWCA Civ 1267, [2013] 2 WLR 1029, para 45
or non-disclosure) by requiring them to apply for a court declaration within strict time limits. Sections 151 and 152 of the RTA 1988 incorporate these provisions.

The RTA 1934 extended the concept of the ‘statutory insurer’\(^{25}\). This expression\(^{26}\) denotes a motor insurer on risk at the time of the incident giving rise to the claim, where the policyholder is in breach of a term which entitles the insurer to avoid its contractual indemnity but where, because of the statutory intervention alluded to above, the insurer remains liable to satisfy a third party claim\(^{27}\).

The RTA 1934 left various lacunae in third party cover unaddressed. Numerous exclusions and restrictions continue to apply to modern policies, such as the commonplace restrictions to ‘social, domestic and recreational use’, or the exclusion of liability for journeys to and from work or for ‘road rage’.

In 1937 these shortcomings were considered in Sir Felix Cassell’s Report\(^{28}\), which noted the problem caused by insolvent insurers and the numerous contractual exclusions not nullified by Section 38, as well as the problem posed by completely uninsured drivers. The exigencies of the Second World War intervened before any of this could be addressed.

**Further stop gap measures**

1945 marks another important milestone. Instead of adopting a dirigiste approach, the Minister for War Transport chose to work in close collaboration with motor insurers. Rather than imposing comprehensive and free-standing third party cover, he settled on devising a workable scheme that protected victims who fell through the anterior contractual or statutory schemes and decided to implement this through a series of negotiated private law agreements with the industry.

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\(^{25}\) A concept first coined by Section 38 of the RTA 1930, supra

\(^{26}\) The term ‘statutory insurer’ is not a statutory definition, it is a term coined by the courts.

\(^{27}\) See the discussion on Article 75 insurers below *Comparison with the UK Provision under The Increasing influence of European law* and see also Merkin R and Hemsworth M, ‘The Law of Motor Insurance’ (2nd edn Sweet & Maxwell 2016) pages 475 and 489 and again at 627 – 631 on Article 75

\(^{28}\) Supra
On 17 December 1945 he secured the collective agreement of every insurer providing motor insurance in the UK to incept and fund a central body. This would be responsible for compensating victims of incidents that should have been covered by third party insurance under Part II of the RTA 1930 but where either there was no insurance in place or the judgment remained unsatisfied for more than seven days. The contract provided that the central body’s role would be further defined in a later agreement.

The Motor Insurers’ Bureau (MIB) was duly incorporated on 14 June 1946 with the object of discharging the role of the central body and it entered into its first agreement with the Minister for Transport three days later on 17 June. This was the progenitor of what are now two contiguous extra-statutory compensation schemes: one for uninsured drivers, the other for untraced drivers.

In anticipation of the UK’s accession to the European Community in 1973, The Road Traffic Act 1972 (RTA 1972) extended third party cover to property damage, albeit restricted by a financial ceiling. This Act was superseded by Part VI of the RTA 1988 which is the UK’s primary legislative implementation of the Directive.

**Improved but incomplete protection**

By the time the UK became part of the European Community in 1973, the compensatory entitlement of third party motor victims was achieved by an eclectic mix of statutory and extra-statutory provision. It involved three different levels of protection:

- contractually derived compulsory third party cover
- additional protection imposed through statutory intervention (but restricted to a limited set of instances that required an insurer to treat a third party’s claim as though it were fully insured, notwithstanding the policyholder’s breach of contract)

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29 This is set out in a memorandum of agreement between the Minister of War Transport and every insurer then transacting compulsory motor vehicle insurance business in Great Britain titled: ‘The Motor Vehicle Insurance Fund’, originally published by the HMSO, London, now out of print but available on request from the Department for Transport.

30 Currently the Untraced Drivers’ Agreement 2003 and the Uninsured Drivers’ Agreements 1999 and 2015

31 Originally Section 36 of the RTA 1930, later Section 143 of the RTA 1972

32 Originally Section 38 of the RTA 1943, later Section 148 of the RTA 1972
the two compensatory schemes managed by the MIB for victims of uninsured or untraced drivers

Third party claims that fell through the contingent protection afforded by compulsory and statutory insurance were clearly intended to be caught by the compensatory schemes. The fact that the same commercial interests managed and funded these tertiary safeguards produced a potential conflict of interest was ignored. However, there is nothing intrinsically unsound in such an arrangement provided it is properly and impartially supervised by the state. Indeed, in the overwhelming majority of cases, the protective aim is achieved.

Emerging flaws

Where these triple measures fail most obviously is at their tertiary stage. It is evident that, from the outset, the Minister for Transport relied on the MIB to draft the terms of the extra statutory scheme it was to manage under the contract agreed between its members and the government in 1945.

Over the years a progressively influential motor insurance lobby managed to persuade successive ministers to agree increasingly complicated and illiberal schemes whereby numerous exclusions, restrictions and pre conditions to MIB liability have been conceded.

The burgeoning length and complexity of the schemes perhaps best demonstrates this phenomenon. The 1946 agreement could be replicated on just two or three sides of A4 paper. By 1999 the Uninsured Drivers’ Agreement had expanded to fourteen A4 pages replete with technical terms. This is accompanied by official guidance that adds half as much again to the bulk and which qualifies, and in places alters or even contradicts the main agreement33.

What had originally been a simple and robust ‘catch-all’ compensatory safeguard had, by 1999, metamorphosed into an extensively qualified, excessively prescriptive and bureaucratic regime replete with exclusions, restrictions and conditions precedent to liability. This allows the MIB to reject entirely legitimate

33 These contradictions were the result of amendments introduced in 2001, following the threat of judicial review, designed to mitigate some of the scheme’s more offensive procedural conditions precedent of liability and to give effect to the House of Lords ruling in White (AP) v White & MIB [2001] UKHL 9, [2001] 1 WLR 481
claims, often for the most inconsequential procedural infraction34. The Untraced Drivers’ Agreement 2003 has similar failings.

34 See APPENDIX, item 2 – The Motor Insurers Role, and item 3 – Why the Uninsured Drivers’ Agreement 1999 needs to be scrapped, JPIL [2011] issues 1 and 2 respectively. The 1999 scheme continues to apply to incidents that pre-date 1 August 2015
The increasing influence of European law

One consequence of the UK’s accession to the European Community was that from 1973 the domestic law provision considered above became subject to the superior authority of the European Council Directive 72/166/EEC\(^\text{35}\) on motor insurance\(^\text{36}\). This was to be the first of six directives on motor insurance. As with Part II of the RTA 1930, it was also drafted in very broad terms.

**First steps**

Article 3.1\(^\text{37}\) imposed a requirement on member states to: ‘... take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures.’ Article 3.2 stipulated that such cover should extend to ‘any loss or injury’.

These Articles conferred a wide discretion on member states to devise their own terms of cover and level of indemnity.

**Increasing restrictions**

As with the RTA 1930, this imprecision set a low implementation threshold: all that was required was that some third party cover should be in place\(^\text{38}\). This resulted in major disparities in the levels of protection provided by different member states. This inconsistency was perceived to undermine the effectiveness of the Directive’s other legislative aim: of liberalising the movement of people and vehicles across the Community.


\(^{36}\) See Merkin R and Hemsworth M, ‘The Law of Motor Insurance’ (2nd edn Sweet & Maxwell 2016) pages 26 – 45, for a detailed account to the development and influence of European law in this area

\(^{37}\) Of this first Directive on motor insurance (72/166/EEC) Article 3 survives as Article 3 of the sixth (consolidating) Directive on motor insurance, see below

\(^{38}\) Which in 1973 the UK provision easily surpassed even with its limited nullification of exclusions of liability in what is now s148(=2) RTA 1988 and its imposition of unlimited liability for personal injuries
Accordingly, over the course of eighteen years, two successive directives\(^{39}\) almost entirely removed this wide legislative discretion on the terms of third party cover.

The second Directive imposed minimum levels of financial cover. It also provided that certain exclusions of liability would be ineffective against third party victims. It also obliged member states to ‘...set up or authorize a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied....’\(^{40}\).

A third Directive followed in 1990\(^{41}\). It emphasised the need to protect particularly vulnerable categories of victim\(^{42}\), such as passengers (other than the driver), pedestrians and cyclists.

**Lock down of discretion and enhancement of rights**

In 1996 the European Court of Justice (hereafter referred to by its modern acronym CJEU\(^{43}\)) delivered a landmark judgment in *Bernaldez*\(^{44}\). It ruled that these three Directives should be interpreted collectively as requiring that compulsory insurance must enable third party victims of motor vehicle accidents to be compensated for all damage to property and personal injuries sustained\(^{45}\). It also ruled that this requirement precluded insurers from being able to rely on either statutory provisions or contractual clauses to refuse to compensate third party victims of an accident caused by an insured vehicle, save to the extent expressly permitted by the Directives\(^{46}\).


\(^{40}\) Article 1(4) of the Second Directive 84/5/EEC survives, duly amended, as Article 10 of the (consolidating) Directive


\(^{42}\) Article 1

\(^{43}\) Court of Justice of the European Union

\(^{44}\) (Case C-129/94) *Ruiz Bernaldez* [1996] ECR. I-1829

\(^{45}\) Within the minimum levels of cover prescribed by Article 1(2) of the Second Council Directive (84/5/EEC)

\(^{46}\) Professor Tridimas notes the significance of (Case C-129/94) *Bernaldez* (cited above) as a departure from the prohibition of the horizontal effect of directives. See his article, ‘Black, White and Shades of Grey: Horizontality Revisited’, (2002) 21 YBL 327, at page 352. He poses the question that as para 20 of that judgment clearly states that insurers are prevented from relying on statutory provisions or contractual clauses that purport to entitle them to refuse to compensate
The CJEU ruled that only one contractual exclusion could be relied on against a third party victim. This applied to a passenger who voluntarily enters a vehicle knowing it is stolen\(^\text{47}\). This decision was consistent with the seventh recital to the second Directive on motor insurance (84/5/EEC) which stated that: ‘...it is in the interest of victims that the effects of certain exclusion clauses be limited to the relationship between the insurer and the person responsible for the accident.’\(^\text{48}\)

Although *Bernaldez* did not feature an uninsured driver claim, its rationale was explained in wide and purposive terms and justified by reference to an underlying principle of protecting motor accident victims. Accordingly, given the teleological nature of European directives, *Bernaldez*’s ratio applies to all motor accident claims governed by these directives. They clearly extended to the Article 10 authorised body responsible for compensating victims of uninsured and unidentified vehicles which in the UK is the MIB. Thus the MIB is also obliged to restrict itself to the single exclusion permitted to it by Article 10.2 of the Directive that applies to a victim who voluntarily enters the vehicle as a passenger knowing that it is uninsured\(^\text{49}\). The CJEU has recited and applied the protective principle

\(^{\text{47}}\) This survives as Article 13.1 of the Directive

\(^{\text{48}}\) This survives as Recital 15 in the Directive

\(^{\text{49}}\) See also the Court of Appeal’s decision in *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172 upholding Jay J’s first instance finding in this respect in *Delaney v Secretary of State for Transport* [2014] EWHC 1785 (QB)
identified in *Bernaldez* in a long line of subsequent judgments, most recently in *Damijan Vnuk*.

In May 2000 a fourth Directive (2000/26/EC) conferred on injured third party victims a direct right of action against the responsible party’s motor insurers, as well as making detailed provision to help expedite claims on behalf of individuals injured abroad in a foreign member state.

A fifth Directive (2005/14/EC) made various revisions and clarified the importance of the protective principle as it applies to passengers and particularly vulnerable road users such as pedestrians and cyclists. The minimum financial limits were increased and member states required to review these levels in line with inflation every five years.

On 16 September 2009 all five Directives were consolidated into a sixth (2009/103/EC) referred to here as ‘the Directive’, which remains in force.

The first directive’s limited legislative objective has evolved over the past four decades into a broad encompassing principle that underpins the European law on motor insurance. It can be summarised as requiring member states to ensure that no innocent third party injured or suffering loss caused by the use of a motor vehicle should go uncompensated, irrespective of the presence or absence of effective insurance.

**The European insurance requirement**

The following key principles can be distilled from the European law defining the comprehensive nature and scope of the insurance requirement as it applies to domestic claims:

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50 (Case C-348/98) *Ferreira v Companhia de Seguros Mundial Confianca SA* [2000] ECR 1-6711; (Case C-537/03) *Candolin* (cited in note 28 above) (where its passages were quoted from extensively); (Case C-356/05) *Elaine Farrell v Alan Whitty, The Minister for the Environment, Ireland and the Attorney General, Motor Insurers Bureau of Ireland* [2007] ECR I-3067; Case C-442/10 *Churchill v Benjamin Wilkinson and Tracy Evans* [2013] 1 W.L.R. 1776; (Case C 409/11) *Gábor Csonka v Magyar Állami* [2014] 1 CMLR 14

51 (Case C-162/13) *Damijan Vnuk v Zavarovalnica Triglav d. d.* [2014] ECLI:EU:C:2014:2146, [2014] All ER (D) 121 (Sep)

52 The government recently increased the levels with effect from 31 December 2016, see the Motor Vehicles (Compulsory Insurance) Regulations 2016

53 See item 5, *Mind The Gap*, The British Insurance Law Association Journal (BILAJ), January 2016 under the heading On the duty to insure and the third party cover required under Article 3
First, the Article 3\textsuperscript{54} minimum requirement for third party motor cover is mandatory and must extends to:

(i) any vehicle conforming with the Article 1 definition\textsuperscript{55}

(ii) any civil liability arising out of a use consistent with the normal function of the vehicle\textsuperscript{56}

(iii) such use anywhere on land\textsuperscript{57}

Secondly, the duty to insure and the scope of cover are coextensive\textsuperscript{58}.

Thirdly, member states have no discretion to introduce or permit restrictions, exclusions or limitations in third party cover except as expressly provided for within the Directive. This extends to contractual as well as statutory provisions\textsuperscript{59} and, as indicated above, is restricted to the stolen vehicle passenger exception. Even then, as an exception to the general rule, it is one that must be construed strictly\textsuperscript{60}.

**The compensating body’s role**

As to the role of the authorised Article 10 compensating body (ie the MIB) this is regulated in precise terms\textsuperscript{61}.

First, it is a strictly circumscribed role. The body is only responsible for:

(i) unidentified vehicle claims

(ii) claims where there is no insurance in place\textsuperscript{62}

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\textsuperscript{54} Which replicates Article 3 of the first Directive (72/166/EEC) on motor insurance

\textsuperscript{55} Namely, ‘any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled.’

\textsuperscript{56} (Case C-162/13) Vnuk paras 56, 57 and 59

\textsuperscript{57} (Case C-162/13) Vnuk paras 57 and 59

\textsuperscript{58} (Case C-537/03) Candolini v Vahinkovakuutusosakeyhtio Pohjola [2005] ECR I-5745, para 28 requires that national provisions must not deprive the provisions of the Directive from their effectiveness. See also (Case C 409/11) Gábor Csonka v Magyar Állam [2014] 1 CMLR 14, para 28 from which it is evident that the protection is required at the anterior stage of insurance cover; not the Article 10 compensating body, see Csonka paras 30 to 32

\textsuperscript{59} (Case C-129/94) Rafael Ruiz Bernaldez [1996] ECR. I-1829, para 20

\textsuperscript{60} (Case C-537/03) Candolini, paras 18, 21, 22 and 34

\textsuperscript{61} See APPENDIX item 7, Mind The Gap!, BILAJ, January 2016 under the heading On the Compensating Body – Article 10 and in particular (Case C-442/10) Churchill v Benjamin Wilkinson and Tracy Evans [2013] 1 W.L.R. 1776, para 41; (Case C 409/11) Csonka, paras 31 and 32

\textsuperscript{62} (Case C 409/11) Csonka paras 30 to 32
Secondly, only one exclusion of liability is permitted under either of the above scenarios and that only applies to a passenger who voluntarily enters the vehicle knowing that it is uninsured\textsuperscript{63}.

Thirdly, it must compensate at least up to the level of the third party cover requirement for identified insured drivers\textsuperscript{64}.

Fourthly, it must apply the European law principles of equivalence and effectiveness\textsuperscript{65} in the discharge of its role.

Finally, the Article 10 body is permitted to treat its liability as subordinated to other sources of redress and, in the case of claims featuring unidentified vehicles, to exclude property damage claims in certain situations. However, applying existing CJEU principles, these are to be construed strictly.

\textbf{Comparisons with the UK provision}

It follows from the above that the qualified nature of the UK provision for third party motor insurance and the third party rule (in both its common law\textsuperscript{66} and statutory manifestations\textsuperscript{67}) are inimical to the free standing and holistic nature of the third party cover required under European law. The Article 3 requirement obliges the third party cover against civil liability for the vehicle’s use (as opposed to the personal liability of the driver or owner\textsuperscript{68}) to be fit for purpose. Accordingly,

\textsuperscript{63} (Case C-129/94) Bernáldez para 20
\textsuperscript{64} This is taken from Article 10.1 of the Directive
\textsuperscript{65} It is settled law that where, in the absence of EU law rules and procedure, a member state seeks to implement EU law, the domestic legal system of each state must lay down the detailed procedural rules to safeguard the rights conferred on individuals under that EU law, and it must do so in conformity with the EU law principles of equivalence and effectiveness. See the explanation given by the CJEU in (Case C-63/01) Evans v Secretary of State for Transport and MIB [2003] ECR I-14447 paras 27 and 28 and paras 41 – 46 - all fully cited above. See also the following CJEU judgments for the application of the principle of effectiveness in this area: (Case C-129/94) Bernaldez, (Case C-537/03), para 19; Candolin, para 28; (Case C-356/05) Farrell, para 34 and (Case C-442/10) Churchill, para 48. The principle of equivalence was considered at some length by the House of Lords in Preston v Wolverhampton NHS Trust [2001] UKHL 5; [2001] 2 AC 455, see also note 93 below
\textsuperscript{66} Tweddle v Atkinson [1861] 1 B & S 393; 121 ER 762 and Beswick v Beswick [1968] AC 58, 72; to the extent abrogated by Donoghue v Stevenson [1932] AC 562 and the other exceptions to this rule
\textsuperscript{67} Section 1(4) Third Parties (Rights Against Insurers) Act 1930; Section 1(5) Contracts (Rights of Third Parties) Act 1999, as to which note Harman LJ’s observations in Post Office v Norwich Union Fire Insurance Society Ltd [1967] 1 All ER 577 at 376 and Regulation 3(2) European Communities Third Parties (Rights Against Insurers) Regulations 2002 and most recently the Third Parties (Rights Against Insurers) Act 2010 that came into force on 1 August 2016
\textsuperscript{68} As stipulated under RTA 1988 Section 145 (3) (a), as amended by Section 151 (2) (a), which restricts the scope of mandatory third party cover to the individual liability of those using the
subject to the single exception already noted, as long as there is some insurance in place for the vehicle responsible then the Directive requires that the insurer on risk must satisfy any liability arising out of its use for death, injury and loss up to the prescribed financial levels. The Directive does not envisage any intermediate category of insufficiently insured vehicle that warrants either a statutory intercession or the intervention of an Article 75 insurer. Accordingly, Article 3 requires this third party cover to extend to any civil liability caused by any use consistent with the normal function of the vehicle during the term of the policy. This is qualified only by the single permitted exclusion of liability concerning a passenger with knowledge that the vehicle is stolen. Where the vehicle responsible is identified, Article 10 only permits the compensating body (MIB) to intervene, if there is no insurance in place. European law requires a binary approach that places a strong emphasis

69 Now set out in Article 9 of the Directive
70 Such as Section 151(5) of the RTA 1934 (originally Section 10 of the RTA 1930) which provides, inter alia, that: ‘Notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy or security, he must, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment... (a) as regards liability in respect of death or bodily injury... (b) as regards liability in respect of damage to property and (c) any amount payable in respect of costs’
71 This term is used to describe one of the MIB’s members appropriating the role of the Article 10 compensating body; which role, in the author’s view, is one properly reserved only to the UK’s authorised body and is restricted to incidents involving uninsured or unidentified vehicles
72 It would appear that the government fails to appreciate that Article 3 requires any civil liability arising out of the vehicle’s use to be covered, as oppose to the user’s personal liability. This issue lies at the heart of an ongoing RoadPeace legal challenge. It has been raised in the permission to appeal application to the Supreme Court from the Court of Appeal in Abdullah Sahin v 1) Cassandra Havard 2) Riverstone Insurance (UK) Ltd [2016] EWCA Civ 1202 based on the author’s advice. The government’s latest legislative proposals within the Vehicle Technology and Aviation Bill (HC Bill 143) ignore the fact that Article 3 already requires product liability cover, despite being advised of this fact by the author in his consultation response. Section 2 (b) of the bill contains similar qualifications to the third-party protection for product liability caused by a defect in the vehicle’s automated systems and this conflicts with the same CJEU rulings considered above under ‘Lock down of discretion and enhancement of rights’, (These begin with (Case C-129/94) Ruiz Bernaldez [1996] ECR. I-1829 and continue with the other cases listed in note 53 above). It is clear that these that prohibit member states from introducing their own idiosyncratic exceptions and exclusions of product liability.
73 Article 13 of the Directive. Even then, The Directive does not prevent insurers enforcing their contractual rights against their policyholder, including any right of recoupment for liabilities incurred in breach of contract. However, where the policyholder happens also to be an injured third party passenger neither the policy nor the state regulation can automatically preclude to a disproportionate degree such an individual from recovering compensation, (Case C-442/10) Churchill v Benjamin Wilkinson and Tracy Evans [2013] 1 W.L.R. 1776, para 44
74 (Case C-442/10) Churchill, cited above, para 41
on the protective purpose being discharged by the comprehensive nature and scope of the anterior Article 3 insurance requirement75.

However, the Court of Appeal in its unanimous decision in *EUI v Bristol Alliance* took a very different view76. The court held that Sections 143 and 145 of the RTA 1988, when read together, impose a duty on the user of a motor vehicle, as opposed to the insurer, to ensure that they have only sufficient insurance for any use actually made of that vehicle. The onus is on the user to ensure that their use conforms to the cover provided under their policy; if they fail in this, then that non-contractual use is treated as being out of cover. The implication of this reasoning is that insurers are not required to cover any and every use that the driver or policyholder might make of the vehicle.77

Ward LJ’s judgment in *EUI* reflects long established jurisprudence, some of which predates the UK’s accession to the European Community. It reposes great weight on the intentions of contracting parties and on the third party rule. Under this orthodoxy, the contractual scope of third party cover is only modified to the extent provided for in the three instances allowed in the RTA 198878.

Furthermore, according to this Court of Appeal decision, vehicles involved in a use that falls outside the terms of their contractual cover and not otherwise nullified by statute are to be treated as uninsured. In that situation, a third party victim’s only recourse is to require the insurer to act as an Article 7579 insurer under the MIB’s uninsured drivers’ scheme80. Insurers exploit this practice to subject victims of insured drivers who have breached a condition of their policy to the disadvantageous terms of the MIB’s scheme for uninsured drivers. This misallocation would not matter quite so much if the MIB schemes complied with

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75 (Case C-162/13) Damijan Vnuk v Zavarovalnica Triglav d.d., ECLI:EU:C:2014:2146, [2014] All ER (D) 121 (Sep), paras 56 and 59
76 *EUI Ltd v Bristol Alliance Ltd Partnership* [2012] EWCA Civ 1267
77 See Ward LJ’s judgment in *EUI v Bristol Alliance* supra, para 38
78 Namely, (i) the nullifying provisions of Sections 148(1) and (2) of the RTA 1988; (ii) Unauthorised use under Section 151(2) and finally (iii) unlicensed use under Section 151(3)
79 A term used to denote an insurer exculpated from its contractual liability to indemnify the policyholder but required, through the aforementioned statutory intervention, to satisfy a third party victim’s claim. Practitioners use the terms ‘article 75 insurer’ and ‘statutory insurer’ interchangeably. See Merkin R and Hemsworth M, ‘The Law of Motor Insurance’ (2nd edn Sweet & Maxwell 2016) pages 475 and 489 and again at 627 – 631 on Article 75
80 i.e. under one or other of the Uninsured Drivers’ Agreements of 1999 or 2015
the European law obligation that the Article 10 body provide equivalent and effective third party protection to the Article 3 requirement, but they don’t^81.

The provenance of and use of the term ‘Article 75’, as a criterion for allocating claims against ostensibly insured drivers as ‘statutory insurer’ claims, has not been subjected to a legal challenge^82. ‘Article 75’ refers to a provision in the MIB’s Articles of Association that allocates responsibility between an insurer on risk and the MIB for investigating and settling an insufficiently insured claim, back dated policies or a claim on a policy rendered void by misrepresentation or non-disclosure. It is a pragmatic intra-insurer arrangement and no more. Yet the Article 75 status of insurers is regularly associated with a collateral right to act as the MIB’s agent and to manage the claim under the terms of the MIB’s uninsured drivers’ scheme. This practice has acquired, through long unchallenged usage, an aura of legitimacy as a rule of law, one that is capable of binding third parties. Yet it is one that does not bear close scrutiny. The MIB’s internal arrangements have no legal relevance to defining a third party’s legal entitlement under either Article 3 or Article 10 of the Directive. Unfortunately, the courts regularly treat Article 75 as if it was a common law or procedural rule and this uncritical approach is evident in Ward LJ’s judgment in *EUI*^83.

The erroneous view that member states retain a large measure of discretion to allocate their implementation between the Articles 3 and 10 regimes is one that seems to have gained wide judicial approval^84.

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^82^ Or at least, no such case has been reported

^83^ *EUI v Bristol Alliance*, para 69 cited above in note 82

^84^ See Ward LJ’s judgment in *EUI*, para 68, and Jay J in *Delaney v Secretary of State for Transport* [2014] EWHC 1785 (QB), para 21
European law remedies

It is a basic precept of EU law that directives do not have direct effect\textsuperscript{85} because they are addressed to the member states who are required to implement their legislative aims\textsuperscript{86} within the time designated\textsuperscript{87}. Accordingly, individuals must usually depend on their member state to implement a directive by transposing them into their national laws and rules before they can rely, indirectly, on any rights conferred under the directive in their national courts.

In consequence of the above, directives cannot impose legal obligations on individuals and so cannot be relied on by individuals directly against other individuals where a member state has failed completely or partially to transpose its objectives into national law\textsuperscript{88}.

Directives often confer a wide discretion as to the form in which member states implement their objectives. This is particularly true of the way in which the motor insurance directives prescribe the role of the compensating body for victims of uninsured and unidentified vehicles under Article 10 of the Directive. Provided the arrangements satisfy the EU law principles of equivalence and effectiveness then member states have a relatively free hand in how they implement a directives’ legislative requirements\textsuperscript{89}.

\textsuperscript{85} Direct effect is an important principle of EU law. It was developed by the CJEU in Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1 (Case 26/62). It describes the ability of individual citizens to cite in proceedings and to rely directly on the provisions of EU law (initially treaty provisions) in private disputes with other citizens, private bodies and institutions, in the same way that they can rely on their own domestic law and statutes. Direct effect is usually reserved to treaty articles, general principles of EU laws. The origins of direct effect and its development by the CJEU are considered in Chalmers D, Davies G & Monti G, ‘European Union Law’ (2nd edn Cambridge University Press, 2010, Chapter 7 Rights and Remedies in National Courts, pages 267-314

\textsuperscript{86} Article 249 (3) EC, provides that: ‘A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is directed but shall leave to the national authorities the choice of form and methods.’

\textsuperscript{87} Section 2(1) of the European Communities Act 1972 is the domestic enabling measure

\textsuperscript{88} (Case 152 / 84) Marshall v Southampton and South-West Hampshire Area Health Authority [1986] ECR 723 para 48. However in recent years it has become apparent that individuals can be impacted by the collateral effects of another individual invoking rights conferred under a directive, such as where an individual is able to assert direct vertical effect against the state, a public authority or other body caught by the doctrine, see (Case C-201/02) Wells v SoSi Transport 2004 ECR 10723, or where a general principle of EU law is invoked (that had s binding and direct effect) which the directive coincidentally seeks to implement, as to which see (Case C-144/04) Werner Mangold v Rüdiger Helm [2004] ECR I-0723 paras 83 and 84.

\textsuperscript{89} see (Case C-63/01) Evans v Secretary of State for Transport and MIB [2003] ECR I-14447 paras 27 -36 which explicate these two EU law principles. These were successfully invoked in (Case C-63/01) Evans by the UK to defend various contentions that its scheme for compensating victims of untraced drivers was incompatible with the motor insurance directives in Carswell v
There is a considerable body of academic commentary on the way the CJEU has developed exceptions to the rule against the horizontal direct effect of directives and which consider the tension between the need to retain the distinctive features of a directive and the remedies need to ensure their effectiveness.  

The doctrine of indirect effect and harmonious or consistent interpretation

In 1984 the CJEU ruled that the provisions of a directive are capable of indirect effect. This is achieved by requiring national courts to interpret their domestic law in the light of the wording and the purpose of a directive. The rationale then offered was that as national courts are part of the state, they are also subject to the member state’s treaty obligation to take all appropriate measures, whether general or particular, to ensure the fulfilment the Member States’ obligation arising from a directive. Accordingly, the courts are required when applying national law on matters within their jurisdiction to interpret them, as far as possible, in the light of the wording and the purpose of any relevant

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Secretary of State for Transport & MIB [2010] EWHC 3230 (QB), [2011] Lloyd's Rep IR 644. See APPENDIX, item 2 – The Motor Insurers’ Bureau’s role, and item 3 – Why the Uninsured Drivers’ Agreement 1999 needs to be scrapped, JPIL [2011] issues 1 and 2 respectively. These twin principles are considered at greater length by Professor Takis Tridimas in 'The General Principles of EU law' (2nd edn Oxford University Press 2006), see Chapter 9 from page 418 and at pages 423 - 427


91 (Case 14/83) Von Colson and Kamann v Land Nordrhein-Westfalen [1984] ECR 1891

92 This exception to the non-horizontality of directives was initially believed to be confined to similar scenarios as the case facts: featuring an action against a state body where the directive relied on was insufficient clear to justify direct effect (see below). However its application was extended in (Case C-106/89) Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-4135 so as to apply to all national law, even laws that predated the implementation date of the directive concerned. The origins and development of direct effect is extensively covered in textbooks, academic papers and journals, including: Chalmers D, Davies G & Monti G, ‘European Union Law’ (2nd edn Cambridge University Press, 2010, Chapter 7 Rights and Remedies in National Courts, pages 294-314; Betlem, G, ‘The Doctrine of Consistent Interpretation—Managing Legal Uncertainty’ Oxford Journal of Legal Studies, Vol 22, No 3 (2002) 397-418, some of them critical of the potential this has for generating legal uncertainty, G.de Burca, ‘Giving Effect to European Community Directives’ (1992) 55 ML 215

93 (Case 14/83) Von Colson and Kamann v Land Nordrhein-Westfalen [1984] ECR 1891, para 26

94 The extent and limits of the duty of consistent construction are considered in some detail by the CJEU in (Case C-378/07) Kiriaki Angelidaki and Others v Organismos Nomarkhiaki Aftodikisi Rethimnis and Dimos Geropotamou [2009] ECR I-3071, paras 197 – 202, with particular regard
directive ‘to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty’

This principle of EU law consistent interpretation was developed further by the CJEU in 2004 when it ruled: first, that ‘when hearing a case between individuals, a national court is required, to provide the legal protection conferred on individuals under the rules of Community law and to ensure that they are fully effective’; second, that when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive.’

It also ruled, that in so doing, the court must presume that the state had ‘intended entirely to fulfil the obligations arising from the Directive concerned.’

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95 (Case C-106/89) Marleasing SA, (see citation in note 98 above) para 8 and referring to the Treaty of Rome 1957
96 Case C-397/01 to C-403/01 Bernhard Pfeiffer et alia v Deutsches Rotes Kreuz, Kreisverband Walshut eV [2004] ECR 1-8835
97 Pfeiffer, cited above, para 111; this passage also confirms a new rationale to the estoppel argument given in Marleasing (of preventing member states from pleading their own failure to implement a directive against an individual) to a more positive dual imperative of (i) ensuring that rights conferred on individuals by a directive are actually put into effect under national laws, as well as (ii) the wider jurisprudential requirement of ensuring the effectiveness of directives, which appears to originate from (Case 8/81) Ursula Becker v Finanzamt Münster-Innenstadt, [1982] ECR 53, paras 210-23 in the context of direct vertical effect). Further insight is provided by the CJEU (albeit in the context of a case where the claimant was seeking direct effect of a directive against a private individual) in (Case C-144/04) Werner Mangold v Rüdiger Helm [2004] ECR I-0723, at para 77 the CJEU had the following to say on the role of national courts: ‘...it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law (see, to that effect, Case 106/77 Simmenthal [1978] ECR 629, paragraph 21, and Case C-347/96 Solred [1998] ECR I-937, paragraph 30).’
98 Hitherto the House of Lords had ruled that Marleasing’s purposive or consistent construction doctrine was confined to legislation; not private law agreements such as the Uninsured Drivers Agreement between the Secretary of State for Transport and the MIB, See Lord Nicholls judgment in White v White & MIB [2001] UKHL 9, [2001] 1 WLR 481, para 21.
99 Pfeiffer, cited above, para 119
100 Pfeiffer, cited above, para 112
In 2003 the CJEU ruled that state liability can attach where this interpretive obligation is not discharged by a court of final appeal\textsuperscript{101}. The potentially far reaching nature of the indirect effect resulting from a directive is demonstrated by the way this doctrine can even require a court to preclude the application of conflicting domestic law provisions or contractual clause and to add wording.\textsuperscript{102} In discharging this obligation, national courts are free to use their own interpretive methods and a comprehensive explication, provided in the context of the Directives on motor insurance, is provided by Lord Aikens, in Part VI of his judgment in \textit{Churchill v Wilkinson} in 2012\textsuperscript{103}. Here notional wording was added to s151(8) Road Traffic Act 1988 to bring it into conformity with these Directives.\textsuperscript{104}

A problem can arise where the parties are ignorant of or otherwise fail to raise the relevant EU law provisions in a dispute before the court\textsuperscript{105}. Although there is no general EU law principle that imposes a duty on national courts to raise points of EU law of its own motion\textsuperscript{106}, the CJEU has demonstrated that it is prepared to forge exceptions on a case by case basis\textsuperscript{107}. In view of the importance attached to the protective purpose of the Directives on motor insurance by the CJEU\textsuperscript{108} it seems at the very least plausible to argue that the

\textsuperscript{101} (Case C-224/01) Gerhard Köbler v Republik Österreich [2004] 2 WLR 976, paras 32 - 36
\textsuperscript{104} Churchill v Wilkinson 2012, cited above, para 75
\textsuperscript{105} For example, this occurred in Delaney v Pickett [2011] EWCA Civ 1532, [2012] 1 WLR 2149 where the Court of Appeal simply noted that neither party had raised the issue as to whether the Uninsured Drivers Agreement was compatible with the Directives on motor insurance before moving on to make a per incuriam finding as a direct result of failing to consider or apply the relevant EU law. The claimant eventually pursued a successful Francovich action in Delaney v Secretary of State for Transport [2015] EWCA Civ 172, [2015] 1 WLR 5177
\textsuperscript{106} (Joined cases C-430/93 and C-431/93) Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten [1995] ER I-4705, paras 17 – 22, especially where the parties had the opportunity, (In Joined Cases C-222/05 to C-225/05) J. van der Weerd et alia v Minister van Landbouw, Natuur en Voedselkwaliteit [2007] ECR I-4233, paras 31 - 41
\textsuperscript{107} For example, it has justified a requirement that a court raise EU law points \textit{ex officio} by reference to the equivalence principle in (Case C-72/95 ) Aannemersbedrijf PK Kraaijveld BV v Gedeputeerde Staten van Zuid-Holland [1996] ECR I-5403 and, arguably of particular relevance to the Directives on motor insurance, in the case of consumer rights prescribed under the Unfair Contract Terms Directive 85/577, it justified such an approach by the need to ensure the special protection conferred on the weaker party to such a consumer contract (Joined Cases C 240/98 to C 244/98) Océano Grupo Editorial and Salvat Editores [2000] ECR I 4941, paras 25 -29
\textsuperscript{108} (Case C-162/13) Damijan Vnuk v Zavarovalnica Triglav d. d. [2014] All ER (D) 121 (Sep)
UK courts have a legal obligation under EU law, to depart from its conventional passive stance and to undertake an EU law consistent interpretation of the UK’s transposition of these Directives *ex officio*.

Unfortunately, a recent line of decisions indicate that the UK courts cannot be relied on to apply an EU law consistent construction correctly, even when seized of the need\(^{109}\). Furthermore, as its exercise is perceived to be a matter discretion\(^{110}\), the parties are only able to influence the construction indirectly, through representations addressed to the court.

**Direct vertical effect**

The rule against direct effect has been modified by the CJEU which has consistently ruled that where a directive’s objectives are intended to confer rights on individuals and are set out in clear, precise and unconditional terms then individuals affected by a member states’ failure to fully implement them can be invoked in an action against the state\(^{111}\).

This doctrine has been extended to embrace a broad range of bodies that are not part of central government but which are nevertheless tasked by the state with discharging an obligation imposed on it under the terms of a directive or bodies otherwise under the control or influence of the state or invested with special powers beyond those exercised by ordinary individuals\(^{112}\).

\(^{109}\) See Clarke v Kato and Cutter v Eagle Star Insurance Ltd [1998] All ER (D) 481, [1998] 1 WLR 1647, which has been overturned by Vnuk, see citation above, and EUI Ltd v Bristol Alliance Ltd Partnership [2012] EWCA Civ 1267, [2013] 2 WLR 1029 and more recently Abdullah Sahin v 1) Cassandra Havard 2) Riverstone Insurance (UK) Ltd [2016] EWCA Civ 1202, which this author has criticised in his article, *Third time lucky?*, New Law Journal, 13 January 2017, pages 13-14, (not supplied in the Appendix) permission to appeal to the Supreme Court in the latter case is awaited.

\(^{110}\) A point well illustrated by the authors in Lenaerts and Corthaut, ‘Of birds and hedges: the role of primacy in invoking norms of EU law’, European Law Review, 2006 page 7, when they state that there is ‘no obligation for the national judges to do the impossible’...and thus... ‘at the end of the day it is the national judge who decides where to draw the line and thus how much “as far as possible” really is.’

\(^{111}\) See (Case C-271/91) Ursula Becker v Finanzamt Münster-Innenstadt [1982] ECR 53, para 24. Various different justifications have been offered by the CJEU to support this exception to the basic rule against the direct effect of directives: one of which is to prevent member states from relying on their own failure, see (Case 152 / 84) Marshall, cited above, para 49; another has been that this is necessary to ensure the effectiveness of this form of secondary legislation, see (Case C-271/91) Becker cited above, paras 19-21.

\(^{112}\) The CJEU has ruled a directive could be relied on against tax authorities [see (Case 8/81) Becker, cited above, and in (Case C-221/88) ECSC v Acciaierie e Ferriere Busse ni (in liquidation ) [1990] ECR I-495], local or regional authorities [ judgment in (Case 103/88) Fratelli Costanzo v
Entities that fulfil this criteria\textsuperscript{113} are for these purposes to be treated as though they were the state and fixed with direct effect of the relevant directive, thus enabling an individual to cite its provisions in legal proceedings against such an entity. The CJEU has sought to justify this exception to the general rule against horizontal direct effect in different ways\textsuperscript{114}. This doctrine has attracted its share of judicial analysis as to the broadest scope of which entities are capable of being caught by it\textsuperscript{115} and it has also generated a considerable body of secondary commentary\textsuperscript{116}. A definitive explanation of the legal principles and guidance on the criteria is expected imminently from CJEU in a reference the

\textit{Comune di Milano} [1989] ECR 1839, constitutionally independent authorities responsible for the maintenance of public order and safety [judgment in Case 222/84 \textit{Johnston v Chief Constable of the Royal Ulster Constabulary} [1986] ECR 1651], and public authorities providing public health services [judgment in Case 152/84 \textit{Marshall}, cited above (Case C-188/89) \textit{Foster and others v British Gas Plc} [1990] ECR 1-3313, paras 18-20]. Also of significance is the Court of Appeal’s ruling that a board of governors who possessed no special powers and who arguably were only under a tenuous degree of state control were subject to the direct effect of the Transfer of Undertakings Regulations or EEC Business Transfers Directive 77/187 in \textit{NUT v Governing Body of St. Mary’s Church of England School} [1996] EWCA Civ J1212-7, [1995] ICR 317. The increasingly wide application of this exception to bodies that are evidently not part of the state but merely charged with discharging a state obligation, suggests that the legal status of the body per se is no longer a decisive factor.\textsuperscript{117}

\textsuperscript{113} See (Case C-188/89) \textit{Foster} cited above, paras 18-20 for a broad statement of the criteria which in its concluding paragraph appears to favour a functionality test, (not unlike that which applies to public authorities that are subject to the Human Rights Convention)

\textsuperscript{114} First propounded both in terms of ensuring the effectiveness of a directive and in terms of a correlative precept of preventing member states from relying on their failure to implement a directive in claims against it by individuals affected that failure, in (Case 41/73) \textit{van Duyn v Home Office} [1974] 1 WLR 110 para 12; (Case 149/78) \textit{Ratti} [1979] ECR 1629, para 21; and (Case 8/81) \textit{Ursula Becker v Finanzamt Münster-Innenstadt}, [1982] ECR 53, para 24. Arguably this reasoning and its practical implications for individual claimants was taken to a new level in (Case C-424/97) \textit{Haim v Kassenzahnarztliche Vereinigung Nordrhein} [2000] E.C.R. I-5123 at paras 27-28, when the Court ruled in para 28 that ‘member states cannot, therefore, escape that liability either by pleading the internal distribution of powers and responsibilities as between the bodies which exist within their national legal order or by claiming that the public authority responsible for the breach of Community law did not have the necessary powers, knowledge, means or resources.’ See notes 98 and 100 above for some of the secondary commentary. Professor Dashwood’s analysis of the conflicting EU law objectives of ensuring that EU law is given full effect with that of preserving the essential nature of directives is particularly helpful, see A. Dashwood, ‘From Van Duyn to Mangold via Marshall: reducing Direct Effect to Absurdity’ (2006-07) 9 C.Y.E.L.S. 8

\textsuperscript{115} Arguably the most helpful of these is Blackburn J’s first instance judgment in \textit{Griffin & ors v South West Water Services Ltd} [1995] IRLR 15 where he held that a privatised utility company was subject to the direct effect of Directive No.75/129 on collective redundancies. In doing so he emphasised that the determining factors in this exercise were the powers and duties conferred upon the organisation and on the control to which it is subject – as opposed to seeking to classify the entity itself (whether as an emanation of the state, a public body or otherwise). At paragraph 94 of his judgment he expands on the \textit{Foster} guidance with a clear and simple set of propositions of his own, which was approved of by Auld LJ in his leading judgment in the House of Lords in \textit{Three Rivers District Council and Others v Governor and Company of the Bank of England (No 3)} [2003] 2 AC 1 at page 99

\textsuperscript{116} See note 96 above
Irish Republic’s Supreme Court concerning the Motor Insurers’ Bureau for Ireland.\textsuperscript{117}

The EU law doctrine of state liability

If the above routes fail\textsuperscript{118} it is possible to claim damages against the state. Such a claim is based on the \textit{Francovich} principle\textsuperscript{119} which requires a member state to make good the loss and damage caused by its failure to implement a directive. It only applies to directives that confer rights on individuals that clearly and precisely articulated the state's failure can be shown to be causative of the loss complained of\textsuperscript{120}. Unfortunately, it is rarely a cut and dry process, depending as it does on a wide range of contextual factors\textsuperscript{121} which the court must take into account when deciding whether a breach is 'sufficiently serious'\textsuperscript{122} to warrant state liability. This can make them a hazardous and prohibitive enterprise\textsuperscript{123}.

\textsuperscript{117} In (Case C-413/15) in \textit{Farrell v Whitty, The Minister for the Environment, Ireland and the Attorney General, Motor Insurers Bureau of Ireland (MIBI) made} on 27 July 2015 and which puts three questions:

'(i) Is the test in \textit{Foster and Others v British Gas plc} (Case C-188/89) as set out at para. 20 on the question of what is an emanation of a member state to be read on the basis that the elements of the test are to be applied (a) conjunctively, or (b) disjunctively?

(ii) To the extent that separate matters referred to in \textit{Foster and Others v British Gas plc} (Case C-188/89) may, alternatively, be considered to be factors which should properly be taken into account in reaching an overall assessment, is there a fundamental principle underlying the separate factors identified in that decision which a court should apply in reasoning an assessment as to whether a specified body is an emanation of the State?

(iii) Is it sufficient that a broad measure of responsibility has been transferred to a body by a member state for the ostensible purpose of meeting obligations under European law for that body to be an emanation of the member state or is it necessary, in addition, that such a body additionally have (a) special powers or (b) operate under direct control or supervision of the member state?'

\textsuperscript{118} For example, where for example a domestic court is unable to provide a consistent interpretation of a national law intended to give effect to a European directive, as in the case of \textit{Byrne v MIB & Secretary of State for Transport} [2007] EWHC 1268 (QB), [2008] 2 WLR 234 where Flaux J took the view that although the MIB's untraced drivers scheme failed to conform with the Second Directive on motor insurance he found the UK state liable to compensate because of its failure to implement the directive.

\textsuperscript{119} (Case nos. C-6/90 and C-9/90) \textit{Francovich v Italian Republic and Bonifaci v Italian Republic Case} [1991] ECR I-5357

\textsuperscript{120} Case nos. C-6/90 and C-9/90) \textit{Francovich}, cited above, para 40

\textsuperscript{121} Derived from the CJEU ruling in \textit{R v Secretary of State for Transport Ex p. Factortame in (No.5)} [1999] 4 All ER 906, [1999] 3 WLR 1062

\textsuperscript{122} (Case C-46/93) \textit{Brasserie Du Pecheur S.A. v Federal Republic of Germany, Regina v Secretary of State for Transport, Ex parte Factortame Ltd (no4)} [1996] ECR I-1029

\textsuperscript{123} There are a number of reasons for this. They are public law actions, where a claimant does not enjoy the protection conferred by qualified one-way cost shifting (under Part 44.12 to 44.17 of the Civil Procedure Rules) that applies to a normal personal injury claim; furthermore if pursued as a separate action, it can add years to the litigation; it usually features a significant disparity in
the respective parties’ resources and know-how, and the Factortame criteria for assessing whether a breach of European law was sufficiently serious often confers a wide discretion on the court. Another potential disadvantage is that the award is assessed on a loss of chance basis rather than the tort law *restitutio in integrum* principle, which can result in a lower award.
Review of author’s publications

Case commentaries:

The EUI case

EUI v Bristol Alliance\textsuperscript{124} featured an ostensibly insured driver who breached a policy exclusion for deliberately caused damage when attempting to commit suicide. He survived but his car caused extensive damage to prestigious retail premises in Bristol.

Ward LJ’s judgment provides a meticulous explanation of his reasons for categorising the case as one against an uninsured driver. In this, it reflects conventional legal perspectives. He ruled that the claimant’s subrogated loss was an excluded liability under the relevant MIB agreement\textsuperscript{125}.

The author was the first to provide a critical analysis, published in the Butterworths’ Personal Injury Litigation Service (BPILS) Bulletin 108 in November 2012\textsuperscript{126} and in Journal of Personal Injury Lawyers (JPIL) in early 2013\textsuperscript{127}. He provides a more expansive critique in Marking the Boundary\textsuperscript{128}, which deconstructs various misconceptions underlying the Court of Appeal’s decision. It identifies seven different precepts relied on in the judge’s reasoning which subjects to a European law consistent analysis. The article is forthright in expressing the view that the decision was made \textit{per incuriam}. It argues that the court relied on outdated UK authorities and the selective use of others such as Churchill v Wilkinson and, most significantly, it contends that the judge failed to apply the European law correctly.

The gravamen of the article is that the RTA 1988, when properly construed in the light of the correct domestic and European law it is supposed to implement, requires even deliberately caused damage to be covered by the third party cover prescribed by Section 145. It exposes the aforementioned misconception\textsuperscript{129}

\textsuperscript{124} EUI v Bristol Alliance Partnership [2012] EWCA Civ 1267
\textsuperscript{125} Relying on purported exclusion of liability set out in clause 6.1(c) of the Uninsured Drivers’ Agreement 1999
\textsuperscript{126} The author’s Case commentary on EUI v Bristol Alliance, was published in BPILS Bulletin 108, Nov 2012
\textsuperscript{127} See Case commentary on EUI v Bristol Alliance, JPIL, [2013] Issue 1; not supplied in the APPENDIX
\textsuperscript{128} See APPENDIX item 5 Marking the Boundary, JPIL [2013] issue 3
\textsuperscript{129} See above in this paper under Comparisons with the UK provision
relating to the status of an Article 75 insurer as inconsistent with the Directive. The article also questions the court’s assumption that the MIB can legitimately exclude subrogated claims. This remains the only published article to openly criticise this decision as wrong in law and to argue for a different outcome.\(^{130}\)

The author’s views have since been vindicated, albeit indirectly, by the CJEU ruling in *Damijan Vnuk*\(^{131}\) which stressed the importance of the Directive’s protective purpose\(^{132}\) and ruled that the Article 3 insurance requirement and thus, by implication, the contractual terms of every motor policy, must cover any use that is consistent with the normal function of the vehicle.\(^{133}\) Although the defendant in *EUI* was deliberately driving his car at an excessive speed and to certain destruction, from a functional perspective, this was consistent with vehicular travel on land.

**The Delaney case**

The author’s critical commentary on the Court of Appeal’s unanimous decision in *Delaney v Pickett*\(^{134}\) is another example of his independent analysis and willingness to advance a controversial argument.\(^{135}\)

The case featured a passenger who sustained a serious brain injury. Both the victim and the driver were found to be in possession of a large amount of marijuana. The majority found that both driver and passenger had been *en route* to sell this consignment when the accident occurred.

The court unanimously upheld the first instance findings that:

(i) because the insurers had, after the accident, obtained a court order declaring the defendant’s driver’s policy void for non-disclosure of

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\(^{130}\) Margaret Hemsworth’s case comment published in The Journal of Business Law, [2013] issue 3, 354-361 post dates the author’s by several months and she kindly acknowledges his commentary in the NLJ. She flags up some of the comparative law issues raised by the author, she points out their potential inconsistency with European law; reporting the outcome rather than advancing any particular view

\(^{131}\) (Case C-162/13) *Damijan Vnuk v Zavarovalnica Triglav d. d.* [2014] ECLI:EU:C:2014:2146, [2014] All ER (D) 121 (Sep)

\(^{132}\) (Case C-162/13) *Vnuk*, paras 48 to 52

\(^{133}\) (Case C-162/13) *Vnuk*, paras 56 to 59

\(^{134}\) *Delaney v Pickett*[2011] EWCA Civ 1532

\(^{135}\) See APPENDIX item 4, *Case commentary on Delaney v Pickett*[2011] EWCA Civ 1532, JPIL 2015, 3, C169-C174
material facts, under Section 152(2) of the RTA 1988 the driver was uninsured and as such the claim was governed by the terms of the Uninsured Drivers’ Agreement 1999.

(ii) consequently, the MIB was exempted from any liability to compensate the claimant passenger because Clause 6(1)(e)(ii) excludes liability for a passenger who knew or had reason to believe that the vehicle responsible was being used in furtherance of a crime.

The author was the only commentator to offer robust criticism of this decision at the time: arguing that it was per incuriam as its key findings were incompatible with the relevant European law: that places an emphasis on providing a consistent level of protection to third party victims.

What was striking about this case was that two of the Lord Justices took care to note that the claimant did not raise any European law compatibility issues. Also, although Ward LJ considered the relevant provisions of the Directive’s predecessors, he was influenced by a House of Lords ruling which was already obsolete following the CJEU ruling in Peiffer, to the effect that the MIB agreements could not be subjected to a European law consistent interpretation.

In doing so, the court failed in its constitutional duty to ‘... interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive...’. The court did not question whether the statutory power to declare a policy void ex post facto was consistent with the protective purpose of the Directives as interpreted by the CJEU in the Bernaldez and Candolin cases.

The author’s commentary contended, admittedly somewhat controversially, that the UK did not have the discretion to permit a court to declare the protection afforded to third parties by the policy void against a third party victim. It went

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136 Delaney, supra, Richardson LJ at para 67, and Tomlinson LJ at para 75, with Ward LJ
137 White (AP) v White & MIB [2001] UKHL 9
138 (Case C-397/01) Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV [2004] ECR I-8835, see paras 110 to 119 that applies the purposive construction principle beyond legislative measures: to all the domestic laws and rules implementing the relevant directive
139 (Case C-397/01) Pfeiffer, supra, para 113
141 (Case C-537/03) Candolin [2005] ECR I-5745
142 Pursuant to Article 3 of the Directive
on to argue with much greater confidence that, even if that order was valid and
the driver had been properly categorised as uninsured, the exclusion of MIB
liability under Clause 6 of the Uninsured Drivers’ Agreement 1999 was invalid as
it did not conform to the single instance permitted under European law.\textsuperscript{143}

When the author wrote to the claimant’s solicitors to advise them of his views they
did not reply. However, when a new legal team brought a \textit{Francovich}\textsuperscript{144} action
against the Secretary of State for Transport on the passenger’s behalf,\textsuperscript{145} it was
divulged that a last minute attempt had been made to appeal to the Supreme
Court: one that argued a European law construction of the 1999 Agreement.
Permission was refused on the basis that these points had not been raised in the
appeal below.\textsuperscript{146} The author’s New Law Journal (NLJ) articles and his response
to the Department for Transport’s February 2013 consultation were referred to in
the successful \textit{Francovich} action and incorporated into the trial bundle.\textsuperscript{147}

The author analysed Jay J’s first instance decision upholding the \textit{Francovich}
claim in a NLJ article\textsuperscript{148} and again, more extensively, in a JPIL feature\textsuperscript{149} in
advance of the Court of Appeal’s decision: which he identified as being probably
the most important decision on motor insurance for nearly two decades.\textsuperscript{150} The
Court of Appeal upheld Flaux J’s findings that the Clause 6 exclusion was
unlawful and that this constituted a sufficiently serious breach of the Directive to
warrant state liability.

In his NLJ article ‘\textit{No Through Road}\textsuperscript{151} published on 17 April 2015 the author
warned the minister that he must act immediately or expect a legal challenge
about the extensive illegality that permeates the 1999 Agreement. The minister
responded promptly to \textit{Delaney} with his July 2015 revisions\textsuperscript{152}. The author is not

\textsuperscript{143} See above under \textit{The compensating body’s role}
\textsuperscript{144} (Case C-6/90) \textit{Francovich v Italian Republic and Bonifaci v Italian Republic} [1991] ECR I-5357
\textsuperscript{145} In \textit{Delaney v Secretary of State for Transport} [2014] EWHC 1785 (QB)
\textsuperscript{146} See Richards LJ’s judgment in \textit{Delaney v Secretary of State for Transport} [2015] EWCA Civ
172, para 3. Arguably, in so doing, the Supreme Court exposed itself to liability under the principle
set out in (Case C-224/01) \textit{Gerhard Köbler v Republik Österreich} [2004] 2 WLR 976
\textsuperscript{147} According to Mr Eric Metcalfe, barrister, of Monckton Chambers, Grays Inn, London
\textsuperscript{148} See the author’s article, \textit{Second sight}, NLJ, 3 October 2014
\textsuperscript{149} See the author’s article, \textit{A World Turned Upside Down}, [2014] JPIL Issue 3
\textsuperscript{150} A view endorsed by Nigel Tomkins, editor of JPIL in his case comment on the appeal decision,
\textit{JPIL} [2015] Issue 3
\textsuperscript{151} See the author’s New Law Journal article, \textit{No Through Road}, NLJ, 16 April 2015
\textsuperscript{152} See below under \textit{Other published articles} and see the author’s New Law Article, \textit{A call for
(more) reform}, NLJ, 17 July 2015

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aware of any other legal commentator who has openly disagreed with the Court of Appeal’s unanimous decision in the first action and criticise it for failing to apply a proper European law consistent construction of these domestic provisions.

**The Vnuk case**

The author had already anticipated certain aspects of this decision and his commentary was the first to explain the significance of the CJEU’s restatement of the importance of the Directive’s protective purpose and the way this should influence any *Pfeiffer* style construction of this and other domestic law or rules implementing it. His feature on *Vnuk* in the online journal, PI Bulletin Update Law Journal (PIBULJ), offers extensive practical guidance.

**Proselytising articles**

The author has also taken a more proactive stance to law reporting. When the MIB failed to propose satisfactory revisions to its agreements the author embarked on an awareness campaign to alert claimant practitioners that both its schemes contained unjust provisions that breached the Directive and the European law principles of equivalence and effectiveness. In comparison, the Law Society’s practitioner guidance continues to provide a largely uncritical account of the MIB schemes. It is largely confined to an unquestioning reportage of the procedural requirements and limitations imposed by the scheme without questioning their consistency with European law.

The author’s articles in JPIL and the NLJ exposed various myths such as:

153 See APPENDIX item 10, *On the right road? (Pt II)* within his critique of the House of Lords’ decision in *Cutter v Eagle Star Insurance* [1998] UKHL 4 All ER 417

154 See the author’s article, *Ignore At Your Peril*, NLJ, 31 October, 2014, under the heading *Far Reaching*

155 See the author’s article, *Vnuk: End of the Road?*, (PI Brief Update Law Journal (PIBULJ), October 2014; not annexed below

156 See APPENDIX, item 2 – *The Motor Insurers’ Bureau’s role*, and item 3 – *Why the Uninsured Drivers’ Agreement 1999 needs to be scrapped*, JPIL [2011] issues 1 and 2 respectively

(i) the common misconception that the MIB is a government financed public body or quango with an impartial agenda unalloyed by the commercial interests it represents\textsuperscript{158}

(ii) the belief that the ‘Article 75 procedure’ mentioned above under EUI has any relevance to a victim’s entitlement to third party cover\textsuperscript{159}

In February 2013 the NLJ ran a four-part series of the author’s articles (in consecutive weeks). They offer a holistic review of the UK’s provision for third party victims. They explain the significance of European law and its key principles in this area, before exposing the UK’s defective transposition of that law. They call for urgent reform to bring the UK provision in keeping with the minimum standard required under European law and concluded with a warning to the Secretary of State that if he does not act, others might\textsuperscript{160}.

\textsuperscript{158} See APPENDIX item 3 Reforming the MIB, JPIL [2011] issue 1; item 3 Why the MIB Uninsured Drivers’ Agreement 1999 needs to be scrapped, JPIL [2011] issue 2, and APPENDIX item 8, Bridging The Gap, BILAJ, March 2016, under On the nature of the MIB; and items 9 – 12 of the APPENDIX: On the Right Road, NLJ, all published in February 2013 and his numerous posts in his campaign blog: NOTA BENE: http://nicholasbevan.blogspot.co.uk/

\textsuperscript{159} See the author’s article, A World Turned Upside Down, JPIL [2014] Issue 3, under the heading Was Pickett an uninsured driver? [not appendaged here] and see also APPENDIX item 7, Mind The Gap, BILAJ January 2016, under the heading 7 Misallocation of insured claims as uninsured claims

\textsuperscript{160} See the author’s article, On the Right Road, NLJ, February 2013, the ongoing judicial review in RoadPeace v Secretary of State for Transport (MIB intervening) (CO/4681/2015) challenges the entire UK transposition of the Directive, are a direct consequence of these warnings being ignored
These articles may have goaded the Department for Transport into releasing its 2013 consultation on the MIB Agreements\(^\text{161}\). This is a plausible hypothesis given (i) the very close timing, after years of inaction, and (ii) the emphasis made in the covering letter as to ensuring conformity with European law, a topic that had been the central theme of the NLJ articles but conspicuously absent from the proposals themselves\(^\text{162}\).

The author was then consulted by the Motor Accident Solicitors Society, APIL and through it the Personal Injury Bar Association, all of whom originally intended to submit responses that amounted to little more than uncritical encomia\(^\text{163}\). The discussions that followed revealed that there was still a profound misconception in the legal profession as to the extent of the UK’s non-conformity with European minimum standards in this area. Nevertheless, they later altered their stance (albeit to differing degrees) once the author had explained the basic European law non-conformity issues identified in his JPIL and NLJ articles. These articles helped prepare the ground for various organisations to join in a concerted call for a much wider review to fully implement the Directive.

During this period the author incepted his own blog, NOTA BENE\(^\text{164}\) to increase awareness about the consultation and to stress the need for informed responses calling for extensive reform. He also contacted every leading personal injury practice and some road safety charities to brief them about the consultation. He later posted links to his consultation response and other articles to maintain public awareness.

In a recent blog posting from March 2016 the author exposes the government’s complicity in refusing to address these non-conformity issues, by providing a

\(^{161}\) The consultation and report can be accessed online at the following location: https://www.gov.uk/government/consultations/review-of-the-uninsured-and-untraced-drivers-agreements

\(^{162}\) The author’s personal impression at the time was that the Department for Transport sought to placate the calls for reform by prematurely releasing a draft review that had been gathering dust, in the hope that this would at least give the impression that it retained the initiative in such matters.

\(^{163}\) Because the practitioner representative bodies were gratified that the procedural knock-out clauses referred to in section 4 of this paper were to be excised under the government proposals

\(^{164}\) NOTA BENE can be accessed at the following location: http://nicholasbevan.blogspot.co.uk/
detailed chronology from February 2013. The author's recent NLJ article refers to this blog posting.

**Other published articles**

In March 2014 the NLJ published the author’s article that exposed for the first time the complete lack of adequate safeguards for minors and protected parties under the Untraced Drivers’ Agreement 2003 and how this exposed the MIB to challenges in the future for under-settlements. The author’s own research revealed that the MIB was routinely settling minors’ claims without independent legal advice being obtained.

When in July 2015 the government announced the revisions to the MIB Agreements the author added a last minute postscript to his article *Tinkering at the Edges* to provide the first (and probably only critical) analysis that belied the government’s empty claim that these changes brought the schemes into line with European law.

More recently, the author consolidated his thinking on the significance and effect of the Directive and on the relevant European jurisprudence on the UK’s domestic law provision for guaranteeing the compensatory entitlement of motor accident victims. *Mind the Gap*, published in the BILAJ in January 2016, updated the author’s comprehensive comparative law analysis and, for the first time, grouped the numerous UK law infringements of the Directive under ten broad categories.

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165 see the author’s online blog: *Action Not Words*, 29 March 2016 posted on Nota Bene: [http://nicholasbevan.blogspot.co.uk/2016/03/action-not-words_29.html](http://nicholasbevan.blogspot.co.uk/2016/03/action-not-words_29.html)

166 See the author’s article *Still driving dangerously*, NLJ, 8 April 2015

167 See the author’s article, *An untidy arrangement?*, NLJ, 12 March 2014

168 See APPENDIX item 6 for the author’s article, *Tinkering At The Edges* [2015] JPIL issue 3; See also the author’s article, *A Call For (More) Reform*, NLJ, 17 July 2015

169 Compare this to the approval given by the chairman of the Personal Injury Bar Association and head of chambers at 9 Gough Square, Andrew Ritchie QC: see MIB – New Uninsured Drivers’ Agreement 2015, accessible online at: [http://www.9goughsquare.co.uk/news/970/](http://www.9goughsquare.co.uk/news/970/). Another relatively uncritical appraisal can be found in the online Personal Injury Bulletin Update Journal at: [http://www.pibriefupdate.com/content/law-journal-summaries/news-category-2/3560-uninsured-drivers-agreement-2015-andrew-baker-horwich-farrelly-solicitors](http://www.pibriefupdate.com/content/law-journal-summaries/news-category-2/3560-uninsured-drivers-agreement-2015-andrew-baker-horwich-farrelly-solicitors). As it happens, the Government has conceded in an ongoing judicial review (RoadPeace v Secretary of State for Transport, in the High Court of Justice Administrative Court, no. CO 4681/2015) that the terrorism exclusion clause is unlawful.

170 See APPENDIX item 7, *Mind the gap!*, BILAJ, February 2016, under the heading *Comparative law analysis*
It also identified the difficulties associated with the two main European law remedies in this area. It considers the European law doctrine of state liability under the principles formulated by the CJEU in Becker, Johnston and Marshall. The article argues that the proper approach to fixing liability on public authorities and other emanations of the state is primarily informed by these authorities. It reappraises the criteria devised by the CJEU in Foster, which it describes as subordinate to the principles set out in the Becker line of cases. It critically evaluates the UK elucidation of the CJEU’s decision in Foster in the House of Lords in Foster v British Gas plc and other UK authorities Doughty v Rolls-Royce plc, Griffin v South West Water, National Union of Teachers and ors v St Mary’s Junior School and others. It recommends an approach that concentrates primarily on the public service delegated to the body, rather than the organisation itself. The article relies on the author’s independent research that reveals an abundance of evidence not only of state control but also for the MIB’s special powers concomitant to the role of the Article 10 compensating body. These findings are impossible to reconcile with Flaux J’s findings in Byrne v MIB. The article contends that Byrne and UK Insurance v Holden were both wrongly decided.

The same article explains the profound impact that establishing direct effect against the MIB will have, namely, its potential for improving the facility with which third party victims can enforce their full legal entitlement to compensatory relief.

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171 See APPENDIX item 7, Mind the gap!, supra, under the heading Emerging Issues
172 See APPENDIX item 8, Bridging The Gap, BILAJ, March 2016
173 (Case C-271/91) Ursula Becker v Finanzamt Münster-Innenstadt [1982] ECR 53
174 (Case 222/84) Johnston v Chief Constable of the Royal Ulster Constabulary [1986] IRLR 263
175 (Case 152 / 84) Marshall v Southampton and South-West Hampshire Area Health Authority [1993] ICR 893
176 (Case C-188/89) Foster and others v British Gas Plc. [1990] ECR 1-3313
177 Foster v British Gas plc [1991] 2 A.C. 306
178 Doughty v Rolls-Royce Plc [1992] IRLR 126 CA
179 Griffin v South West Water Services Ltd [1995] IRLR 15
180 National Union of Teachers & Ors v The Governing Body of St Mary’s Church of England School [1997] IRLR 242
181 Byrne v MIB & Secretary of State for Transport [2007] EWHC 1268 (QB)
183 These themes are also considered in the author’s New Law Journal articles, Putting wrongs to rights, Part I: NLJ, 27 May 2016 and Part II of 3 June 2016
under European law\textsuperscript{184}. The author argues that whilst he considers the MIB to be an emanation of the state, direct effect of Article 10 against it does not depend on that classification\textsuperscript{185}. One particularly significant aspect of this will be that it will allow third party victims to be compensated for incidents that are currently (wrongly) excluded from third party motor cover under UK law, through the simple expedient of bringing a claim against the MIB\textsuperscript{186}.

\textsuperscript{184} See APPENDIX item 8, \textit{Bridging The Gap}, BILAJ, March 2016, under MIB liability for non-compliant statutory provision

\textsuperscript{185} Arguably this assertion goes further than some commentators are prepared to concede. In Steiner & Woods, EU law, (12th edn Oxford University Press 2012, the authors seem to consider that direct vertical effect of a directive is limited in its application to a state entities, albeit the entity is to be broadly construed after (Case C-188/89) Foster and others v British Gas Plc. [1990] ECR 1-3313, see pages 118 & 119, a view apparently endorsed by Albors-Lorens, A, ‘The direct effect of EU Directives: fresh controversy or a storm in a teacup? Comment on Portgas’, ELR, 2014, and Professor Tridimas, whilst taking note of the Court of Appeal’s decision in NUT still perceives direct vertical effect of directives as being confined in its application to the state and emanations of the state. Whereas this author adopts Blackburn J’s reasoning in \textit{Griffin v South West Water Services Ltd} [1995] IRLR 15 that the legal status and characteristics of the defendant is irrelevant and that para 20 of \textit{Foster} looks primarily to the public service function that has been devolved. It is a functional test that requires responsibility for fulfilling this service to be devolved onto the entity by the state and subject to the control of the state, and for which purpose the entity is also conferred with special powers. It is to be hoped that the CJEU will shortly clarify this point (see note 123 above on the impending CJEU ruling in \textit{Farrell v Whitty})

Significance of contribution

Contribution to legal knowledge

The author’s articles and reports provide the first systematic appraisal of the extent to which our domestic law fails to meet the European law minimum standard of protection for third party victims of motor vehicles\textsuperscript{187}. The author’s consistent and disconcerting message is that our national law in this area is so defective that it simply cannot be taken at face value.

The author’s research is the first to reveal the true extent of this failure and the way it permeates not only Part VI of the RTA 1988 but also both sets of MIB agreements. It is also the first to identify the incompatibility of the common law third party rule as well as the way it influences the way the courts interpret Sections 145, 148 and 151 RTA 1988, and this has led him to reveal its statutory manifestations: in the European Communities (Rights Against Insurers) Regulations 2002 and the Contracts (Rights of Third Parties) Act 1999.

Other commentators tend to view and report individual legal challenges relating to the UK’s failure to properly implement the Directive as isolated anomalies. However, the sheer scale of the non-conformity unearthed by this author’s research suggests that they are better understood as being symptomatic of an underlying malady: resulting from the basic incompatibility of certain fundamental UK law principles with the European law it is intended to implement\textsuperscript{188}.

The author has argued the case, for the first time, that Article 3 of the Directive requires a free-standing compensatory guarantee\textsuperscript{189}, a principle to which some of the abovementioned UK statutory provisions and common law precepts (such as the third party rule and the \textit{ex turpi causa non oritur actio}) are inimical. The

\textsuperscript{187} A link to copy of the author’s \textit{Infringement Complaint to the European Commission}, of August 2013, is published via a link in the author’s 29 March 2016 Nota Bene blog entry, \textit{Action Not Words}, [\url{http://nicholasbevan.blogspot.co.uk/2016/03/action-not-words_29.html}] [last accessed on 1 March 2017] see page 19 of the complaint under \textit{Summary of potential United Kingdom infractions} for a sense of the sheer scale of the UK infringement, which list has since been augmented by further infringements that have come to light, and item 7 in the APPENDIX to this paper, for \textit{Mind The Gap}, BILAJ, January 2016

\textsuperscript{188} See the author’s article \textit{Trial And Error}, NLJ, 20 April 2012 and in the APPENDIX items 9-12 \textit{On The Right Road?}, NLJ, February 2013 and item 5 in the APPENDIX to this paper, \textit{Marking The Boundary}, [2013] JPIL, issue 3

\textsuperscript{189} For a first indication, see APPENDIX item 9, \textit{On The Right Road? (Part II)} NLJ, 8 February 2013 under Other compensatory lacunae but for the developed argument see APPENDIX item 7, \textit{Mind The Gap}, BILAJ, January 2016 especially the penultimate and final paragraphs under the heading: Csonka
effective ring fencing of these third party rights is a concomitant of this governing European law principle.

The author’s articles identify that a different approach is required when interpreting or applying our domestic law in this area. They advocate that whenever either a motor insurer or the MIB raise a technical issue to either defend or reduce a third party victim’s entitlement to compensatory relief, legal advisors should consider the relevant European law first, as this is the primary law that the domestic provisions are supposed to implement. These articles explain that this European law is generally shorter, simpler and more generous in the comprehensive nature of the protection afforded to motor accident victims.\(^{190}\)

The author has also revealed the inconsistent approach of the judiciary to discharging its constitutional obligation to apply a European law consistent construction of our national law transposition of the Directive.\(^{191}\) Judges acting on their own initiative should undertake this routinely; notwithstanding the passivity rule.\(^{192}\)

The author was a lone voice in arguing that two unanimous decisions of the Court of Appeal were made per incuriam (see the references above to EUI and Delaney cases, above). He was the first to offer any analysis on those cases.\(^{193}\) He has been the first to question the currency of a number of other well entrenched

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\(^{190}\) See for example the author’s article Changing Gear, PI Focus, published by the Association of Personal Injury Lawyers, in February 2015 under Better, Simpler, European law and see APPENDIX item 7, Mind The Gap, supra

\(^{191}\) See APPENDIX item 7 Mind The Gap!, BILAJ, January 2016, under the heading The curative effect of consistent interpretation

\(^{192}\) A commonplace practice, if not a common law doctrine, by which judges tend to restrict their inquiry and deliberations to the facts and matters raised and pleaded by the parties. The CJEU authorities on this issue have been equivocal as to whether national court should of its own motion routinely apply a European law consistent construction of national law intended to implement a directive. The author’s views on this point are argued on an a priori basis. See the comments above under ‘the European law remedies’ heading. The EU law doctrine of harmonious or consistent interpretation subheading. Put another way, it is difficult to envisage how else a court can discharge the duty imposed on it to give full effect the EU law if when interpreting its domestic implementation, if it does not first appraise itself of that EU law. This appears to the necessary corollary of the CJEU’s restatement of the duty of consistent construction in (Case C-397/01 to C-403/01) Bernhard Pfeiffer et alia v Deutsches Rotes Kreuz, Kreisverband Walshut eV [2004] ECR 1-8835, paras 111 to 113

\(^{193}\) Margaret Hemsworth’s later article, Insurance obligations, The Road Traffic Act 1988 and deliberately caused damage, JBL, 2013, 3, 354-361 offers some useful analysis of EUI without offering any view on whether it was erroneous
judicial decisions (such as the House of Lords ruling in *White v White*, and many pre-accession case authorities\textsuperscript{194}).

The way *Delaney v Pickett*\textsuperscript{195} was handled at first instance and on appeal demonstrates that European law considerations continue to be something of a blind spot for motor claims practitioners. The imperative of routinely testing the European law compatibility of our national law in this area, and not just when a provision is ambiguous or produces unjust results, is a regular refrain in the author’s published articles in this field\textsuperscript{196}.

The author has exposed for the first time the mistaken adherence by many lawyers to certain long established practices that are inconsistent with the Directive; for example, the almost universal acceptance of the different procedure attending a ‘statutory insurer’ or an ‘article 75 insurer’, where European law does not allow such a distinction\textsuperscript{197}. Similarly, the commonplace view (endorsed by senior members of the judiciary\textsuperscript{198}) that the MIB agreements are merely private law contracts and as such not subject to a European law consistent interpretation\textsuperscript{199} is also shown to conflict with European jurisprudence and basic rule of law principles\textsuperscript{200}.

The author’s articles and his official reports\textsuperscript{201} anticipated the final outcome in the *Delaney* case and the CJEU decision in *Vnuk*\textsuperscript{202}. No other commentator has argued against the current orthodoxy (which views the MIB as little more than an outsourced private contractor free from state control and possessing no special

\textsuperscript{194} See for example APPENDIX item 5 *Marking the Boundary*, JPIL, [2013] Issue 3 under *What went wrong* or APPENDIX item 8, *Bridging The Gap*, BILAJ, March 2016 under *On the nature of the MIB*

\textsuperscript{195} *Delaney v Pickett* [2011] EWCA Civ 1532

\textsuperscript{196} See the author’s article, *A World Turned Upside Down*, JPIL [2014] Issue 3, under *Points to take away*, not included in the appendix

\textsuperscript{197} See above under the heading: *The EUI case*

\textsuperscript{198} See Hobhouse LJ’s judgment in *Mighell v Reading, Evans v Motor Insurers’ Bureau, White v White* [1999] 1 CMLR 1251 and the comments of his colleagues

\textsuperscript{199} See APPENDIX item 8, *Bridging The Gap*, BILAJ, March 2016 under *On the nature of the MIB*

\textsuperscript{200} See for example (Case C-365/93) *Commission v Greece* [1995] ECR 1-499, paragraph 9 on the minimum requirements for legal certainty considered by the author in *Good Law*, NLJ, July 2013; not supplied in the appendix that follows

\textsuperscript{201} This refers to the author’s consultation response submitted in reply to the DfT’s February 2013 review of the MIB Agreements. This was published via a link in the author’s 29 March 2016 Nota Bene blog entry, *Action Not Words*, [http://nicholasbevan.blogspot.co.uk/2016_03_01_archive.html](http://nicholasbevan.blogspot.co.uk/2016_03_01_archive.html)

\textsuperscript{202} A point raised by the author in his articles, see under *Lack of Legal Certainty* in APPENDIX items 6, *Tinkering at the edges* and 7 *Mind the gap*, and in his Law Commission Report, December 2013, pages 14 and 18, the latter is not annexed here
powers), let alone advocated the vicarious state liability of the MIB for the government’s failure to properly implement the Directive. The author was the first to undertake a comprehensive and critical appraisal of the MIB agreements’ extensive incompatibility with the Directive.

The author’s advocation of his controversial view that Article 10 of the Directive has direct effect against the MIB opens up a third European law route to redress. This should make it easier for individual motor accident victims to assert their full legal rights under European law. This route may become even more important if judicial reticence against curing defective domestic provision, Pfeiffer style, increases with the impending referendum on the UK’s membership of the EU. Direct effect involves considerably less judicial discretion.

**Contributions to practice**

The author’s articles provide the only succinct explication of the third party motor insurance requirement under European law. His summary of its core principles have been adopted by leading counsel in the Statement of Case to serve as a paradigm for the European law requirement in an ongoing judicial review relating to the UK’s numerous breaches of European law in its transposition of the Directive.

The author has exposed the lack of safeguards in the Untraced Drivers’ Agreement 2003 for minors and protected parties. This conflicts with the

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203 See APPENDIX item 8, *Bridging The Gap*, supra; see also the author’s New Law Journal articles: (i) *Putting wrongs to rights Pt1*, NLJ, 27 May 2016, and (ii) *Putting wrongs to rights Pt2*, NLJ, 3 June 2016, these NLJ articles are not annexed here.

204 (Case C-397/01) *Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV* [2004] ECR I-8835

205 See APPENDIX item 7, *Mind the gap!*, for the author’s explanation of the problems associated with Francovich actions under the heading *Seeking compensation from the state*, in his BILA journal article *Mind the Gap!* (supra), see also Lord Clyde’s judgment *R v Secretary of State for Transport Ex p. Factortame* in (No.5) [1999] 4 All ER 906.

206 See APPENDIX item 7, *Mind The Gap!,* under the heading *The culminating principles*, also published more widely within the author’s New Law Journal articles such as *Still Driving Dangerously*, 8 April 2016 and *Putting wrongs to rights (Part 1)* 27 May 2016 and in *A World Turned Upside Down* [2014] JPIL issue 3, under *European law in a nutshell* and also in this paper under *The European insurance requirement*.

207 *RoadPeace v Secretary of State for Transport*, issued on 1 October 2015 in The High Court of Justice Administrative Court no. CO 4681/2015, where the author’s schedule of infringements is incorporated and attributed to him.
European law equivalence and effectiveness principles\textsuperscript{208}. Practitioners should be able to insist on proper funding to allow them to represent these vulnerable individuals. Furthermore, as none of these settlements have binding effect if these protective measures are not adhered to, they are avoidable, at least by an infant on attaining majority, according to the House of Lords ruling in *Dietz v Lennig Chemicals*\textsuperscript{209}.

The author’s simple approach to European law consistent construction\textsuperscript{210} and to identifying and tackling infringements\textsuperscript{211} improves the likelihood that an increasingly de-skilled profession will identify and challenge these European law infractions. His classification of the ten different types of infraction may also assist\textsuperscript{212}. At least one legal commentator has adopted some of the author’s key points in their own analysis\textsuperscript{213}.

The promulgation of this message is still a work in progress: further articles are planned\textsuperscript{214}.

\textsuperscript{208} See APPENDIX item 7, *Mind The Gap!* under the heading *Discrimination of minors and protected parties*, the author’s article, a view more widely promulgated (and raised for the first time by as a potential infringement of European law) in the author’s New Law Journal article *An untidy arrangement*, NLJ, 12 March 2014

\textsuperscript{209} *Dietz v Lennig Chemicals* [1969] 1 AC 170, [1967] 2 All ER 282

\textsuperscript{210} See APPENDIX item 9, *On The Right Road?* (Pt I), NLJ, February 2013 under the heading *Interpreting Community law*, and APPENDIX item 10, *On The Right Road?* (Pt II), NLJ, February 2013 under *Interpretive tips*; also covered in the author’s article, *Case commentary on EUI v Bristol Alliance*, published in JPIL 2013 Issue I under Practice Points and Interpretive Tips and his New Law Journal article, *Still driving dangerously*, NLJ, April 2016; see also his other articles *Putting wrongs to rights* (Part1), NLJ May 2016 and *Putting wrongs to rights* (Part2), NLJ June 2016

\textsuperscript{211} See the author’s New Law Journal articles: *Second Sight*, NLJ Oct 2014 and *Still Driving Dangerously*, NLJ, 8 April 2016 from *Purposive construction with and edge* onwards and more extensively in APPENDIX item 8 *Bridging the Gap*, BILAJ, March 2016

\textsuperscript{212} see APPENDIX item 7, *Mind The Gap*, BILAJ, January 2016 under *Comparative law analysis*

\textsuperscript{213} See Nigel Tomkins’s *Case commentary on Delaney v Secretary of State for Transport* in JPIL [2015] Issue 3, especially under his Practice Points heading; see also note 258 below concerning the publication by Marson, J, Ferris, K and Nicholson A, ‘Irreconcilable differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives’, JBL, 2017

\textsuperscript{214} See for example APPENDIX item 13, *Self-driving vehicles: the road ahead*, NLJ 2 September 2016, alerts the profession to another newly discovered major flaw in the UK’s transposition of the Directive. Section 145 of the Road Traffic Act 1988 restricts compulsory third party cover to a liability incurred by the user / driver whereas Article 3 of the Directive’s liability scope is much wider and embraces product liability. This has important implications for the Government’s plans to introduce autonomous driving systems to replace driver control as the UK compulsory insurance requirement does not extend to product liability. The author has been consulted by the Association of Personal Injury Lawyers and RoadPeace and various leading firms, who support the author’s analysis and have joined him in calling for this lacuna to addressed. The author has submitted two detailed reports, one in response to the DTI’s consultation on driverless vehicles, the other in response to the House of Lords select committee on autonomous vehicles pointing out the need for urgent reform in this area as well.
Literature review

The primary focus of the author’s work has been to expose the extensive nature of the UK’s infringements of the Directive\(^\text{215}\) as well as the unsatisfactory approach of the UK judiciary when discharging its obligation to interpret the UK’s transposition, in so far as possible, in the light of this European law. A secondary and subordinate concern has been to argue the case for Article 10 having direct effect against the MIB, contrary the only UK authority on this point\(^\text{216}\).

When the author’s articles were published, there was little detailed academic commentary on the UK’s transposition of the Directive\(^\text{217}\). Indeed practically every text book in print at that time which covered motor insurance adhered to the conventional approach for explicating the third party motor insurance obligation – starting with the UK law and only raising the EU law it implemented where the domestic provision was unclear or obviously inconsistent with it\(^\text{218}\). In the author’s view this put the domestic law cart before the European law horse\(^\text{219}\).


\(^{217}\) The author’s research and published work offer the first academic re-evaluation of the sufficiency of the UK provision for third party motor accident victims since the debate that followed in the wake of the Cassel Committee Report of 1937.

\(^{218}\) The conventional approach of these secondary sources is evident in: Bingham and Berrymans’ Personal Injury and Motor Claims Cases 14th edition, LexisNexis; Butterworths Personal Injury Litigation Service, where even the heading for the relevant section, ‘Division III Road Traffic Accidents’, is something of a misnomer following the CJEU’s judgment in Vnuk (see above) and the same can be said of the APIL Guide to Road Traffic Accidents, by Andrew Ritchie QC, Jordans, 2012. Even Halsbury’s Laws of England offers a similarly conventional treatment of this subject in section (5) on Compulsory Insurance In Relation To Motor Vehicles (within Volume 60 On Insurance; Chapter 9 Motor Vehicle Insurance). Whilst offering a passing reference to the first five European Directives on motor insurance it goes on to offer a relatively uncritical account of the domestic law implementation of the Directive’s predecessors. For example, at 738 its treatment of the Article 75 insurers and the MIB agreements gives little if any indication that they are incompatible with the Directive or its predecessors. None of these works tackle head-on the fundamental European law incompatibility issues that pervade much of our domestic provision in this area.

\(^{219}\) As the author explains above under the ‘European law remedies’ heading, any proper harmonious construction of the UK’s transposition of the direct must necessarily be predicated on the European law it is supposed to implement. A view adopted by Jeremy Hyams QC in the pleading in the ongoing judicial review in RoadPeace v Secretary of State for Transport (MIB intervening) (CO/4681/2015). The pleadings can be accessed by the public on payment of the requisite fee from the Court Service.
This trait is particularly noticeable in the *APIL Guide to MIB Claims*\(^\text{220}\), by Andrew Ritchie QC\(^\text{221}\). His useful book opens with the relevant UK statutory and extra-statutory provision and although he subjects this to a meticulous analysis his conventional UK-centric focus leads him into error. He fails to identify many serious infringements: such as the terrorism exclusion\(^\text{222}\); the flawed arbitral appeal process; the unlawful property damage exclusions\(^\text{223}\) and the lack of suitable protection for minors and the mentally handicapped. He also fails to consider the possibility that the MIB is an emanation of the state, or that it might be subject to the direct effect of Article 10. He does not question the legitimacy of the so called Article 75 procedure\(^\text{224}\) or consider whether under European law insufficiently insured vehicles can properly be treated as uninsured vehicles and so processed under the disadvantageous compensatory schemes managed by the MIB. He promotes *Francovich* actions as his principal remedy, without offering warning of the substantial litigation risk, delay and cost involved. He does not explore the full potential for a European law consistent interpretation as a potentially more immediate, affordable and effective remedy for these infringements\(^\text{225}\), whether under ordinary domestic construction principles\(^\text{226}\) or by applying *Pfeiffer*\(^\text{227}\), nor the possibility of Article 10 having direct effect against the MIB\(^\text{228}\).

\(^{220}\) Jordan Publishing, March 2016

\(^{221}\) Mr Ritchie is a particularly well regarded specialist in MIB claims. This very able silk has won numerous awards and is a general editor of *Kemp & Kemp: Personal Injury Law, Practice and Procedure*, published by Sweet & Maxwell and an author of several other personal injury practitioner guides. He is the Chairman of the Personal Injury Bar Association and he is head of chambers at 12 Kings Bench Walk, a leading set of personal injury barristers

\(^{222}\) Which exclusion the government has now removed from both schemes with effect from 1 March 2017, arguably in response to the point being raised in the judicial review in *RoadPeace v Secretary of State for Transport (MIB intervening)* (CO/4681/2015). See note 267 below below

\(^{223}\) Also removed with effect from 1 March 2017 and for the same reasons, see note 267

\(^{224}\) See above under *Comparisons with the UK provision*

\(^{225}\) Most probably because he has not thought to review whether the House of Lords finding to this effect in *White v White* (supra) and the Court of Appeal's obiter remarks in *Mighell* (supra) are consistent with *Pfeiffer*

\(^{226}\) See the line of authorities relating to the courts' approach to ascertaining the objective meaning to be derived from the contract terms from Lord Hoffman's judgment in *Investors Compensation Scheme Limited. v West Bromwich Building Society* [1998] 1 W.L.R. 896 through to Lord Clarke's in *Rainy Sky S.A. v Kookmin Bank* [2011] UKSC 50

\(^{227}\) See Waller LJ's analysis of (Case C-397/01) *Pfeiffer's* significance in this area in *McCall v Poulton* [2008] EWCA Civ 1263, paras 35 to 39

\(^{228}\) See above under Section 6: *Significance of contribution* for the significance of direct effect
Probably the most influential text in this area is *The Law of Motor Insurance*, which gives the European law framework prominent treatment. Concerns first raised by this author surface in this 2016 edition. For example, the book goes some way to questioning whether: (i) Ward LJ was correct in *EUI* to hold that there is no general prohibition on exclusion clauses affecting third party victims; (ii) whether the EC Rights Against Insurers Regulations 2002 are compatible with the Directive and (iii) whether the MIB agreements are subject to a European law construction after *Pfeiffer* and (iv) the compatibility of the MIB’s terrorism exclusion. However, this seminal reference work does not have the space to subject the entire UK transposition of the Directive to a rigorous EU law compliant scrutiny.

There is also an extensive body of excellent and authoritative academic commentary on the general principles of European law and the relevant European law remedies. Yet this author’s published work on its implications for motor insurance and arguing the case for direct effect of the Directive against the MIB as well as his bolder approach to applying a European law consistent interpretation to its compensatory schemes are discrete points that were arrived

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230 The Law of Motor Insurance, exclusively so at pages 26 to 45 and extensively elsewhere in the text, especially in Chapter 5 on Compulsory Liability Cover
231 *EUI Ltd v Bristol Alliance Ltd Partnership* [2012] EWCA Civ 1267, [2013] 2 WLR 1029
232 Ibid, page 464
233 Ibid, 490-493
234 (Case C-397/01) *Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV* [2004] ECR I-8835
235 Ibid, page 627
236 In keeping with the ‘APIL Guide to MIB Claims’, it does not flag up the illegality of the exclusion of property damage to uninsured vehicles, see pages 603-604, nor does it question the compatibility of Article 75 of the MIB’s Memorandum and Articles of Association with the insurance requirement prescribed by Article 3 in its extensive account of its workings (pages 475 and 489 and again at 627 – 631). Whereas this author argues that the CJEU has ruled that member states have no discretion to treat victims of inadequately insured defendants as uninsured driver claims, see Appendix item 7 Mind The Gap under the heading ‘7. Misallocation of insured claims as uninsured claims’ and (Case C-442/10) *Churchill v Benjamin Wilkinson and Tracy Evans* [2013] 1 W.L.R. 1776, para 41 and (Case C 409/11) *Gábor Csonka v Magyar Állam* [2014] 1 CMLR 14, paras 30 – 32. The need for concision may also explain why, whilst citing various obiter dicta and authorities against the proposition that the MIB is subject to direct effect of Article 10 (Ibid pages 590 and 595-596), it does not go as far as this author in re-examining the evidence and case law in the light of (Case C-188/89) *Foster* (see note 194 above) to argue for direct vertical effect as a means of remedying the numerous lacunae in the UK legislation explained above. This latter issue is raised within the ongoing judicial review in *RoadPeace v Secretary of State for Transport (MIB intervening)* (CO/4681/2015)
237 See the author’s bibliography post and note 92 above under the ‘European law remedies’ heading
at independently of those broader scoped works\textsuperscript{238}. However, the author’s work is based on the same core body of knowledge as those commentaries: consisting of the relevant judgments from the CJEU, UK and Ireland\textsuperscript{239} as well as various opinions of the advocates generals. It is therefore perhaps not surprising that the author’s views on the discrete points of European law that he raises are broadly consistent with the academic consensus\textsuperscript{240}, even if in places his specialist knowledge of the MIB and his expertise in motor insurance and liability practice has allowed him to develop his arguments a little further in practical terms.\textsuperscript{241}

\textbf{Wider implications}

The author’s work has increased awareness within the legal profession (and beyond\textsuperscript{242}) of the need for extensive reform in this area. He is alone in having undertaken a detailed analysis of these third party rights, proposing detailed measures for reform\textsuperscript{243}, and in re-evaluating and fully explicating the various legal

\begin{itemize}
\item \textsuperscript{238} The author’s research was the first to question the Flaux J’s findings in Byrne v Motor Insurers’ Bureau [2008] EWCA Civ 574; [2009] Q.B. 66, [2008] 3 W.L.R. 1421 that the MIB was not an emanation of the state and that Article 10 of the Directive was capable of direct effect against it. Even now this view has only been adopted in one other paper, see Marson, J, Ferris, K and Nicholson A, ‘Irreconcilable differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives’, JBL, 2017. Even here it is difficult to discern any new insights, as the paper appears to achieve little more than traverse and represent the author’s previously published research in this area.
\item \textsuperscript{239} Which informed the author’s principle understanding in this specific area after a critical study of Butterworths Personal Injury Litigation Service, ‘Division III Road Traffic Accidents’, Lexis Nexis; Halsbury’s Laws of England, Volume 60 On Insurance; Chapter 9 Motor Vehicle Insurance Section (5) on Compulsory Insurance In Relation To Motor Vehicles. Lexis Nexis and APIL Guide to MIB Claims, by Andrew Ritchie QC, 2\textsuperscript{nd} Edn Jordans)
\item \textsuperscript{240} As recounted above under the ‘The increasing influence of European law’ and European law remedies’ headings
\item \textsuperscript{242} The European Commission’s Inception Impact Assessment of 8 June 2016 indicates an intention to undertake a wide ranging regulatory fitness review of the Directive.
\item \textsuperscript{243} See APPENDIX items: no. 2: The Motor Insurance Bureau’s role, no. 3 Why the Uninsured Drivers’ Agreement 1999 needs to be scrapped, no. 29 Response to the DfT consultation on the MIB Agreements and in his Report on reform submitted to the Law Commission in December 2013, not reproduced here but published via a hyperlink in his Nota Bene blog entry, Action not words, here: http://nicholasbevan.blogspot.co.uk/2016_03_01_archive.html.
\end{itemize}
remedies in this area,\textsuperscript{244} including a new third route to redress by way of direct effect against the MIB\textsuperscript{245}.

His articles and activism have already provoked a modicum of reform\textsuperscript{246}. There is also the expectation of further concessions as the ongoing \textit{RoadPeace} judicial review\textsuperscript{247} and the European Commission’s regulatory review proceeds\textsuperscript{248}.

It is a reasonable expectation that this reform will materialise, even though the Government has now triggered Article 50 of the Treaty of Lisbon\textsuperscript{249}. Clearly once the UK leaves the European Union in approximately two years’ time the European Communities Act 1972 will be repealed, effectively revoking the supremacy of European law in this jurisdiction and the European law remedies.

However, a political decision will need to be made on whether the UK should fully implement the Directive regardless, including any successor into our national law. It should be remembered that there is a very considerable, if not complete, consensus of political and legislative intent between the UK and European

\textsuperscript{244} See APPENDIX item 8, \textit{Bridging The Gap}, BILAJ, March 2016 and his New Law Journal article, \textit{Still driving dangerously}, NLJ, 8 April 2016
\textsuperscript{245} See the author’s New Law Journal articles, \textit{Putting wrongs to rights (Pt1)}, NLJ May 2016 and \textit{Putting wrongs to rights (Pt2)}, NLJ June 2016, not included in the appendix
\textsuperscript{246} Seen in the removal of various procedural conditions precedent to MIB liability from the Uninsured Drivers’ Agreement 2015, that remain in clauses 9 to 13 of the Uninsured Drivers’ Agreement 1999, these issues were raised by the author in his 2008 meeting with the MIB and subsequently in his articles, see APPENDIX item 3 \textit{Why the Uninsured Drivers’ Agreement 1999 needs to be scrapped}, JPIL [2011] Issue 2. More recently, further events have vindicated the authors views, such as (i) within the government’s consultation on Vnuk (the consultation is available online: \url{https://www.gov.uk/government/consultations/motor-insurance-consideration-of-the-vnuk-judgment}) and this finally concedes that the technical definition of ‘motor vehicle’ in section 185 RTA and the geographic scope of the third party insurance requirement in section 145 are non-compliant (which defects it was alerted to in April 2013 in response to the Department for Transport’s February 2013 consultation on the MIB Agreements); (ii) the new MIB agreements introduced in March 2017 which remove the unlawful exclusions of liability for damage to uninsured vehicles and the exclusion of liability for victims of terrorism which the government conceded to be illegal in the ongoing judicial review in \textit{RoadPeace v Secretary of State for Transport (MIB intervening)} (CO/4681/2015). The victims of the 22 March 2017 terrorism attack on Westminster bridge will now receive their full compensatory entitlement from the MIB as opposed to the substantially less generous award under the Criminal Injuries Compensation Scheme; (iii) Further concessions have been made by the government within the ongoing judicial review in \textit{RoadPeace v Secretary of State for Transport (MIB intervening)} (CO/4681/2015), for example it concedes that the protection afforded to minors and the mentally handicapped under the Untraced Drivers Scheme is inadequate. The author hopes that his other aspects of his work will be validated if the Supreme Court grant permission to appeal in \textit{Sahin v Havard} (see note 77 above) and when Ousley J gives judgment in the \textit{RoadPeace} judicial review (see notes 186, 225 and 267 above). This author has advised in both cases, see below under the ‘Wider implications’ heading.
\textsuperscript{247} Which the author persuaded the claimant to initiate and where he continues in an advisory role
\textsuperscript{248} See note 263 above
\textsuperscript{249} Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01
legislatures in this area. The differences appear to lie in the execution of this policy; not in the policy itself.

250 One need only compare Lord Mance’s account of the legislative aim of the MI directives in Moreno v MIB [2016] UKSC 52, [2016] 1 WLR 3194 [para 2] – ‘The expressed and obviously beneficial purpose of the arrangements introduced by the Directives ... is to ensure that compensation is available for victims of motor accidents occurring anywhere in the Community (now the Union) and to facilitate their recovery of such compensation.’ ...with Waller LJ’s account of the UK Parliament’s intention in Churchill v Wilkinson [2010] EWCA Civ 556 [para 3] – ‘Compulsory insurance has been a feature of legislation in the United Kingdom for many years. The aim is to provide a guarantee that an injured person will obtain the compensation that he or she is awarded against the negligent driver.’ Lord Hailsham makes a similar observation in Gardner v Moore & Ors [1984] 1 All ER 100- ‘Part VI of the Road Traffic Act 1972 is designed to protect the innocent third party from the inability to pay of a driver who incurs liability by causing him death or personal injuries.’
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Preface
The author has explained above, under the *Literature review* heading, that his research did not rely on conventional secondary sources for his analysis of UK motor insurance law. He would argue that this approach and his views in this regard are supported by the way that the UK judiciary, on the subject of compulsory third party motor insurance, does not appear to rely on legal commentaries either; if they have been referred to, they are rarely, if ever, cited.

His contribution to legal knowledge in this field was not developed in a vacuum. It builds on an extensive body of authoritative, erudite and often pellucid legal commentary and analysis. This is to be found in the judicial interpretation of the primary sources of law by various members of the CJEU and by numerous UK and some Irish judges. These judgments are cited extensively throughout this extended introduction. The author’s independent research is based on his critical analysis of these sources.

The author respectfully invites his examiners to assess his contribution to the existing body of knowledge by reference to these primary sources which are the most important, authoritative and readily accessible element of the wider body of knowledge in this field.

When the author’s papers and articles were written, there were no academic studies that focused on the European law requirement for third party motor insurance or which attempted a comprehensive analysis of the egregious extent to which the UK transposition fails to meet the minimum standard of protection required under European law. One notable exception now being *The Law Of Motor Insurance*[^251], whose second edition, published on 23 September 2015, includes new material that tackles the thorny issue of the UK’s failure to fully implement the Directive. .

Other important secondary sources have been Halsbury’s Laws[^252] and the corpus of legal opinions written by the various Advocates General, who have advised the CJEU on the European motor insurance requirement over the past two decades.

[^251]: See below for the citation
[^252]: See below for the citation
Other than this, most of the secondary sources on motor insurance and European law listed below did not inform the author’s original research.

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\(^{253}\) Most past and all current MIB Agreements and the MIB Articles of Association can be downloaded from the MIB website, here: \(https://www.mib.org.uk/\)
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Appendix of publications

A selection of published articles by Nicholas Bevan
On the theme of third party motor insurance

The papers and articles are grouped in date order under the different publications. The author has obtained the kind permission of Nigel Tomkins, solicitor and co-editor of the Journal of Personal Injury Law to reproduce here Nigel Tomkins’ case summaries that prefaced the author’s own case commentaries, set out in Appendix as well as the permission of the publishers, Sweet & Maxwell. All the other articles set out in the appendix are the author’s own work. The author has also obtained the kind permission every other publisher of the author’s articles (set out in this Appendix) to reproduce them here or he is otherwise contractually entitled to reproduce them for the purposes of this paper.

Nicholas Bevan
A. The Journal of Personal Injury Law


JPIL Issue 4, 2010

[Nigel Tomkins, solicitor and JPIL editor, wrote the initial case summary and Nicholas Bevan, JPIL editor, the commentary that follows]

CHURCHILL INSURANCE CO LTD v WILKINSON [1]
EVANS v EQUITY CLAIMS LTD
CA (Civ Div) (Lord Neuberger MR, Waller LJ (V-P), Wall LJ) 19/5/2010
[2010] EWCA Civ 556


These were conjoined appeals in which the court was required to determine whether two insurers had a right of recovery against the insured Wilkinson and Evans.

The facts in Churchill v Wilkinson

This was tried as a preliminary issue on the following assumed facts. In October 2004, Mr. and Mrs. Wilkinson, Benjamin Wilkinson’s parents, bought him a car for £1,600. The car was insured through Churchill. The policy holder was Mrs. Wilkinson, but Benjamin was a named driver. On 23 November 2005, he met with a couple of friends, one of them being Mr Fitzgerald, who had been drinking. Benjamin, who had not been drinking, drove them to a local MacDonald’s, where they had something to eat. When they left, Benjamin
allowed Mr Fitzgerald to drive the car. It was accepted for the purposes of the preliminary issue that Benjamin knew Mr Fitzgerald was not insured under the policy. Unfortunately, Mr Fitzgerald lost control, and the car collided with a vehicle driving in the opposite direction. Benjamin, who was aged 20 at the time, suffered severe injuries. Mr Fitzgerald was subsequently convicted of dangerous driving, driving with excess alcohol and driving without insurance. Blair J. found that by virtue of the Road Traffic Act 1988 s.151(5)254[2], Benjamin Wilkinson’s insurers were bound to compensate him and were not entitled to reclaim that compensation from him under s.151(8)255[3].

**The facts in Evans v Equity**

Tracy Evans owned a motorcycle. She insured the same with Equity under which she was insured to drive her motorcycle but no one else. On 4th August 2004 she permitted Adam Cockayne to drive her motorcycle with herself as pillion passenger. Through the negligence of Adam Cockayne he drove into the back of a lorry and Tracy Evans was seriously injured. Adam Cockayne had been insured under a policy to drive his own motorcycle but no other and was consequently uninsured. Tracey Evans was unaware that he was uninsured. His Honour Judge Gregory found that in permitting Adam Cockayne to drive she had given no thought to the question whether Adam Cockayne was insured to drive her motorcycle. She was awarded compensation, but the judge found that her insurers were entitled to reclaim that compensation from her under s.151(8).

The Court of Appeal held that the effect of s.151(8) as a matter of English law was to exclude from the benefit of insurance a passenger who was the insured but who had given permission to an uninsured driver to drive. However, the question was whether European Community law would hold that such an exclusion was void and unenforceable, and whether s.151(8) could be interpreted so as not to breach Community law.

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254[2] see below for the provisions of s 151 (5)
255[3] see below for the provisions of s 151 (8).
To reach a conclusion it was necessary to consider that question by reference to Directive 2009/103/EC256[4], since, although that directive had come into force after the relevant judgments, it was a consolidating directive which simply codified the previous directives. Article 12(1)257[5] suggested to them that insurance was required to cover all passengers injured except those contemplated by the second paragraph of art.13(1)258[6].

They stated that if art.12(1) had that wide meaning then it seemed to preclude excluding from compensation a passenger who was an insured under the policy but was injured in an accident due to the negligence of a driver whom the insured had permitted to drive uninsured259[7]. That seemed to be the case, even if the insurer could prove that the insured passenger knew that the driver was uninsured.

That result might not seem altogether satisfactory since if the driver was unidentified or there was no insurance at all, the Motor Insurers Bureau could exclude from compensation an injured passenger whom they could prove knew that the driver was uninsured. It was unclear to the court why Community law suggested that so far as statutory insurers were concerned the position should be different. They noted that there might also be a distinction between an insured passenger who permitted a person to drive whom he knew was uninsured, and an insured passenger who believed the driver had insurance, or who had not turned his mind to that question.

As a result they held that it was therefore appropriate to refer to the Court of Justice of the European Union questions concerning (i) whether s.151(8) in its present form complied with Community law; (ii) whether some amendment or reinterpretation as to the degree of the insured’s knowledge was necessary in order for s.151(8) to comply with Community law and they did so.


Commentary

This case presents the reader with two interesting phenomena: both seemingly paradoxical in effect. The first, stems from the wide ranging compensatory protection that the Road Traffic Act 1988 bestows on all victims of negligent drivers under s the provisions of 151 (5) Road Traffic Act 1988) and the fact that this protection is effectively negated where the victim happens (i) also to be insured under the policy covering the vehicle in which the he or she is a passenger and also (ii) where that victim permitted the negligent driver to drive whilst uninsured. This coup de grace is delivered under s 151 (8). Oddly, no such sanction is extended to a policyholder / passenger who allows an inebriated person to drive them. Similarly, and just as perversely, a passenger who owns but does not insure the vehicle in which he or she is injured as a passenger will not be excluded from the benefit of s 151 (5) where they knowingly permit an uninsured driver to drive them. Accordingly this seemingly arbitrary, and certainly isolated, exception sits at odds with the general tenor of s 151, whose object is to ensure that victims of negligent drivers are compensated by the policyholder’s RTA insurers. The second phenomenon lies in the fact that two experienced first instance judges could, on near identical facts, draw such diametrically opposed conclusions about the import of s 151 (8). One is tempted to conclude that our national law in this regard is far from satisfactory and in need of clarification if not revision.

When one is confronted with what appears to be something of a conundrum it is often sensible, metaphorically speaking, to take a step back and to view the problem from the wider perspective that distance affords. In our case, and because our national law in this area is intended to implement the European Motor Insurance Directives, it is sensible to commence our analysis by considering the EU Directive itself. This approach is also to be preferred as our national law is supposed to give effect to the United Kingdom’s obligations under Community Law.
The primacy of European law was most clearly expressed by Lord Denning in *H.P. Bulmer Ltd v J. Bollinger SA* [1974] Ch 401 at 418

‘The Treaty [of Rome] does not touch any of the matters which concern solely England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.’

It is now a commonplace that when interpreting national law that is also governed by European law it is necessary to apply a purposive construction where possible to our national law so as to give effect ‘as far as is possible’ to the European law, this accords with the dicta propounded in *Marleasing* [1990] ECR 1-4135.

**EU law on the compensation of victims of motor accidents**

Although the accidents featured in both the *Wilkinson* and *Evans* appeals predated the 6th EU Motor Insurance Directive, as it was a consolidating directive, it seems sensible to follow Lord Justice Waller’s example by referring to the consolidating 6th EU Motor Insurance Directive as though it were in force.

The relevant provisions of the 6th EU Motor Insurance Directive 260 are as follows, beginning with the Recitals:

(2) Insurance against civil liability in respect of the use of motor vehicles (motor insurance) is of special importance for European citizens, whether they are policyholders or victims of an accident. It is also a major concern for insurance undertakings as it constitutes an important part of non-life insurance business in the Community. Motor insurance also has an impact on the free movement of persons and vehicles. It should therefore be a key objective of Community action in the field of financial services to reinforce and consolidate the internal market in motor insurance.

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260 2008/0037(COD)

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(3) Each Member State must take all necessary measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the insurance cover are to be determined on the basis of those measures.

(12) Member States' obligations to guarantee insurance cover at least in respect of certain minimum amounts constitute an important element in ensuring the protection of victims. The minimum amount of cover for personal injury should be calculated so as to compensate fully and fairly all victims who have suffered very serious injuries, whilst taking into account the low frequency of accidents involving several victims and the small number of accidents in which several victims suffer very serious injuries in the course of one and the same event. A minimum amount of cover per victim or per claim should be provided. With a view to facilitating the introduction of these minimum amounts, a transitional period should be established. However, a shorter period than the transitional period should be provided in which Member States should increase these amounts to at least a half of those levels.

(14) It is necessary to make provision for a body to guarantee that the victim \( \text{sic: of a motor accident} \) will not remain without compensation where the vehicle which caused the accident is uninsured or unidentified. It is important to provide that the victim of such an accident should be able to apply directly to that body as a first point of contact. However, Member States should be given the possibility of applying certain limited exclusions as regards the payment of compensation by that body and of providing that compensation for damage to property caused by an unidentified vehicle may be limited or excluded in view of the danger of fraud.

(15) It is in the interest of victims that the effects of certain exclusion clauses be limited to the relationship between the insurer and the person responsible for the accident. However, in the case of vehicles stolen or obtained by violence, Member States may specify that compensation will be payable by the abovementioned body.
Within the main body of the Directive:

Article 3 provides (amongst other things) for each Member State being obliged to take all appropriate measures ‘to ensure that civil liability in respect of the use of a vehicle normally based in its territory is covered by insurance.

Article 10 imposes an obligation to set up a body to compensate for injuries caused by unidentified vehicles or an uninsured vehicle i.e. in the United Kingdom the Motor Insurers Bureau. It provides however that ‘Member States may exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured.’

Chapter 5 of the Directive is headed ‘Special categories of victim, exclusion clauses, single premium, vehicles dispatched from one Member State to another’.

Articles 12 and 13 then provide as follows:

‘Article 12

Special categories of victim

1. Without prejudice to the second subparagraph of Article 13(1), the insurance referred to in Article 3 shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle.

2. The members of the family of the policyholder, driver or any other person who is liable under civil law in the event of an accident, and whose liability is covered by the insurance referred to in Article 3, shall not be excluded from insurance in respect of their personal injuries by virtue of that relationship.

3. The insurance referred to in Article 3 shall cover personal injuries and damage to property suffered by pedestrians, cyclists and other non-motorised users of the roads who, as a consequence of an accident in which a motor vehicle is involved, are entitled to compensation in accordance with national civil law.
This Article shall be without prejudice either to civil liability or to the quantum of damages.

Article 13

Exclusion clauses

1. Each Member State shall take all appropriate measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3 shall be deemed to be void in respect of claims by third parties who have been victims of an accident where that statutory provision or contractual clause excludes from insurance the use or 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;

   (c) persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned.

However, the provision or clause referred to in point (a) of the first subparagraph may be invoked against persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen.

Member States shall have the option in the case of accidents occurring on their territory of not applying the provision in the first subparagraph if and in so far as the victim may obtain compensation for the damage suffered from a social security body.

2. In the case of vehicles stolen or obtained by violence, Member States may provide that the body specified in Article 10(1) is to pay compensation instead of the insurer under the conditions set out in paragraph 1 of this Article. Where the vehicle is normally based in another Member State, that body can make no claim against any body in that Member State. Member States which, in the case of vehicles stolen or obtained by violence, provide that the body referred to in Article 10(1)
is to pay compensation may fix in respect of damage to property an excess of not more than EUR 250 to be borne by the victim.

3. Member States shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy which excludes a passenger from such cover on the basis that he knew or should have known that the driver of the vehicle was under the influence of alcohol or of any other intoxicating agent at the time of an accident, shall be deemed to be void in respect of the claims of such passenger.’

It is suggested that the correct way to view our national law in this area is through the lens of the European Directive it is supposed to transpose and implement.

**Our national law:**

The statutory duty to satisfy judgments is contained in s. 151(5) RTA which provides:

‘Notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy or security, he must, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment

(a) as regards liability in respect of death or bodily injury, any sum payable under the judgment in respect of the liability, together with any sum which, by virtue of any enactment relating to interest on judgments, is payable in respect of interest on that sum,

(b) ×

(c) any amount payable in respect of costs.’

**Secton 151 (4) RTA** provides for an excluded category of cases where the insurers are not liable under s 151 (5), namely where the passenger

‘…was allowing himself to be carried in or upon the vehicle and knew or had reason to believe that the vehicle had been stolen or unlawfully taken, not being a person who—
(a) did not know or had no reason to believe that the vehicle had been stolen or unlawfully taken until after the commencement of his journey;

and

(b) could not reasonably have been expected to have alighted from the vehicle.'

Whilst S 151 (4) RTA has no direct application to the case facts in *Churchill or Evans* it does emphasise the otherwise very wide scope of the obligation to compensate within s 151 (5) RTA, set out below.

However the right to recover from the policyholder is contained in section 151(8) RTA, which provides:

‘Where an insurer becomes liable under this section to pay an amount in respect of a liability of a person who is not insured by a policy …, he is entitled to recover the amount from that person or from any person who

( a) is insured by the policy……, by the terms of which the liability would be covered if the policy insured all persons × and

(b) caused or permitted the use of the vehicle which gave rise to the liability.’
Conclusions:

The effect of s 151 (8) is to exclude from the benefit of insurance cover a passenger (who is also the insured) where that passenger has given permission to an uninsured driver to drive. This has no parallel within the European Directive, as can been observed from the above excerpts. It would follow therefore that in European Law a passenger’s knowledge that their driver is uninsured cannot be excluded from the protection afforded by our national law, either under contract or by national / statutory provision.

Furthermore, as Waller LJ observed, we have the Advocate General’s opinion in Ruiz Bernaldez [1996] ECR 1-1847 to the effect the list of void exclusions set out in Article 12 are not exhaustive: so in Bernaldez, an exclusion of liability imposed on the insured due to his knowledge that the driver was intoxicated was deemed void. The European Court of Justice took the same view and this resulted in the 6th EU Motor Insurance Directive’s predecessor being amended to include what is now Article 13 (3).

Nevertheless s 151 (8) has the ostensible result of excluding an injured person from a remedy prescribed by Articles 3 and 12 of the 6th EU Motor Insurance Directive. If this view is correct then s 151 does not implement E U law completely.

If s 151 (8) is in conflict with the Directive, then it is necessary to ask whether it is in fact possible to interpret s 151 (8) purposively so as to give effect to the Directive or whether the Road Traffic Act 1988 needs amending. This is the object of the referral to the European Court of Justice.

Practice Point

Where any national law provision is supposed to implement our government’s obligations under a European Directive, one must begin the interpretation of that provision by studying the European directive and then construing the provision in the light of that Directive.
This approach is also good for construing the Uninsured and Untraced Drivers Agreements entered into between the Secretary of State for Transport and the Motor Insurers Bureau in order to compensate victims of uninsured and untraced drivers. Any cursory study of which will reveal a number of glaring inconsistencies with the directives, but that is the subject of another article.

[Nicholas Bevan]

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261 Dated 1999 and 2003 respectively.
Reforming the Motor Insurers’ Bureau’

[The two articles below were published under the heading ‘Reforming the Motor Insurers’ Bureau’]

In the first of a two-part article Nicholas Bevan looks at the origins and evolution of the MIB and examines its role and the legal structure within which it operates with particular reference to the State’s European obligations. In the second article Nicholas will examine whether the MIB is fit for purpose and outline areas for reform.

Muiris Lyons, partner of Stewarts Law solicitors, JPIL general editor

2. Part I the Motor Insurers Bureau’s role


The Bureau

The Motor Insurers Bureau (MIB) has been in existence for approximately 64 years. It plays a vital role in the framework of protective measures designed to ensure that road accident victims recover their full compensatory entitlement. The service it provides is crucial—especially for those unfortunate enough to be victims of up to 1.5 million uninsured drivers that plague our roads. Without this safety net many injured victims would be unable to recover their compensatory entitlement because most uninsured drivers have little or no means to satisfy a judgment themselves.

Yet, the MIB does not enjoy the universal esteem of claimant representatives and commentators. Indeed its fitness for purpose is coming under increasing scrutiny amidst calls for a radical reform to the compensatory scheme it operates on behalf of the State. This arises out of a growing appreciation within the legal profession that the Uninsured Drivers Agreement 1999 that MIB administers on behalf of the State is potentially under compensating many victims of uninsured and untraced drivers.

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262 J.P.I. Law 2011, 1, 39-53

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Any fair assessment of the MIB and its role in delivering the State’s policy aims should commence with an appraisal of the MIB itself, as an institution and this is where this paper will begin. It will review the historical background against which the MIB was incepted, its principal objects as well as the much extended role embraced over the past decade. Its function as a compensatory safeguard for victims of uninsured and untraced drivers will then be critically examined but with particular emphasis being placed on the substance and operation of the Uninsured Drivers Agreement 1999. The preeminence of the EU Motor Insurance Directives and its related jurisprudence, both as a source of primary law and principle and as a means of interpretation, will also be considered. The Untraced Drivers Agreement 2003 will only be mentioned in passing as it is a very different creature.

**Origins**

Both the formation of the MIB and its continuing role are inextricably linked with the passing of the Road Traffic Act 1930. This made it obligatory for the user of a motor vehicle on a road in Great Britain to be insured against liability for personal injury caused by or arising out of that use. This requirement is now contained within sections 143 to 145 Road Traffic Act 1988. Unfortunately the legislative purpose was frustrated by difficulties right from the outset.

Two key failings were identified. The first was that many drivers were simply failing to purchase the third party motor insurance. The second problem was that even where such insurance cover existed, any material breaches by the policy holder entitled the insurer avoid its contractual liability to indemnify. In either case, the social policy aim of ensuring that victims would recover their full compensatory entitlement from the responsible party’s insurer, regardless of the financial circumstances of the defendant, was being frustrated.

This unsatisfactory state of affairs was highlighted in 1937 by the Cassel Committee (chaired by the eminent jurist Sir Felix Cassel QC, PC). It made two principal recommendations: firstly that further legislation be enacted to regulate motor insurance contracts more stringently, so as to restrict the ability of insurers to impose policy conditions and exclusions that would enable them to avoid liability to compensate and secondly, to set up a National Guarantee Fund that
would compensate victims of uninsured drivers. Both measures also conferred on the compensator a right of recovery from the policyholder / uninsured driver.

The Second World War intervened before these recommendations could be implemented. However, in its aftermath and with the prospect of imminent statutory intervention, the insurance industry took the initiative and agreed a non-statutory scheme that it would administer; this was the genesis of the Motor Insurance Bureau.

**Objectives**

The MIB was established by the insurance industry as a private company limited by guarantee on 1 July 1946. It was set up to facilitate the motor insurance industry to contract with the State to deliver a compensatory scheme for victims of negligent uninsured and untraced motorists. It is a not for profit organisation.

The MIB entered into the first of a series of formal agreements with the State, undertaking the role of compensating victims of negligent uninsured motorists. The first scheme was set up under The Uninsured Drivers Agreement 1946, which has since been modified by various later agreements from time to time: most recently in 1972, 1988 and currently 1999. The first Untraced Drivers Agreement was entered into in 1969 and the current version is dated 2003. These two compensatory regimes are known as the 'Domestic Agreements'.

The agreements are self contained, in the sense that they remain in force even when superseded, so that different regimes co-exist: prescribing different compensatory regimes that remain in force from the date of their commencement to the date of any successor agreement. This policy worked well enough up to and until the UK’s accession to the European Community in 1973. However, this paper will demonstrate below that this arrangement has become an anachronism and is unsuited to the task of ensuring the UK’s implementation of EU Law.

Every authorised insurer that underwrites compulsory motor insurance in the UK is obliged, by virtue of S 145 (5) of the 1988 Act, to be a member of MIB and to contribute to its Guarantee Fund. The MIB’s management board comprises senior representatives appointed by the major insurance companies. Accordingly the motor insurance industry not only have a direct role in the management of the MIB itself but they are able to influence the Secretary of State in any negotiations,
not just through the organ of the MIB, which they control, but also by direct lobbying.

Ultimately, the National Guarantee Fund is not a creation of the motor insurance industry’s largess because every penny expended by the MIB in satisfying claims under the Uninsured and Untraced Drivers Agreements and in managing the seemingly ever widening role of the MIB is eventually recouped from the premium paying public. The State has in effect empowered the representative body of a commercial consortium to impose indirect taxation in order to implement its social policy aims. The MIB estimates that the additional cost to each insured driver of funding the MIB is approximately £30 a year. However, recent research published by Cooperative Insurance puts the additional cost at £50.\(^{263}\)

Widening scope of operations

1. The MIB is acquiring a steadily widening agenda and influence. In addition to serving as an extra statutory compensator under the two Domestic Agreements it has taken on the following roles for the State:

   - It operates what is known as the ‘Green Card Scheme’ in this jurisdiction. This scheme was set up under the Uniform Agreement 1949 that the United Kingdom Government entered into as a member of the Council of Bureau.\(^{264}\) It provides what is in essence an international certificate of motor insurance limited to the territories of the contracting states. The MIB has several roles. One is to act as a handling agent to ensure that residents who are injured in this jurisdiction by a foreign driver\(^{265}\) temporarily visiting under a Green Card is compensated. The Bureau will investigate and settle the claim before recovering its outlay from the foreign bureau concerned. The MIB also serves as an information bureau, helping the victim to trace a foreign insurer. Another major role for the MIB under this Agreement

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\(^{263}\) *Uninsured drivers cost motorists £1.25 million a year*, Calum McIntyre Rogers, Daily Telegraph, 28 August 2010

\(^{264}\) This Council was set up under the aegis of the United Nations Economic Commission for Europe and although its members are primarily confined to Europe its remit extends to the Urals, the Caspian Sea and other countries around the Mediterranean Sea.

\(^{265}\) The Scheme only applies between the contracting states.
is to meet claims by foreign nationals injured by UK residents temporarily visiting member state under a Green Card insurance scheme.

- The MIB enforces an intra-insurer agreement, set out in Article 75 within the MIB’s Articles of Association. Article 75 fulfills the purpose imposed on EU Member States by what is now Article 11 of the 6th EU Motor Insurance Directive of providing a mechanism to deliver compensation without delay where there is a dispute as to which is liable.

The MIB’s activities were extended significantly under the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003. These regulations appoint the MIB as the Compensatory Body for the United Kingdom and confer extensive powers and duties on the MIB. Acting in this role, the MIB has an important compensatory role for a claimant resident in this jurisdiction but who has been injured abroad (in a foreign state within the EEA). Under this scheme the MIB will stand in the shoes of any foreign insurance representative that has failed to respond to a claim promptly or if no claims representative has been appointed or if the vehicle or driver is not insured or cannot be traced.

- The MIB also acts as the Information Bureau under the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003. If the Motor Insurance Information Centre (MIIC) receives a written request containing sufficient information to identify the vehicle concerned and is accompanied by a fee of £10, it will, through the network of other national bureaux, provide the victim with details of the name, address and policy number of the insurer of the vehicle, the identity of its UK representative and, where the victim

266 These regulations were introduced to implement the Fourth Motor Insurance Directive 2000/26/EC whose principal object was to make it easier for victims of road traffic accidents injured in a foreign EU member state to claim compensation against a foreign representative of the third party insurer and (perhaps most significantly) to do so in the victim’s own country of residence. The Fourth Directive was passed by the European Union on 16 May 2000 and the Regulations came into force on 18 January 2003

267 Regulation 1 provides for the setting up of the Motor Insurers Information Centre which based at the MIB in Milton Keynes.
has a 'legitimate interest', the registered keeper of the vehicle. The MIB is responsible for maintaining an insurance database for vehicles registered in the UK and has the power to fine insurance undertakings that fail to submit details.

2. The MIB has assumed a number of other roles, over and above implementing the UK’s treaty obligations:

- The MIB shares the data acquire in its role as the Information Bureau with the police, operating a 24 hour telephone helpline, to enable the police to enforce the requirement imposed by s143 Road Traffic Act 1988 for road users to have third party insurance cover for their vehicles. According to the MIB millions of insurance checks are made by the police every month. The MIB claims that this has reduced the incidence of uninsured driving from around 2 million a few years ago to about 1.5 million today and since 2005 approximately 600,000 cars have been seized and about 40% of these were crushed under this initiative. According to the MIB this initiative appears to have reduced the number of uninsured and untraced driver claims by 20%. However, it seems likely that we will witness an increase in uninsured driving following the recent announcement by some motor insurers of their intention to increase the premiums for young drivers by as much as 51%.

- The MIB has become a very effective lobbyist in furtherance of its declared mission: to reduce the incidence of uninsured driving. It has successfully campaigned for the introduction of a continuous insurance enforcement policy, enforced as a new offence under s22 of the Road Safety Act 2006 of keeping a vehicle without insurance. When this comes into force in early 2011 it will amend s144 Road Traffic Act 1988 to make it an offence to keep a motor vehicle off road without insurance unless the owner has filed a Statutory Off Road Notice at the Department of Vehicle and Licensing Authority. The DVLA and police will be able to undertake database searches to track down potentially uninsured drivers. In its 2009 report the MIB reported
remarkable success in its campaign to reduce uninsured drivers and as a result it spent £69m less last year than predicted and paid a substantial rebate to its members. It also lobbied for a new offence of causing death by driving where the driver is uninsured is also planned; presumably with an enhanced penalty. It is questionable whether the latter initiative will influence uninsured drivers to any significant extent. Many uninsured drivers are probably motivated more by their inability to afford the very high premiums than by sanctions.

- The MIB also undertakes its own research into the incidence of uninsured and untraced drivers. It recently enquired into the demographic makeup of uninsured drivers. This identified that a typical uninsured motorist is male and aged between 17 and 29; that 10% of 18-24 year olds are not aware you need insurance to drive legally in the UK and that of the 1.2 million drivers aged 17-20, 243,000 (20%) are believed to be driving without insurance.

- More recently the MIB has set up a management service for the online portal through which claims are notified and processed under the new Low Value Personal Injury Claims in Road Traffic Accidents Scheme.

- It has also set up a subsidiary company to operate the Employers Liability Insurance Database that was an initiative of the last Government. The ELID is an electronic record of employers' insurance policies. Its objective is to make it easier for victims of long tail / historical industrial disease to recover compensation by enabling them to trace their (often former) employers' insurance records.

- It has been proposed by various stakeholders in the field of industrial injury and disease litigation, including the author, that the MIB should manage an Employers Liability Insurance Bureau. Such a Bureau would be tasked with raising a levy on EL / PL insurers underwriting business in this company and with compensating victims of industrial disease or injury claims where the insurer cannot be traced but for incidents which employers were obliged to have been covered by insurance under Employers' Liability (Compulsory Insurance) Act.
1969. It is not known if this initiative, adopted by the previous Government, will survive the present Government’s sweeping cuts.

It will be readily appreciated that the MIB has evolved into a major enterprise with a much extended scope of operations from that originally conceived. In 2009 MIB employed about 320 and handled approximately 60,000 uninsured and untraced driver claims from its premises in Milton Keynes; roughly half of those were untraced / hit and run accidents. All of its activities are paid for by the insurance premium paying public. In 2009 its total income amounted to £ 226,662 million.

**Mission Statement**

According to its website it describes a strategic mission that is not directly concerned with its original objective but which is laudable all the same, namely: ‘to significantly reduce the level and impact of uninsured driving in the UK’.

**Innovation**

During the past 10 years, the MIB has been a powerhouse of innovation across an impressively wide range of activities. The brief account that follows does not do justice to the outstanding dynamism of its executive managers over the past decade.

It developed a motor insurance database of insured vehicles to tackle fraud, long in advance of The Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003; it centralized the claims handling of claims to deliver a more efficient and consistent approach; it provides training to claimant representatives at its offices; it introduced an MIB Legal Expenses Scheme to assist claimants fund their claims, without the need for expensive after the event insurance premiums; introduced the MIB / MASS Fast Track Understanding that streamlined and expedited low to moderate value accident claims, which was later extended to all claimants; it devised an MIB Customer Charter that treats claimants as well as their legal representatives as customers; it introduced a complaints policy; it actively encourages claimants to use periodical payments as a means of compensating injury claims featuring a significant element of future loss; it instituted an MIB Training Academy for insurance claims handling; it lobbied successfully for police powers to search and seize uninsured vehicles, resulting in the Serious Organised Crime and
Police Act 2005 and the Road Safety Act 2006; it has introduced an online process for lay applicants to submit claims direct, and finally it claims that it has, as a result of efficiencies and improvements in its claims handling processes, reduced the number of outstanding claims and its response times for dealing with correspondence substantially compared with what they were two years ago.

Thus far the MIB, as an institution, comes through with flying colours. Its scope of operations has expanded considerably and it has successfully introduced a number of innovations which have improved its accessibility and the efficiency of its operations. Its close cooperation with the Government and the police appear to have reduced the incidence of uninsured driving. These are remarkable achievements by any standard and they indicate that the MIB’s senior management is innovative and effective. But is the MIB fit for purpose as a compensator of victims of uninsured and untraced drivers? The answer to that question lies in examining its own stated objectives and the compensatory role it has assumed under its Domestic Agreements and then to compare these with what is required under national and European law.

**Constitution**

This is to be found in the MIB’s Memorandum and Articles of Association. The Memorandum is publicly available from Companies House and is downloadable for free from the MIB’s website. It sets out a long list of objects in Article 3.

As recently as 2008 Article 3 (A) (i) used to provide that the MIB would operate:

> 'As a fund of last resort to satisfy, or provide for the satisfaction of, claims, judgements, awards or settlements in respect of any liability required to be covered by contracts of insurance or security under Part VI of the Road Traffic Act 1988 or by any other statute, ......

For roughly 62 years was an oft quoted precept that the MIB’s Guarantee Fund was a fund of last resort. This inculcated the perception in many that MIB’s obligation under the Domestic Agreements was limited to topping up the shortfall in the victims compensatory needs, taking into any account funds were received from any other source. Indeed this principle underscores various exceptions to be found within the Uninsured Drivers and Untraced Drivers Agreements and which the MIB have relied upon to justify reducing the level of compensation.
some claimants would otherwise have rightly expected; had the defendant been insured. These will be alluded to later on. Suffice it to say here that under this principle, and over many years, very substantial savings have been achieved by the MIB and the insurance companies who comprise its membership – a saving made at the expense of many claimants’ compensatory entitlement and one that the industry was not entitled to make.

It is therefore of particular significance that the reference to ‘a fund of last resort’ has been removed from the 2010 edition of the MIB’s Memorandum and Articles of Association, although the Uninsured and Untraced Driver’s Agreements that reflect this principle remain unaltered. Article 3 now provides that the objects of the bureau are:

‘A (i) To provide a safety net for innocent victims of identified and uninsured drivers to satisfy, or provide for the satisfaction of, claims, judgements, awards or settlements in respect of any liability required to be covered by contracts of insurance or security under Part VI of the Road Traffic Act 1988 or by any other statute, statutory instrument, rule, regulation, order, directive or similar measure introduced by any competent authority or at common law or by custom.’

The MIB’s role, as a compensatory safety net, is set out clause 5 of the Uninsured Drivers Agreement 1999, entered into between the MIB and the Secretary of State for Transport on 13 August 1999. The adequacy of this safety net, in so far as it effects uninsured driver claims, will be examined in Part II.

Returning to the MIB’s constitution, Article 3 (B) (i) provides that the MIB will:

‘… enter into any agreements or arrangements with any governments or authorities, municipal, local or otherwise ……….. that may seem conducive to the Bureau’s objects ……………. and to carry out, exercise and comply with any such agreements, arrangements, rights, privileges and concessions. 268’

In short, and in so far as victims of uninsured and untraced drivers are concerned, one can readily discern that the MIB has two primary functions: Firstly to enter into agreements with the Government (for the delivery of a suitable compensatory safety net for this class of victim) and secondly, to comply with these agreements (i.e. to manage the compensatory scheme). Any assessment of the MIB’s fitness

268 The bold text is the author’s own emphasis.

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for purpose must include an assessment of the fitness for purpose of the agreements themselves, since not only was the MIB was a contracting party to and proponent of those agreements but also it is obliged by its constitution to adhere to them; and by and large, so it does.

The MIB’s Memorandum and Articles of Association can be downloaded free of charge from the MIB website: http://www.mib.org.uk. The current version is dated 10 June 2010.

**The nature of the MIB Domestic Agreements**

We have seen that the Domestic Agreements are a series of agreements between the State and the motor insurance industry in the UK. These agreements define the scheme under which the National Guarantee Fund is administered to deliver the Governments’ social policy aim of ensuring that victims of motor accidents recover their compensatory entitlement and in order to comply with the State’s treaty obligations.

The MIB’s compensatory role is restricted under the terms of the Domestic Agreements to claims arising out of a liability for which compulsory road traffic accident insurance applies: this is what the MIB means by a “relevant liability” in Clause 5 of the Uninsured Drivers Agreement\(^\text{269}\). Conversely, where the party responsible for the claimant’s loss was not obliged under Part VI of the Road Traffic Act 1988 to have third party insurance, then the MIB has no obligation to compensate under the Clause 5.

The requirement to have third party insurance is set out in s 143 Road Traffic Act 1988:

\[s 143\] 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, and

\(^{269}\) see *Lees v MIB* [1952] 2 QB 511
(b) a person must not cause or permit any other person to 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 other 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.

The extent of the insurance indemnity required is defined within section 145 of the Road Traffic Act 1988. This includes the following extract:

….any liability which may be incurred 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 in Great Britain.

Accordingly the scope of the Uninsured Drivers Agreements and the Untraced Drivers Agreements are drafted in such a way as to be coextensive with the obligation to to have insurance under Part VI of the 1988 Act.

The first MIB Agreement, dated 17 June 1946, only concerned itself with uninsured driver claims, however untraced driver claims were also compensated at the MIB’s discretion. There have been a series of revisions to these Domestic Agreements, culminating in the MIB Uninsured Drivers Agreement 1999 (effecting accidents occurring on or after 1 October 1999) and, the MIB Untraced Drivers Agreement 2003 (effecting accidents on or after 14 February 2003).

The precise nature of the Domestic Agreements has been the subject of some judicial comment. They are arguably quasi-regulatory and extra legislative but they are certainly not legislation and nor do they confer any direct contractual right of action upon a victim.

Whenever the MIB is potentially involved in a claim against an uninsured driver, it has a right to intervene as an interested party in an action against an uninsured driver on the basis that it is party potentially liable to satisfy any judgment against the uninsured defendant. The MIB now insists that it is joined as a party to any claim against an uninsured driver.

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270 Gurtner v Circuit [1968] 2 QB 587
271 See clause 14 (b) of the Uninsured Drivers Agreement 1999 and also the Revised Notes for Guidance, clause 5.3

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The style and substance of the agreements have more in common with an insurance policy than with what one might expect from a extra statutory compensatory scheme: as they are hedged with liability exclusions and impose the most draconian penalties for a wide range of relatively minor administrative and procedural stipulations (which are themselves imposed as conditions precedent of any liability). These requirements go far beyond anything imposed under the Road Traffic Act 1988 (RTA 1988), a fortiori the EC Motor Insurance Directives. They produce a regime that many contend to be unjust, arbitrary and excessive. These will be considered in more detail below as the agreements are considered in turn. Suffice it to say here that these provisions seem to be at odds with Sir Felix Cassel’s original objective of providing motor accident victims with a safety net through the institution of a National Guarantee Fund.

*Constitutional safeguards*

One remarkable characteristic of the MIB is the way in which its different functions and responsibilities are fused.

We have seen that the MIB acts as an outsourcing agency for the State in the provision of its social law policy of compensating uninsured and untraced drivers. This was its genesis. However, that relationship extends much further than that of any ordinary contracting party at arms length. There is a clear interdependency between successive Governments and the motor insurance industry: one that provides the industry with a captive market and assured revenues by imposing on road users the obligation to take out insurance but in return requires the motor insurance industry to serve as a safety net for injured victims. There is nothing bye or sinister in principle with this pragmatic approach. However, as this paper will demonstrate, there are insufficient safeguards to balance the conflicting interests of the public, who rely on the Agreements as a safety net, and the commercial interests of the motor insurance industry, to maximise its revenue.

A cursory examination of the Domestic Agreements shows the hand of the insurance interests that drafted them. This is revealed in their layout and structure, the insurance terms employed, their use of conditions precedent and
imprecisely defined exclusions. All these features are redolent of an insurance
policy and are quite unlike any compensation scheme one might expect from
Parliamentary draftsman. It is unfortunate that their complexity defeats a cardinal
principle of any sensible scheme of redress: that it should be clear and readily
understandable by those affected.

We have seen from the MIB’s constitution and the way in which its role has
increased over recent years and from its widening scope of operations that it has
moved on from this original compensatory function to become a significant
presence in the insurance and motor accident claims industry. The insurance
companies that dominate this market also control the MIB’s management board.

The critique of the Uninsured Drivers Agreement 1999 that follows will
demonstrate that many of the exclusions, limitations and strike out clauses cannot
be justified because they conflict with the Government’s obligations under EU
Law. It must follow therefore the arrangement, in its present form works against
the public interest. How then could this have been permitted to subsist and for
so many years?

One answer lies in the fact that there are no adequate constitutional safeguards
and controls on the way in which the MIB operates. Given that the MIB funds
ultimately derive from the tax paying public, would it not be reasonable to expect
a more representative composition within its board of management? This should
involve the secondment to its board of representative members of APIL or MASS
and perhaps a consumer association.

Would it not also be reasonable to require the MIB to account more precisely for
its different revenue streams? The MIB has become a multi-million pound
business with a wide range of activities. It is likely that most members of the
public would expect the insurance levy that is ultimately derived from their
premiums would be hypothecated solely for the purposes of the National
Guarantee Fund. This may well be the case but given the origin of these funds,
greater clarity is desirable. Detailed accounts should be published to
demonstrate the use to which these funds are being applied so they are not
diverted elsewhere. The need for open disclosure of its detailed accounts
becomes ever more pressing as the range of the MIB’s commercial interests and
its role widens.
For example, it is understandable that the motor insurance industry might wish to employ the MIB to conduct research or to otherwise lobby the Government to represent its interests; but is it right that these activities be funded by the taxpayer? At the very least this is an issue that should be debated.

One further area of concern is that there is insufficient independent control over the manner in which the MIB investigate claims under the Untraced Drivers Agreement 2003. The sufficiency of this non-contentious extra statutory compensation scheme has been the subject of a number of legal challenges. Whilst the efficacy of the procedure has not been successfully challenged to date, that negative establish the contrary: namely that the procedure is fair or that it produces a just outcome. Indeed there is legitimate cause for concern that it may not deliver a fair outcome in many cases. For example, there is notorious injustice associated with the MIB’s investigation of a claim presented by the actor, Mr Kenneth Moore in 1997. It seems probable that this resulted in that applicant being denied a fair and proper level of compensation. His Francovich action was only defeated on the ground that it was statute barred, due in large part to the inordinately long time that it took to deal with this claim. Nor should it be forgotten that until 2007 the MIB’s policy was to unjustifiably refuse applications made on behalf of minors where more than three years had elapsed since the date of the injury. Furthermore, as the Untraced Drivers Agreement attempts to limit, except and exclude liability in almost identical terms as under the Uninsured Drivers Agreement, it follows that where these are established to conflict with the EU Directives in the Uninsured Drivers Agreements, the same will apply with equal force to claims under the former agreement. It would be a simple matter for the MIB to agree protocols with representative bodies such as APIL and MASS and to set up a simple audit and regulatory process to ensure that these claims are being processed and adjudicated fairly.

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272 Moore v Secretary of State & MIB [2007] EWHC 879 (QB)
273 Byrne v Secretary of State & MIB [2007] EWHC 1268 (QB)
The impact of Europe

Prior to the United Kingdom’s accession to Europe in 1973 the entire issue as to the nature and extent of compensation provided under the National Guarantee Fund fell entirely within the province and control of the contracting parties: namely the insurance industry acting through the MIB and the Government. Accordingly, if the Government of the day considered it just or expedient to either restrict access to or to limit the level compensation under the Domestic Agreements then it could do so, and with impunity.

However the Government’s position following its accession to The European Economic Community in 1973 Directives is a very different matter. In the words of Lord Denning:

‘The Treaty [of Rome, 1957] does not touch any of the matters which concern solely England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.’

Indeed, there is an established corpus of judicial rulings which demonstrate that many of the restrictions and limitations within the Domestic Agreements conflict with the more generous and less restricted compensatory regime prescribed by the EU Motor Insurance Directives.

The first of these Motor Insurance Directives was passed shortly before the UK’s accession to the Treaty of Rome. This First EU Motor Insurance Directive imposed on member states an obligation to require insurance against civil liability for the use of motor vehicles, along the lines of our existing national legislation. This directive and three successive Motor Insurance Directives are now all consolidated within a codified 6th EU Motor Insurance Directive (Council Directive 2008/0037(COD)). However, whilst the first EU Motor Insurance Directive may have done no more that bring some of our putative European partners into line,

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274 H.P. Bulmer Ltd v J. Bollinger SA [1974] Ch 401 at 418
the relatively unqualified nature of the compensatory safety net prescribed by subsequent EU Motor Insurance Directives contrast sharply with the regime in this jurisdiction.

It is long established that an English court is under an obligation to interpret all national legislation (primary and secondary) as far as possible, in a way which gives effect to the Directive, - *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135. Furthermore, as Lord Oliver of Aylmerton observed in *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546, 559:

‘a purposive construction will be applied to legislation even though, perhaps, it may involve some departure from the strict and literal application of the words which the legislature has elected to use.’

**Judicial interpretation of the 1999 Agreement**

It will be noted that the Domestic Agreements are a series of private contracts between the Secretary of State acting on behalf of the Government and the MIB acting on behalf of the motor insurance industry; not legislation.

Even so, the House of Lords employed a remarkably similar process of reasoning when construing the contractual terms of the Uninsured Drivers Agreement 1988 in *White v White* [2001] UKHL 9. It applied what was in effect a purposive construction of clause 6 of the 1988 Agreement that excluded any liability to compensate in certain circumstances.

In *White* claimant had been severely injured whilst riding as a passenger in a car driven by his brother who was not only uninsured but also drunk. The MIB intervened and sought a declaration that it was not liable to compensate the claimant on the grounds that the Clause 6.1.(e) of the 1988 Agreement excluded any liability to compensate a passenger *who knew or ought to have known* their driver was uninsured.

The claimant contended that whatever the UDA 1988 might provide, Article 1 of the Second Motor Insurance Directive (84/5/EEC) only permitted member states to exclude liability to a passenger in such circumstances where there was *actual* knowledge.
The House of Lords upheld the Court of Appeal’s finding in the claimant’s favour: His claim was not excluded notwithstanding the provision within the UDA 1988 to the contrary. Although technically speaking Marleasing had no application, the use of conventional contractual construction principles produced the same result.

There is also ample authority from the European Court of Justice that any exception within a Directive should be constructed restrictively. Accordingly the House of Lords ruled that it must have been in the mind of the contracting parties at the time of entering into the UDA 1988 that they wished to comply with the Second Motor Insurance Directive so that the relevant phrase within clause 6 of the UDA 1988 (knew or ought to have known) should be taken to mean ‘knew’ and not ‘ought to have known’

A consequence of this landmark ruling is that, as a matter of contract law construction, the Domestic Agreements are to be interpreted in a purposeful manner in recognition of the contracting parties presumed intention to comply with the Government’s obligations under EU Law.

If the result prescribed by a directive cannot be achieved by way of judicial interpretation, the remedy lies in an action by the victim affected against the member state in accordance with Francovich and others [1991] ECR 1-5357.

In Evans v Secretary of State for Transport & MIB C-63/01 [2003] ECR I-14 the High Court referred a challenge under the Untraced Drivers Agreement 1972 to the European Court of Justice (ECJ) for a ruling.

This case is notable for the crucially important EJC ruling that the effect of the 2nd Motor Insurance Directive276 was to ensure that the protection provided is ‘equivalent to and as effective as’ the protection available under the domestic legal system to victims of insured drivers (i.e. equivalent and effective to the protection afforded to victims of drivers who are insured under national law, be this the Road Traffic Act 1988 or any other statute that has the same purpose). Similarly, the procedural process should be no less favourable than those governing similar claims against insured drivers.

276 The 2nd Motor Insurance Directive imposed on member states the obligation to put in place compensation for victims of uninsured and untraced drivers.

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However, as Mr Justice Hickinbottom recently observed in *Carswell v Secretary of State & MIB [2010]*\(^{277}\), the burden is a heavy one for a claimant to discharge. In Evans, the ECJ ruled:

45. It is settled case-law that in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness) (see, in particular, *Case C-120/97 Upjohn [1999] ECR I-223, paragraph 32*).

46. As regards application of the principle of effectiveness, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis, the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration (see *Joined Cases C-430/93 and C-431/93 Van Schijndel and Van Veen [1995] ECR I-4705, paragraph 19*).

It should be appreciated however that both *Evans* and *Carswell* featured untraced driver claims. These were non-contentious applications for compensation where the ‘equivalence’ principle can hardly apply. This would suggest that it is easier to challenge the sufficiency of the procedure for an uninsured driver claim, particularly where there are such gross detractions from the normal procedure against an insured and identified defendant.

Between them, *White* and *Evans* provide the interpretive mechanism for the agreements. Accordingly, the House of Lords ruling in *White* is that where possible the Domestic Agreements should be interpreted in such a way as to give

\(^{277}\) *Carswell v Secretary of State & MIB [2010] EWHC 3230 (QB), para 17*
effect to the presumed intention of the Government and the MIB: which is that it should comply with the EU Motor Insurance Directives. The European Court of Justice ruling in Evans indicates in the clearest terms that the level of protection afforded to a victim of an uninsured or untraced driver under either of the Domestic Agreements should, taken as a whole, be equivalent to and as effective as the protection available the Road Traffic Act 1988.

Given the primacy of European Law, and the EU Motor Insurance Directives in particular, this paper will consider the relevant EU Motor Insurance Directives first before moving on to critically examine whether the Uninsured Drivers Agreement 1999 provides the scope and level of protection prescribed by these Directives. The correct way to view our national law in this area is through the lens of the European Directives it is supposed to transpose and implement.
The European Motor Insurance Directives

The EU Motor Insurance Directives fulfil an important role in promoting the free movement of persons, goods, services (and implicitly, vehicles) within the European Union, which the UK has been a full member since 1973.

We have seen that EU Directives are important sources of law and that where the conflict with national law, European law will prevail. Where the construction of statute or regulation is at issue, the courts will often consider the relevant EU Directive. They have influenced our road traffic law and they also effect the obligations of the MIB.

It has already been observed that the first four EU Motor Insurance Directives have been codified within a new 6th Motor Insurance Directive.

The 5th EU Motor Insurance Directive (2005/14/EC) is of limited relevance to this paper. It is sufficient to note that it abolished the excess on property damage claims. Hitherto the MIB had deducted an excess on property damage claims of brought under the Uninsured Drivers Agreement of £350. It also required the maximum statutory property and injury cover limits to be regularly increased, in line with inflation.

In this regard, the MIB demonstrated that it could act decisively, as the Uninsured Drivers Agreement 1999 was amended in short order by a Supplemental Agreement dated 7 November 2008 that gave effect to these changes. The other changes introduced by this Directive are not germane to the MIB’s management of the compensatory regime for uninsured and untraced drivers.

The 6th EU Motor Insurance Directive

As has been stated, the 6th EU Motor Insurance Directive (2008/0037(COD) consolidates and clarifies the first four EU Motor Insurance Directives. Of particular relevance are the following articles:

Article 3: Compulsory Insurance of Vehicles
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 in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of the measures referred to in the first subparagraph.

Each Member State shall take all appropriate measures to ensure that the contract of insurance also covers:

(a) according to the law in force in other Member States, any loss or injury which is caused in the territory of those States;

(b) ……

The insurance referred to in the first subparagraph shall cover compulsorily both damage to property and personal injuries.

The principal obligation within Article 3 is that member states should: ‘take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance’.

**Article 10: Body responsible for compensation**

1. Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied.

The first subparagraph shall be without prejudice to the right of the Member States to regard compensation by the body as subsidiary or non-subsidiary and

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278 The reference to Article 5 is to the right of member states to derogate from the obligation to impose an obligation to insure for certain persons. This applies to exempt Ministry of Defence vehicles and local authorities, that are able to self insure, from the obligation to purchase compulsory third party cover under the Road Traffic Act 1988.

279 In this jurisdiction: the Motor Insurers Bureau.
the right to make provision for the settlement of claims between the body and the person or persons responsible for the accident and other insurers or social security bodies required to compensate the victim in respect of the same accident. However, Member States may not allow the body to make the payment of compensation conditional on the victim establishing in any way that the person liable is unable or refuses to pay.

2. The victim may in any event apply directly to the body which, on the basis of information provided at its request by the victim, shall be obliged to give him a reasoned reply regarding the payment of any compensation. Member States may, however, exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured.

3. Member States may limit or exclude the payment of compensation by the body in the event of damage to property by an unidentified vehicle. However, where the body has paid compensation for significant personal injuries to any victim of the same accident in which damage to property was caused by an unidentified vehicle, Member States may not exclude the payment of compensation for damage to property on the basis that the vehicle is not identified. Nevertheless, Member States may provide for an excess of not more than EUR 500 for which the victim of such damage to property may be responsible. The conditions in which personal injuries are to be considered significant shall be determined in accordance with the legislation or administrative provisions of the Member State in which the accident takes place. In this regard, Member States may take into account, inter alia, whether the injury has required hospital care.

4. Each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by the body, without prejudice to any other practice which is more favourable to the victim.

The most important part of Article 10 is set out in the first subparagraph. This sets the standard by which the MIB’s fitness for purpose as a compensatory agency is to be tested, namely of:
‘providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or,….. [uninsured]… vehicle …’

As to the right to exclude subrogated claims, it is to be remembered that this, as with any exception, is to be construed restrictively. It is suggested that the right to deduct subrogated claims from a victim’s compensation is confined by the use of the phrase: ‘…other insurers or social security bodies’ to subrogated claims by insurance undertakings and state run social security bodies.’

If this interpretation is correct, then it would appear that the ability of the MIB to make deductions is limited to two circumstances: firstly, where a deduction is already imposed by the State for the recovery of state benefits received as result of the accident (as under the Social Security (Recovery of Benefits) Regulations 1997) and secondly, where there is a subrogated insurance claim, such as where the victim had a comprehensive motor insurance policy that had already paid out the damage on the victim’s vehicle. Both circumstances amount to a concession limiting the liability of the MIB to compensate where there is in effect no actual loss sustained by the victim.

There is no indication within Article 10 or elsewhere of any intention that the victim should recover any anything other than his or her full compensatory entitlement as guaranteed by the first subparagraph of Article 10. Nor is there any provision that permits any deduction of other payments or benefits independently accruing to the victim as a result of the accident, such as under a life or health insurance policy.

The only other exception within Article 10 of relevance lies in sub paragraph 2 of Article 10. That entitles the MIB to refuse to compensate a passenger whom they can prove knew that the vehicle they were travelling in was uninsured. However it requires the MIB to establish actual, not deemed, knowledge of this fact. We have seen from the White case that the Clause 6 of the Uninsured Drivers Agreement is misleading.

Articles 12 and 13 of the 6th EU Motor Insurance Directive are relegated to a separate Chapter within the Directive. They are a hotchpotch of special categories of claimant, exclusions of liability and restrictions on the right to exclude liability. They are of limited relevance to this paper save to the extent that
within Article 13 is to be found a further passenger exclusion, entitling member
states to exclude from the compensatory safety net passengers who *knew* the
vehicle was stolen. One late amendment, originally introduced by the 4th EU
Motor Insurance Directive is the proscription against exclusions of liability for
passengers who knew or ought to have known that the driver of the uninsured
vehicle was intoxicated.

The critique of the 1999 Agreement that follows in Part II will reveal, within clause
6 and elsewhere, major and wholesale infractions of the State’s obligations under
the EU Motor Insurance Directives.
Is the MIB an emanation of the state?

The relevance of this issue lies in the fact that it is established law that whilst a directive cannot be relied on against an individual it can be relied on directly against a state.

In McCall v Poulton & Ors [2008] EWCA Civ 1263, the Court of Appeal referred to the ECJ the thorny issue as to whether the MIB is an emanation of state. Although this issue was considered by the Court of Appeal in Evans v Motor Insurers Bureau (Mighell v Reading) [1999] LRIR 30 it did not decide the issue either way. However it was considered in the High Court by Flaux J in Byrne v The Secretary of State and The MIB [2007] EWHC 1268 (QB) where the judge thought that the MIB was not an emanation of the state. The McCall case was settled and so the reference to the ECJ on this issue was also withdrawn. So the question of the MIB’s status in this regard has yet to be decided in the Country by a senior appellate court.

Had the ECJ ruled that the Bureau was an emanation of the state then the EU Motor Insurance Directives would have had direct effect. This would have had a profound impact on the way in which our national courts could approach challenges to the Domestic Agreements. This is because it would be possible for individuals, offended by the numerous procedural knock-out clauses and technical conditions precedent to liability, to require the courts to resolve these discrepancies with the 6th EU Motor Insurance Directive directly against the MIB; without obliging the claimant to pursue a separate Francovich action for damages against the Secretary of State.

A Southern Irish High Court ruling is also worthy of note. In Farrell v Whitty and the MIBI [2008] IEHC 124, the court reviewed the EU jurisprudence and the English authorities and came to the conclusion that the Irish Bureau (founded on almost identical principles and in a very similar context) was indeed an emanation of the state.

This issue is a topic for another article. However it seems likely that the MIB is indeed an emanation of the State. Clearly the Court of Appeal thought there was at least some merit in the proposition for it to refer the issue to European Court of Justice. Certainly, if a private utility company can be deemed to be an
emanation of the State\textsuperscript{280} it does not take too great a leap of interpretation to confer the same status on the MIB. The MIB has been tasked by the State with implementing its obligations under the EU Motor Directives and as we have seen, these are not merely confined to managing the Guarantee Fund\textsuperscript{281}. It has had conferred upon it a special status that enables it to levy a tax on its insurance company membership, ostensibly to fund the State’s compensatory safety net, and to investigate and determine claims under the Untraced Drivers Agreement 2003. Its activities are controlled and directed by the State, however imperfectly, through its constitution, a series of agreements with successive Secretaries of State and by regular meetings. It would be rather odd if such an entity were not an emanation of the State.

Whatever its status, sufficient safeguards should be imposed to ensure that the MIB is properly regulated and accountable. It is wholly inappropriate for any Government to avoid its treaty obligations by effectively hiding behind a private limited company tasked with implementing such a wide range of its treaty commitments.

\textsuperscript{280} Foster and Others v British Gas [1991] 2 AC 306
\textsuperscript{281} See above under ‘Widening Scope of Operations’
3. Part II: Why the Uninsured Drivers Agreement 1999 needs to be scrapped


An overview of the main defects

The most offensive defects in what is now commonly perceived by most claimant practitioners to be a notoriously unjust and unsatisfactory compensatory regime are:

- The unjustified exclusions of liability under clause 6;
- The requirement, imposed as a condition precedent of any liability, that all claimants should complete the MIB’s own very detailed claim notification form, when the form itself has recently been changed so as to require applicants to supply unwarranted and wide ranging mandate that provides access to highly personal and privileged information; clause 7;
- The imposition of numerous disproportionate and heavy handed procedural requirements imposed as conditions precedent to any liability within clauses 7 to 12. These run a coach and horses through the overriding objective of Article 10;
- A bizarre penalty imposed on an innocent victim should he or she fail to request the other driver’s insurance details or to pursue a formal complaint to the Police, where there are in fact no insurance details to disclose in the first place, under clause 13;

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^{282} J.P.I. Law 2011, 1, 39-53

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• The assertion that any sums received by the claimant as a result of the accident fall to be deducted from the compensation, clause 17;

The combined effect of these deficiencies is to deter or disentitle some claimants from making any application and to deny to many others their full proper compensatory entitlement. There is a strong case to argue that even if these do not individually amount to the degree of impediment that would trigger a Francovich action, taken as a whole they fail to provide an effective implementation of the 6th EU Motor Insurance Directive.

The intricacies of the procedural requirements within the 1999 Agreement seem occupy something of blind spot in many practitioners’ competence. Ideally, they should be handled by dedicated specialists and where not, practitioners will need to appreciate how these claims differ from a typical RTA claim; case management systems and protocols should distinguish MIB claims as a separate category of claim. Many lawyers fall into the trap of treating an MIB claim as though it were an ordinary RTA claim. This can often have disastrous consequences. Even where claimants manage to successfully sue their legal representative in negligence, the compensation awarded for professional negligence is almost inevitably reduced to take into account the risks of litigation; representing as they do only the lost prospect of recovering their full entitlement.

The Uninsured Drivers Agreement 1999 was drafted long before the inception of the Civil Procedure Rules and prior to the pre action protocols that provide for the free exchange of information before proceedings are commenced. However it was left to languish for a couple of years before being nonchalantly waived through, presumably unexamined and as drawn, by the new incumbent at the office of Secretary of State for Transport; without any proper consultation with other stakeholders. The result produced a predictably one sided compensation scheme that prejudices the legal entitlement of innocent victims.
Amended Notes For Guidance

Whilst the amended Notes For Guidance do mitigate some of the more obvious procedural failings and remove the earlier declaration that the notes for guidance do not ‘control or influence the legal interpretation of the Agreement’, their effect is limited. Many of the procedural strike out clauses remain and there is uncertainty regarding their legal provenance.

They do not constitute an amendment of the Agreement itself, as this would require the Secretary of State’s fiat. However, the MIB does act in good faith and it honours the Amended Notes. Presumably, were it to attempt to renege on the softened procedural approach it would be possible to argue that the MIB is nevertheless bound by them, or at least estopped from raising technical objections to a step taken in accordance with these notes: on the grounds that they constitute a waiver. It is not suggested that the MIB do not act in compliance with these notes or otherwise other than in good faith. Even so, this widespread inconsistency between the Agreement and the Guidance (and indeed the case law) is confusing to lay applicant.

An insurer’s perspective

Whilst it is easy to criticise the Domestic Agreements regime it should be remembered that many of the conditions precedent have been introduced in an attempt to restrict improper claims and dubious tactics.

When the Uninsured Drivers Agreement 1999 was being formulated the motor insurance industry was having to cope with an unprecedented number of uninsured and untraced driver claims. A significant proportion of these claims were being made late in the day, probably as a result of the late presentation of claims in response to television and radio advertisement by compensation claims agents and referrers, giving the MIB little opportunity to trace the drivers responsible or to investigate the accident circumstances and the claim. The Bureau also faced reluctance by some practitioners and claimant’s to cooperate with the provision of information.

In 2006, the MIB estimated that there were approximately 2 million uninsured drivers. The numbers have reduced since the introduction by the MIB of its MID helpline that enables the police to confirm whether a vehicle is insured or not.
These measures are thought to contributed to a declined in numbers to 1.5 million in 2010.

It appears that the MIB’s Domestic Agreements reflect the Bureau’s harsh experience in dealing with uninsured driver claims in prior in the 1990. This may explain the extraordinary increase in the procedural conditions precedent and the excessive bureaucratic controls imposed under the 1999 Agreement. The MIB contend that their principally concern is with preventing fraudulent and exaggerated claims and vetting claims; not depressing the value of legitimate claims;

Unfortunately, this empirical approach to shoring up the MIB’s defences and revisions made to the Uninsured Drivers Agreement 1988, implemented without proper consultation with strategic and other interested parties, only served to exacerbate further the UK Government’s existing failures to properly implement the First and Third EU Motor Insurance Directives. The current Agreement contains so many procedural conditions precedent to any liability, unjustified exclusions of cover and knock out clauses and results in a regime so draconian and unjust to make the 1999 Agreement completely unsalvageable.

What follows is a critique of the most egregious failings within the Uninsured Drivers Agreement 1999, it is not intended to be a comprehensive commentary.

**Specific instances considered**

**Unjustified exclusions of certain categories of claim**

We have seen from reviewing the EU Directives that some exceptions are clearly permitted by 6th EU Motor Insurance Directive. The following section will identify which exceptions within the Uninsured Drivers Agreement 1999 fall outside those permitted by the Directive.

**Subrogated claims**
Under clause 6.1 (c) the MIB seeks to exclude liability to compensate persons other than the individual sustaining the injury or loss, whether the claim is based on a subrogated right of action, an assignment or other right. This rather convoluted clause (and until recently the notion that the Guarantee Fund was a fund of last resort) has been relied on in the past to justify the MIB’s refusal to pay a number of legitimate heads of claim: legal costs and expenses incurred by a legal expenses insurer; legal expenses insurance premiums; success fees under a conditional fee agreement; credit hire costs; medical expenses incurred under a health policy or provided by an employer; sick pay claims and monies already advanced by a motor insurer under a comprehensive motor policy. With the exception of the last category, we have seen from Article 10 that it provides in the clearest possible terms that the MIB should compensate:

‘at least up to the limits of the insurance obligation for damage to property or personal injuries…’

It is interesting to note that the issue that precipitated the dispute in McCall v Poulton was the MIB’s refusal to pay the claimant’s credit car hire charges. Even more significant is the fact that this head of damages appears to have been conceded in those proceedings, eventually.

It is unfortunate that Article 10 is less clear in the second paragraph in stating that member states may regard compensation as ‘subsidiary or non-subsidiary to other compensation arranged by the MIB, whether paid direct by the uninsured driver, an insurer or social security body. What is abundantly clear however is that nowhere, by implication or otherwise, does the Directive permit the level of compensation received by the claimant, from whatever source or sources, to fall below the level of a comparable claim against an insured driver. Accordingly whenever the MIB reduce a claimant’s net entitlement to compensation on the basis that all or part of the claim is a subrogated claims, then this is in contravention of the EU Directive. This could occur, where for example, the claimant is contractually obliged to repay the cost of treatment received under a private medical health insurance policy from any damages received or where the claimant receives a payment under a personal health insurance policy as a result of the accident.
Passenger’s with culpable knowledge

One further area of controversy in clause 6 concerns the exclusion of liability to compensate a passenger who knew or ought to have known about any one of five different facts, these are set out in sub-clause 6.1 (e) and sub-clauses 6.2 to 6.5. Whilst there may well be sound policy reasons for penalising irresponsible behaviour, it should be remembered that Parliament has already addressed this issue when it passed the Law Reform (Contributory Negligence) Act 1945.

We will begin by examining the treatment of ‘passenger knowledge’ after reprising the relevant provisions within Articles 10 and 13, considered above. It will be remembered that EU Directive permits member states to exclude the payment of compensation to passengers who voluntarily entered the vehicle which caused the damages or injury when the compensatory body (i.e. the MIB) can prove that they knew either that it was uninsured (Article 10) or that they knew that the vehicle was stolen (Article 13).

It is interesting to compare the exclusions of cover within s 151 of the Road Traffic Act 1988283 with and Clause 6.1 (e) of the Uninsured Drivers Agreement 1999:

Section 151 of the 1988 Act provides:

(4) In subsection (2)(b) above “excluded liability” means a liability in respect of the death of, or bodily injury to, or damage to the property of any person who, at the time of the use which gave rise to the liability, was allowing himself to be carried in or upon the vehicle and knew or had reason to believe that the vehicle had been stolen or unlawfully taken, not being a person who—

(a) did not know and had no reason to believe that the vehicle had been stolen or unlawfully taken until after the commencement of his journey, and

(b) could not reasonably have been expected to have alighted from the vehicle.

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283 s 151 otherwise obliges insurers to satisfy judgments against their insured for any third party liability covered by the 1988 Act
In this subsection the reference to a person being carried in or upon a vehicle includes a reference to a person entering or getting on to, or alighting from, the vehicle\textsuperscript{284}.

Clause 6.1 Uninsured Drivers Agreement 1999 provides

\textbf{6.1 Clause 5} [which sets out the MIB’s obligation to compensate] \textit{does not apply in the case of an application made in respect of a claim of any of the following descriptions (and, where part only of a claim satisfies such a description, clause S does not apply to that part)}

(a) \ldots

(c) a claim by, or for the benefit of, a person (“the beneficiary”) other than \ldots the person suffering death, injury or other damage which is made either –

(i) in respect of a cause of action or a judgment which has been assigned to the beneficiary, or

(ii) pursuant to a right of subrogation or contractual or other right belonging to the beneficiary;

\ldots
d(\ldots)

e a claim which is made in respect of a relevant liability described in paragraph (2) by a claimant who, at the time of the use giving rise to the relevant liability was voluntarily allowing himself to be carried in the vehicle and, either before the commencement of his journey in the vehicle or after such commencement if he could reasonably be expected to have alighted from it, knew or ought to have known that -

(i) the vehicle had been stolen or unlawfully taken,

\textsuperscript{284} The underlining is added by the author for emphasis
(ii) the vehicle was being used without there being in force in relation to its use such a contract of insurance as would comply with Part VI of the 1988 Act,

(iii) the vehicle was being used in the course or furtherance of a crime, or

(iv) the vehicle was being used as a means of escape from, or avoidance of, lawful apprehension.

6.2 The relevant liability referred to in paragraph (1) (e) is a liability incurred by the owner or registered keeper or a person using the vehicle in which the claimant was being carried.

6.3 The burden of proving that the claimant knew or ought to have known of any matter set out in paragraph (1)(e) shall be on MIB but, in the absence of evidence to the contrary, proof by MIB of any of the following matters shall be taken as proof of the claimant's knowledge of the matter set out in paragraph (1)(e)(ii) -

(a) that the claimant was the owner or registered keeper of the vehicle or had caused or permitted its use;

(b) that the claimant knew the vehicle was being used by a person who was below the minimum age at which he could be granted a licence authorising the driving of a vehicle of that class;

(c) that the claimant knew that the person driving the vehicle was disqualified for holding or obtaining a driving licence;

(d) that the claimant knew that the user of the vehicle was neither its owner nor registered keeper nor an employee of the owner or registered keeper nor the owner or registered keeper of any other vehicle.

Both s 151 and clause 6 impose constructive or deemed knowledge. However, we have seen from the House of Lords ruling in White, that a purposive interpretation of clause 6.1 (e) this requires actual knowledge. Extending this rationale and applying the Marleasing principle to the s 151 of the 1988 Act achieves the same result. Section 151 should be amended in any event.

However that is not the least of it, because it is clear that the two passenger knowledge exclusions permitted by Articles 10 and 13 of the 6th EU Directive do
not extend to a knowledge that the vehicle was being ‘used in the course or furtherance of a crime’, nor to a knowledge that the vehicle was ‘being used as a means of escape from, or avoidance of, lawful apprehension’. These additional culpable knowledge categories were not present in the 1988 version of the Uninsured Drivers Agreement. They are not permitted by the Directive and thus expose the state and the Bureau to a legal challenge. It is noteworthy that in Farrell, the European Court of Justice ruled that Member States are not entitled to introduce additional restrictions to the level of compulsory insurance cover to be accorded to passengers.

**Assumption of the court’s role and prescribing rules of evidence**

Another curious irregularity is the MIB’s attempt, at clause 6.3 to 6.5 to abrogate to itself the right to introduce rules of evidence to establish what a claimant knew or ought to have known. In this jurisdiction we do not operate a dual set of civil law codes; we are all equal before the same law and it is simply not within the MIB’s remit of authority to prescribe the approach our civil courts should take to the evidence before it. This clause can safely be ignored.

**Offsetting monies received from other sources**

Another category of excluded claim is featured in clause 17 where the MIB claims to be entitled to deduct any compensation arising from a different source that has resulted from the occurrence of the death, injury or loss to which the proceedings relate. Presumably, the intention of the MIB is to catch any accident or sickness insurance policy payment received by the victim and to deduct its compensatory payment pro rata. However under our tort law jurisprudence the rule against double recovery does not extend to an insurance payment where the claimant has paid or contributed towards the premium. No such concession is made by clause 17.

Clause 17 is clearly inconsistent Article 10 because that the MIB should provide compensation, at least up to the limits of the insurance obligation for the damage to property or personal injuries caused by the untraced or uninsured driver. It
also runs contrary to the equivalence and effectiveness principle propounded by Evans.

**Unjustified insistence on an applicant making enquiries**

Under clause 13.1 of the 1999 Agreement the MIB contends that it will incur no liability to compensate unless the claimant has as soon as reasonably practicable -

(a) **demanded the information and, where appropriate, the particulars specified in section 154(1) of the 1988 Act, and**

(b) **if the person of whom the demand is made fails to comply with the provisions of that subsection -**

   (i) **made a formal complaint to a police officer in respect of such failure, and**

   (ii) **used all reasonable endeavours to obtain the name and address of the registered keeper of the vehicle or, if so required by MIB, has authorised MIB to take such steps on his behalf.**

It will be recalled that s 154.(1) of the Road Traffic Act 1988 imposes an obligation on a person against whom a claim is made (not the claimant) where their liability arises out of an event that ought to be covered by a policy of insurance under section 145 of this Act must, **on demand by or on behalf of the person making the claim (i.e. the claimant) —**

   ‘(a) state whether or not, in respect of that liability—

   (i) **he was insured by a policy having effect for the purposes of this Part of this Act or had in force a security having effect for those purposes, or**

   (ii) **he would have been so insured or would have had in force such a security if the insurer or, as the case may be, the giver of the security had not avoided or cancelled the policy or security, and**
b) if he was or would have been so insured, or had or would have had in force such a security—

(i) give such particulars with respect to that policy or security as were specified in any certificate of insurance or security delivered in respect of that policy or security, as the case may be, under section 147 of this Act, or

(ii) where no such certificate was delivered under that section, give the following particulars, that is to say, the registration mark or other identifying particulars of the vehicle concerned, the number or other identifying particulars of the insurance policy issued in respect of the vehicle, the name of the insurer and the period of the insurance cover.’

The object of s 154 is to aid a victim to identify the insurer liable to indemnify the responsible driver under s 151 to enable the victim to recover compensation. Clause 13 of the 1999 Agreement subverts this principle to produce the very opposite effect.

Few motorists are aware of s 154 Road Traffic Act 1988 and far fewer still have any inkling about the not inconsiderable burden placed on them by clause 13. Where information is not provided by the other driver at the accident scene, innocent claimants (often injured) are obliged by clause 13 to undertake their own investigation and to attempt to ascertain the defendant’s insurers, without any clear guidance on the extent of these inquiries or on what ‘as soon as reasonably practicable means’. Many injured motorists will be unaware that the defendant was uninsured until several weeks after the accidents. Arguably, obtaining even part of the information listed in s 154 (such as the name of the insurers or the policy number) would be insufficient and thus risk breaching this condition precedent of MIB liability.

This clause clearly discriminates against this category of claimants, as opposed to those pursuing claims against insured defendants, and there is a strong case to argue that this contravenes the EU Motor Insurers Directives. This oppressive clause is also unnecessary, with the advent of the Motor Insurers Database.
Fortunately, in *Shapoor v Promo Designs & MIB* (Romford CC) 2009 a piece of flawless common sense has mitigated the harsh effect of clause 13. In *Shapoor* the MIB had sought to reject a claim under the Uninsured Drivers Agreement where the defendant mistakenly provided false insurance details in the erroneous belief that he was insured and where the claimant did not report the failure to provide this information to the police. The judge held that the MIB were attempting to import into their agreement an obligation to report the accident where C was uninsured or gave conflicting answers. This was held to be contrary to EC Law as it attempted to impose an additional burden on a claimant’s right to compensation provided under the EU Motor Insurance Directives, one that was in conflict with the EU Directives themselves. Furthermore, a driver who honestly but mistakenly believes that they are insured does not commit an offence under s 154 (2) RTA 1988, even if they are guilty of driving without insurance under s 143.

H H J Platt held that Clause 13.1 only applies to circumstances where the third party has insurance; not where the third party is uninsured.

**Breach of the right to privacy**

Under clause 7 MIB shall incur no liability under MIB’s obligation unless an application is made to the person specified in clause 9(1) -

(a) *in such form,*

(b) *giving such information about the relevant proceedings and other matters relevant to this Agreement,* and

(c) *accompanied by such documents as MIB may reasonably*

It is necessary to use the MIB’s application form. The prescribed form is available from the MIB website or by phone request.

In its notes for guidance the Bureau has adopted a more lenient stance on the completion of the application form, provided that it is signed.

There are two versions of this application form. The latest version obliges an applicant to make a declaration; this is set out at section 12. At clause 4 of this declaration the applicant must consent to the disclosure of personal information
and the form explicitly authorises the release to the MIB of confidential data from their employers, any government department, insurance companies, local authorities and even their medical records. These are unjustified demands which go beyond anything that the MIB have a right to demand.

Any applicant that does not complete the application form is at risk of being deemed by the MIB to have committed technical breach of clause 7, which is itself a condition precedent of any MIB liability. The imposition of this excessive and unwarranted level of disclosure exposes the Government and the MIB to the accusation that it is committing a breach of Article 8 of the Human Rights Convention, which confers the right to privacy. Any solicitor that fails to properly advised client on this issue is at risk of professional misconduct. The MIB should instead rely on the usual pre action and post issue provisions for disclosure within the Civil Procedural Rules, along with every other litigant in our civil justice system.

Disproportionate insistence on disclosure

As with clause 5.1 under the UDA 1988, failure to serve the requisite notice in the form prescribed is fatal to an MIB claim. This is because this requirement is set as a condition precedent of any liability.

Under Clause 9 an applicant must within 14 days after issue give the MIB and any relevant/potential insurer “proper” notice that he has commenced proceedings, and at the same time the applicant must supply a substantial dossier comprising:

(a) notice in writing that proceedings have been commenced by Claim Form, Writ, or other means,

(b) a copy of the sealed Claim Form, Writ or other official document providing evidence of the commencement of the proceedings (i.e. notice of issue),

See rules 1 and 4 Solicitors Code of Conduct 2007
(c) a copy or details of any insurance policy providing benefits in the case of the death, bodily injury or damage to property to which the proceedings relate where the claimant is the insured party and the benefits are available to him,

(d) copies of all correspondence in the possession of the claimant or (as the case may be) his Solicitor or agent to or from the Defendant or the Defender or (as the case may be) his Solicitor, insurers or agent which is relevant to -

   (i) the death, bodily injury or damage for which the Defendant or Defender is alleged to be responsible, or

   (ii) any contract of insurance which covers, or which may or has been alleged to cover, liability for such death, injury or damage the benefit of which is, or is claimed to be, available to Defendant or Defender,

(e) subject to paragraph (3), a copy of the Particulars of Claim whether or not indorsed on the Claim Form, Writ or other originating process, and whether or not served (in England and Wales) on any Defendant or (in Scotland) on any Defender, and

(f) a copy of all other documents which are required under the appropriate rules of procedure to be served on a Defendant or Defender with the Claim Form, Writ or other originating process or with the Particulars of Claim, (i.e. medical report and schedule of special damages)

(g) such other information about the relevant proceedings as MIB may reasonably specify.

The over-elaborate nature of this ‘proper notice’ is at stark odds with the simple obligation imposed on victims of insured drivers under s 152 of the 1988 Act: to give notice (written or oral) ‘before or within seven days after the commencement of the proceedings’. Clause 9 does not permit notice to be given prior to the commencement of proceedings. It also imposes a completely disproportionate burden on the applicant, one that arguably constitutes an unwarranted impediment to an applicant’s right to compensation. It is conceivable that there
will be occasions when the notice provisions within clause 9 are practically impossible or excessively difficult to comply with.

In *Silverton v Goodall* [1997] an MIB claim was dismissed because the claimants served their notice (under the UDA 1988) a few days late. The primary cause was a delay at the local court office in posting out the issued summons. This unjust windfall resulted notwithstanding the fact that the court held the MIB had suffered no prejudice.

Clause 9 requires the applicant to search for and obtain copies of all insurance contracts that may cover a relevant liability. This would appear to extend to: private healthcare for treatment received as a result of the accident; household; credit card policies; employers insurance; union benefits; personal accident cover. It also requires disclosure of all correspondence between applicant / claimant and the defendant or insurer. No road traffic insurer would be entitled to demand so much information. Furthermore, it ought not to be within the power of the MIB to dictate a much heavier level of pre action disclosure to that prescribed by the Civil Procedure Rules still less to impose such an oppressive sanction for any non compliance. There is a strong case to argue that rule 9, taken as a whole, constitutes yet another instance of the 1999 Agreement failing to implement the 6th EU Motor Insurance Directive by raising unwarranted difficulties in the path of legitimate claims.

*Imposition of excessive post issue notices*

Under **Clauses 10 and 11** the MIB shall incur no liability to pay a penny in compensation unless the applicant has, no later than 7 days after the occurrence of any of the following events, given notice in writing of the date of that event to the MIB or insure, and supplied a copy of the relevant document:

- On the service of the proceedings, but see clause 10
- On the filing of a defence, clause
- Any amendment of the Particulars of Claim
• Any addition to any schedule or other document required to be served with the Particulars of Claim (i.e. medical report or schedule of special damages)

• Either when setting down of the case for trial or where the court gives notice to the claimant of the trial date, then 7 days from when that notice is received

Once again the Notes for Guidance relax some of the notice requirements, where the MIB is joined as a party.

Under clause 12.1 MIB shall incur no liability unless the claimant has, after commencement of the relevant proceedings and not less than 35 before the appropriate date, given notice in writing of his intention to apply for or to sign judgment in the relevant proceedings.

It is entirely right that the MIB, like any other party in our civil justice system, should be informed of relevant steps within the proceedings by a claimant. It is also appropriate that any party failing to adhere to the principles set out in overriding objective in Part I of the Civil Procedure Rules or who otherwise acts unreasonably should be subject to a costs sanction. The Civil Procedure Rules provide adequate safeguards and sanctions for all litigants and there is no reason or justification to confer extra rights and privileges on the MIB. Furthermore the excessive penalties imposed for failing to adhere to these notice provision, whether innocently made or deliberately contrived, is wholly excessive. There is a very strong case to argue that these clauses constitute a breach of the UK Government’s implementation of the 6th Motor Insurance Directive because they infringe the ‘equivalent and effective’ principle set by the European Court of Justice in Evans and because they constitute an restriction to the basic right to recover compensation under the EU Directives.

Fit for purpose?

There can be little doubt that the Uninsured Drivers Agreement 1999, is unfit for purpose. This Agreement along with its predecessor needs to be revoked and substituted by a shorter, simpler, fairer agreement in conformity with the 6th EU Motor Insurance Directive, and given retrospective effect.
As a statement of a claimant’s legal right to compensation, we have seen from the extracts set out above that it is highly misleading. How then can it be reasonable to assume that any lay claimant, pursuing an online application for compensation, would be able decipher his or her legal entitlement from reading the Agreement.

It is unacceptable that any Government backed compensation scheme should require an applicant to have to contend with the cryptographical task of devising which clause is valid and which is not. As we have seen, a correct understanding cannot be achieved merely by reading the Agreement itself; not even if undertaken in conjunction with the MIBs’ notes for guidance (which are not comprehensive anyway). A proper understanding can only be attained by someone that has a working knowledge of the 6th EU Motor Insurance Directive as well as an appreciation of the purposive approach to the judicial interpretation of the Domestic Agreements, propounded by the House of Lords in White. To add further impediment, the bewildering panoply of procedural conditions precedent to liability constitute, in themselves, an unwarranted barrier to claimants’ accessing their compensatory entitlement, and has been argued by some to constitute a breach of Article 6 of the Human Rights Convention.

**Who is to blame?**

Ultimate responsibility must rest with the Secretary of State for Transport, a Mr John Prescott, for blithely approving this manifestly unjust anachronism back in 1999 and for the successive holders of that office under the previous Government: all of whom have failed abysmally to protect the legitimate rights of injured victims by not properly implementing the relevant EU Motor Insurance Directives. The past 12 or more years has demonstrated that is naive to rely on a private commercial contractor to act altruistically and in the public interest without sufficient supervisory safeguards being put in place. Any commercial operator will wish to maximise its commercial interests and those of its members and their shareholders.

There is little that is objectionable in the pragmatic approach of successive Governments to employ the private sector to deliver part of its social law policy aims. It is well recognised that the insurance industry has in effect funded the tort law civil justice system in this country for many decades, and by and large it
has been a positive experience. However, there will always be a natural tension between motor insurance company interests and the wider, social policy and tort law objectives of our compensatory system. It is the duty of any competent government to ensure that its policy aims are properly implemented and to take decisive action when these are threatened or undermined. No Government should rely excessively on the inventiveness of the Judiciary to bridge the void between what is an equivalent and effective delivery of the compensation scheme imposed under the European Directives and what provided by this agreement. The obscurity and lack of accountability associated with the present set up seems increasingly out of keeping with modern times and thinking.

All this begs the question: how is it that such a large constituency of citizens have so little influence on the extra statutory compensatory schemes devised in their name and for their protection and which, they also fund?

MIB’s board of management cannot wash its hands of its responsibility either: for proposing such a harsh and unconstitutional compensation regime in the first place and for failing to replace it, despite numerous calls for its revision.

Whilst the MIB and the motor insurers it represents have legitimate interests that require protection, especially from the risk of fraudulent claims under the Untraced Drivers Agreement 2003, this should not extend to conferring upon it rights superior to any other litigant in our civil law system of justice. The Civil Procedure Rules and the Courts inherent jurisdiction confer abundant powers on the courts to discourage fraudulent, reprehensible or contumelious behaviour by claimants. The MIB should be content to rely on those, along with other user of the civil justice system.

We should never lose sight of what should be the overriding imperative: that an injured victim is entitled to fair and just compensation. Nor should we forget that the insurance premium paying public have a right to expect fair and equal treatment under the legal system they fund through their premiums and this should extend to providing them with their full compensatory entitlement where they are unfortunate enough to be injured or sustain loss through the fault of an uninsured driver.

The MIB has, under the dynamic leadership of its current chief executive officer, demonstrated that it is capable of acting very effectively and efficiently as an
enterprise. However there is a limit to what the MIB senior management and its staff can do to mitigate the injustices perpetrated by the Uninsured Drivers Agreements, when they are constitutionally obliged under Article 3 (B) (i) of the MIB Memorandum and Articles of Association to adhere to the very Domestic Agreements that inflict them in the first place.

Each member of the MIB’s management board shares a collective responsibly for the MIB’s failure to fulfil the MIB’s single most important role: of providing an equivalent and effective safety net for innocent victims of uninsured and untraced drivers in accordance with the EU Directives. We have seen in Part I of this paper that Article 3 A (i) of the MIB’s Memorandum of Articles imposes a constitutional obligation on the MIB to fulfil that compensatory role, whether imposed under our national law or through EU directives. We have seen from Part II of this paper that the MIB board has signally failed to deliver a compensatory safety net that is equivalent to and as effective as that which would result in a claim against an insured defendant. The roll call of MIB Board members, published within their 2009 Report, include some very senior executives from within the world of motor and liability insurance. It is inconceivable that the Board was unaware of the defects within the Domestic Agreements. It is abundantly clear that the regime is biased in favour of the motor insurance companies who provide the levy and it stands to reason that this has resulted in many innocent victims being under compensated. On the other hand, it could be argued that far from serving the motor insurers interests, the Domestic Agreements have the ultimate effect of reducing the cost of insurance premiums. The casuistry of such an argument is exposed as soon as one returns to the simple principal within the 6th EU Motor Insurance Directive. This requires the Member States to ensure that victims recover at least up to the level of compensation recover from an insured driver; this is standard that successive Government have failed to meet.

It seems implausible that the MIB should have proposed so many exclusion and strike out clauses in the first place and then to have so trenchantly defended them if they did not intend to exercise them. However the fragmented nature of the solicitors’ profession, comprising s it does over 10,000 independent practices, makes it practically impossible for them to collectively establish whether or not the MIB is systematically under compensating victims of uninsured and untraced drivers. That is a task better suited to the Government.
The Secretary of State could do worse than require the board to account for their actions over the past decade. He might wish to invite the MIB to account for every wrongful deduction, limitation or exclusion of liability made under the Uninsured and Untraced Drivers Agreements between 2009 and 2010, for example. If this information is not forthcoming, perhaps the services of an independent auditor could be suggested.

It is to be hoped that the present incumbent at the office of the Secretary of State for Transport will take expeditious action to remedy the failings of his predecessors. The current regime must be replaced by a short, clear and above all fair compensatory mechanism. Furthermore, constitutional safeguards must be introduced to the MIB to ensure that rights of innocent victims are never again compromised. The case for reform is so strong that if the Secretary of State will not act, others will, either by bringing Francovich claims that will revive the whole issue as to whether the MIB is an emanation of the State or by means of Judicial Review should anything short of a complete overhaul be countenanced when the current regime is eventually revised.

Proposed reforms

The defects in the current compensatory regime and their causes suggest the following measures:

1. Rescission of the MIB Uninsured Drivers Agreements 1988 and 1999 (including the November 2008 Supplementary Agreement) with immediate effect;

2. The substitution of a new, much shorter, agreement concurrently with the rescission or new legislation; that:
   - is shriven of all inconsistency with the 6th EU Motor Insurance Directive and
   - imposes no additional procedural hurdles to those imposed by s 152 Road Traffic Act 1988 or otherwise, and
• sets out in unambiguous terms the right to compensation: that is at least to the standards and extent required under the 6th Motor Insurance Directive, and

• is retrospective in effect so that it applies to all relevant claims that occurred on or after 31 December 1988. (The Government is unlikely to be exposed to a raft of *Francovich* claims arising out of the 1988 Agreement since the 6 year time limit for making such claims runs from the date when the original cause of action against the uninsured driver occurred, *Moore v Secretary of State for Transport and the MIB* [2007] EWHC 879.) , and

• is written in plain English so that it is readily understandable without separate interpretive notes, and

3. Reform of the MIB to make it more accountable for its conduct in administering the functions it fulfils on behalf of the Government under the EU Motor Insurance Directives. This accountability should not be limited to supervision by the Secretary of State on behalf of the Government but it should extend to the public at large and major stakeholders operating in the civil tort law compensatory regime. This could involve:

• The inception of a stakeholders committee that meets regularly to voice concerns and to report to the Secretary of State on the MIB’s administration of the Domestic Agreements, and

• The co-option to its management board of representatives nominated by professional associations such as MASS or APIL who have an expertise in this field.

4. A clearer breakdown within the MIB’s financial accounts and an agreement that the levy raised from its insurance members, raised from increased premiums charged to the premium paying public, should be hypothecated to the National Guarantee Fund.

5. Improving the dialogue between the MIB and those who represent the interests of injured victims by creating a joint working party to devise new protocols and procedures under a reformed set of Domestic Agreements to help identify potentially fraudulent claims, to avoid incurring
unnecessary legal costs and encouraging the early and economic disposal of claims.

6. To appoint an independent arbitrator or commissioner to deal with any complaints in the way claims has been handled by the MIB.

It is suggested that the new Uninsured Driver’s Agreement include an obligation on both the applicant and the MIB to participate in an initial mediation assessment process or that it should otherwise encourage alternative dispute resolution, perhaps restricted to claims that fall outside the Fast Track and Low Value Personal Injury Claims in RTA scheme.
4. Case commentary on Delaney v Pickett [2012] EWCA Civ 1532

[Nigel Tomkins, solicitor and JPIL editor, wrote the initial case summary and Nicholas Bevan, JPIL editor, the commentary that follows]

DELANEY v PICKETT

CA (Civ) (Ward, L.J.; Richards, L.J.; Tomlinson, L.J.) 21/12/2011

[2011] EWCA Civ 1532


On 5th November 2006 Shane Pickett, negligently drove the Mercedes 500 SL sports car in which Sean Delaney was the front seat passenger, head on into an oncoming Toyota people carrier. Delaney was very seriously injured. When being rescued from the car, Pickett was found to have sufficient cannabis to make 170 cigarettes stuffed down his sock, while Delaney had a package sufficient to make 1,200 cannabis cigarettes under his jacket.

Delaney’s substantial claim for damages against Pickett was dismissed by His Honour Judge Gregory as was his claim against Tradewise Insurance Services Ltd brought under the provisions of the Uninsured Drivers Agreement made on 13th August 1999. The judge rejected the claimant's case that Pickett had taken him out for a drive in his new car. Instead he held that the two men were in possession of the cannabis with intent to supply it.

286 J.P.I. Law 2015, 3, C169-C174
287 Sitting in the Coventry County Court on 26th January 2011
288 Pickett's insurer who had avoided his policy

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The judge said:

“As I have already found as a fact the purpose of the journey in this case was the collection and transportation of illegal drugs for subsequent resale. It follows in my judgment that the Claimant's action arises directly ex turpi causa and for that reason must fail. Alternatively in my judgment the conduct upon which the Claimant was engaged in concert with the first Defendant was sufficiently anti-social that public policy prevents him from pursuing a claim arising out of it.”

He accordingly held that Delaney’s claim had arisen ex turpi causa and therefore failed. As against the insurers, he found that liability was excluded under the clause 6(1)(e)(iii) of the Motor Insurers' Bureau Agreement because the vehicle was being driven in the course or in furtherance of crime. Permission to appeal was given to consider both the extent of the ex turpi causa defence and the proper interpretation of the Agreement.

The Court of Appeal held on the facts\(^{289}\) that the judge had been correct to find on the balance of probabilities that the transportation of illegal drugs had been the purpose of the journey. He had therefore proceeded on a correct factual basis when considering ex turpi causa and the MIB Agreement issue. However the judge had been wrong to uphold the ex turpi causa defence. The damage suffered by the claimant had not been caused by his, or his and the defendant's, criminal activity. It had been caused by the defendant's tortious act in the negligent way in which he drove his car. In those circumstances the illegal acts were incidental and Delaney was entitled to recover his loss from Pickett\(^{290}\).

They concluded that although the MIB Agreement was intended to give effect to Directive 2009/103\(^{291}\), the Directive gave only limited assistance in the

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\(^{289}\) Ward L.J. dissenting as to the judge's factual findings and on the MIB Agreement issue. His view was that the MIB Agreement had to be construed restrictively as it was an exception to the purpose of the Directive. Clause 6(1)(e)(iii) could not mean that compensation was excluded if the vehicle was being used for any crime, as that could be disproportionate; "crime" had to mean serious crime. The crime in the this case had not been heinous enough to be the kind of crime covered by the clause.


\(^{291}\) 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
interpretation of cl.6(1)(e) as it contained nothing corresponding to the clause. The most that could be derived was that a restrictive interpretation of the clause was required by the fact that it was an exclusion from the general principle of compensation set out in the Directive.

In the majority view it was obvious on the facts that the vehicle was being used in the furtherance and in the course of a crime within the meaning of the clause. "Crime" could not be read as being restricted to "serious crime"; that would leave the clause with little practical purpose. In any event, possession of a commercial quantity of cannabis with intent to supply was a serious crime to which the clause applied; given the finding that the very purpose of the journey had been the transportation of the drugs, the situation fell squarely within the wording of the clause. Use of the vehicle did not have to constitute an ingredient of the offence for the exclusion to apply; in any event, the vehicle had been an essential element in the crime, as the men would not have wanted to carry so large a packet of drugs on public transport.

The appeal was dismissed.

[Nigel Tomkins]

Comment

The Court of Appeal treated us to a truly extraordinary decision in the lead up to Christmas. The ingredients to this veritable fruit cake of a case feature a road accident injury; a couple of Dell-boys a’dealing a footie of cannabis; an unappealing appellant; an insurer avoiding its policy; two queen’s counsel a’muddling the issues and three Lords Justices of Appeal, all a’leaping – unfortunately to a wrong conclusion. Comical as some of this may seem, it left a seriously injured petty criminal bereft of his compensatory entitlement.

As the summary above indicates, the respondent insurers succeeded before HHJ Gregory in the court below on two issues; both of which were subsequently appealed. Their first line of defence was tenuous at best, their second wholly misconceived.
The first issue: was there no primary liability to indemnify?

The first defence consisted of Tradewise contending, in effect, that there was no relevant liability to trigger their duty to indemnify under the Road Traffic Act 1988 (the 1988 Act). They argued that because the claimant happened to be up to no good when he was injured, the negligent driver should be absolved from any liability whatsoever on public policy grounds.

The maxim *ex turpi causa non oritur actio* was deployed in support. However intrinsic to the maxim is the requirement that the illegality should be causative and not merely incidental. One instance where this public policy defence succeeded is *Pitts v Hunt*[^292]. That case featured a motorcycle accident where both the claimant (riding pillion) and the defendant driver were intoxicated. Worse yet, the claimant had encouraged and abetted the driver in the reckless and dangerous manoeuvres which lead directly to the accident itself. Compare *Pitts* with *Delaney*: where although the claimant's presence in Pickett's car was incidental to an illegal activity, that had absolutely no bearing on the driver's reckless driving. In this jurisdiction, the medieval concept of outlawry has long been abolished, with the result that petty criminals are entitled to the same civil law rights as their law abiding compatriots. Little wonder then that Delaney's appeal was upheld on this issue.

That then left Pickett liable to compensate his passenger, Delaney.

Tradewise’s second line of defence can be summarised thus. Although they were the 1988 Act insurers for the Mercedes at the time of the accident, upon learning of Pickett's habitual cannabis smoking they were able to take proceedings to avoid the policy on the ground of the policyholder’s material non disclosure of this fact; obtaining a declaration to that effect, presumably under s 152 of the 1988 Act.

[^292]: *Pitts v Hunt* [1991] 1 Q.B. 24

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The second issue: could the insurers avoid their statutory duty to compensate?

Two excerpts from the 1988 Act which concern a RTA insurer’s obligation to compensate are particularly worth noting:

S 151 (5)

(5) Notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy or security, he must, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment—

(a) as regards liability in respect of death or bodily injury, any sum payable under the judgment in respect of the liability, together with any sum which, by virtue of any enactment relating to interest on judgments, is payable in respect of interest on that sum,

(b) as regards liability in respect of damage to property, any sum required to be paid under subsection (6) below, and

(c) any amount payable in respect of costs.

S 152 (2)

(2) .......... no sum is payable by an insurer under section 151 of this Act if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration—

(a) that, apart from any provision contained in the policy or security, he is entitled to avoid it on the ground that it was obtained—

(i) by the non-disclosure of a material fact, or

(ii) by a representation of fact which was false in some material particular, or

(b) if he has avoided the policy or security on that ground, that he was entitled so to do apart from any provision contained in it
[and, for the purposes of this section, “material” means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions.]

It is apparent from the above that the default position, imposed by s 151 of the 1988 Act, is that an insurer must indemnify its policyholder against a liability required to be covered by a policy of insurance under s 145, notwithstanding the policyholder’s breach of contract. However that obligation can be avoided if an insurer obtains a declaration before or within three months of the proceedings that ultimately lead to the judgment against its insured, under s 152 (2).

So much then for our national law which appears to excuse Tradeswise from its statutory obligation to indemnify Pickett s under s 152 (2). However, this provision inconsistent with European law.

At the time of the accident, in 2006, the position was covered by three successive directives, the First, Second and Third EU Motor Insurance Directives\(^\text{293}\) (the Directives). The Court of Appeal referred instead to a later consolidating Directive\(^\text{294}\).

The First Directive imposed the obligation on member states to ‘take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance’\(^\text{295}\). This has been partially transposed into s 143 of the 1988 Act.

The Second Directive sets out one instance where insurance cover can be excluded in a policy issued under the First Directive: namely, where a passenger enters the vehicle that causes the damage knowing that it has been stolen. This is transposed into our national law by s 151 (4) of the 1988 Act\(^\text{296}\). The Directive also allows Member States to permit state benefits to be deducted from the

\(^{293}\) The First Motor Insurance Directive 72/166/EEC (4); the Second Motor Insurance 84/5/EEC (5) and the Third Motor Insurance Directive 90/232/EEC

\(^{294}\) The Sixth Motor Insurance Directive 2008/0037(COD) of 28 February 2008

\(^{295}\) Article 3(1) of the First Directive 72/166/EEC of 24 April 1972

\(^{296}\) Section 151 (4) contains the exclusion where the passenger enters the vehicle knowing that it has been stolen or unlawfully taken.

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compensation. It then provides a non-exhaustive list of contractual clauses that are void in so far as they seek to exclude the cover imposed by the First Directive\textsuperscript{297}.

Furthermore, Recital 7 of the Second Directive states:

“… it is in the interest of victims that the effects of certain exclusion clauses be limited to the relationship between the insurer and the person responsible for the accident; whereas, however, in the case of vehicles stolen or obtained by violence, Member States may specify that compensation will be payable by the abovementioned body;”

The clear implication of this Second Directive is that, subject to the stolen vehicle exception, the legal effect of any exclusion of liability within a policy of insurance should be confined to the policyholder / tortfeasor; not third parties.

These two directives still left Member States free room to legislate certain exceptions or exclusions in the insurance cover extended to third parties. Consequently, and in order to guarantee that the victims of accidents receive comparable treatment irrespective of where in the Community the accident occurred, the EU Council legislated again, to bolster the rights of third parties, with a special emphasis being placed on passengers.

Accordingly, and with effect from 31 December 1992 in this jurisdiction, the Third Directive\textsuperscript{298} declares in Recital 5:

“… there are, in particular, gaps in the compulsory insurance cover of motor vehicle passengers in certain Member States; whereas, to protect this particularly vulnerable category of potential victims, such gaps should be filled”

As though to emphasise the imperative nature of this objective, the first paragraph of Article 1 provides:

“Without prejudice to the second subparagraph of Article 2(1) of [the Second Directive\textsuperscript{299}], the insurance referred to in Article 3(1) of the [First

\textsuperscript{299} See above for Article 2 (1) and the stolen vehicle exception.
Directive] shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle.”

If we apply the Delaney facts to these three European directives, Tradewise are the statutory insurers and furthermore, they are obliged by the Second and Third Directives to compensate Delaney. The position is just as clear under the consolidating Sixth EU Motor Insurance Directive300.

The approach to interpreting our national law (i.e. the 1988 Act) in the light of European Law is well established. The Marleasing 301 principle applies. Consequently the Court of Appeal should have applied ss 151 and 152, so far as is possible, in a way that gives effect to the EU Motor Insurance Directives. It should have either have held that s 151 (2) was inconsistent with EU Law and given preference to s 151 (5) in so far as it concerned passengers, or it should at least have referred the issue to the European Court of Justice: to determine of whether s 152 (2) is incompatible with European law. It is regrettable that it did neither.

The Court of Appeal seems to have accepted the implications of s 152 (2) at face value; to have wrongly assumed that Delaney did not benefit from statutory insurance provision under EU Law and then treated the claim as though it were an uninsured claim. It further compounded its error by assuming that Tradewise were entitled to rely on a private law agreement between the Secretary of State and the Motor Insurance Bureau and then added insult to injury by applying the wrong interpretive test to clause 6 of the Uninsured Drivers Agreement 1999. The end result is a per incuriam decision.

This was never an uninsured driver claim. It was instead a claim where the injured claimant was entitled to the benefit of insurance cover through a combination of national and European law, as opposed to private contractual law. The Uninsured Drivers Agreement has no bearing on the claim as it is confined to claims where this is no insurance; contractually conferred or statutorily imposed.

301 Marleasing SA v La Comercial Internacional de Alimentación SA (Case C-106/89) [1990] ECR I-14135

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Even if it did, the clause 6 (i) (e) (iii) exception cannot be sustained under European law, but that is the subject of another article.

If a circuit judge, two QC’s and three very learned and experienced Lords Justices of Appeal are all baffled by our national law provision for compensating victims of road accidents, then surely it is time to reform this unsatisfactory and ramshackle regime.

**Practice Points**

Whenever national law provision is supposed to implement the Government’s obligations under a European directive, one must begin the interpretation of that provision by studying the European directive and then construing the provision in the light of that Directive, applying the *Marleasing* principle.

This approach holds good for construing the Uninsured and Untraced Drivers Agreements entered into between the Secretary of State for Transport and the Motor Insurers Bureau for compensating victims of uninsured and untraced drivers. In these circumstances, the House of Lords ruling in *White v White* offers guidance on the correct approach. Any cursory study of which will reveal a number of glaring inconsistencies between what the European directives dictate and what the present compensatory regime delivers.

Practitioners should ensure that they have the right risk management procedures in place to identify these inconsistencies. This case, or one like it, will expose the deficiencies in our national law provision, this could expose firms to negligence actions.

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302 See above
303 Dated 1999 and 2003 respectively.
304 *White v White* [2001] UKHL 9, [2001] 1 W.L.R. 481

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5. Marking the Boundary

JPIL Issue 3, 2013

The Department for Transport (DfT) is due to announce its plans for reforming our national law provision for guaranteeing the compensatory entitlement of road accident victims, in July. Whilst the initiative is as welcome as it is long overdue, there are growing concerns that instead of addressing the urgent need for major reform, all we are likely to see is some superficial tinkering at the edges of the problem.

The compensatory guarantee scheme is currently delivered by a curious mix of closely interlinked statutory and extra-statutory provisions. The former consists of the statutory duty to insure the use of a motor vehicle on a road or other public place against third party liabilities under by s143 of the Road Traffic Act (RTA 1988) together with a corresponding statutory indemnity imposed on motor insurers to satisfy third party claims by s151 RTA.

The extra-statutory provision is contained in two agreements between the Motor Insurers Bureau (MIB) and the Secretary of State for Transport. These are the Uninsured Drivers Agreement 1999 and the Untraced Drivers Agreement 2003. Between them they require the insurance industry to extend the statutory indemnity to victims of (i) drivers who are uninsured (the 1999 Agreement) and (ii) hit and run and other unidentified drivers (the 2003 Agreement). The insurance industry's collective liability to meet these uninsured losses is a mutualised one: every authorised insurer contributes to a central fund that is managed by the MIB under its contractual arrangement with the DfT. The MIB also investigates and settles individual claims.

One of the many problems with the extra statutory schemes is that over the years successive amendments have resulted in their becoming skewed in the favour of the motor insurers; at the expense of the victims they are supposed to serve. This is because the DfT has given the MIB a wide latitude to dictate the terms of the extra statutory schemes it operates. The very form and structure of the MIB agreements is redolent of an insurance policy. They are packed with

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305 J.P.I. Law 2013, 3, 151-161

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impenetrable jargon and over elaborate procedural sophistication. They impose arbitrary conditions precedent and limitations of liability as well as numerous arbitrary strike-out clauses that completely disentitle any hapless victim who falls foul of them. They allow for unlawful deductions to be made to an applicant’s compensatory entitlement\(^{306}\) that are not to be found under the statutory scheme. The end result is that the MIB’s extra statutory regime offers an inferior level of compensatory protection to victims than under the statutory indemnity scheme. The egregious deficiencies and irregularities within the Uninsured Drivers Agreement 1999 have already been covered in some detail in a previous article published in this Journal\(^{307}\).

Because the MIB Agreements contain so many disadvantages, it is important to identify precisely where the boundary lies between claims that are subject to the statutory indemnity imposed under s151 RTA 1988 and those that fall within the DfT’s extra statutory schemes. Obviously the extra statutory schemes apply where a defendant driver is one that either has no insurance in place at all or who cannot be identified. However, the position is less clear for the growing number of incidents where there is some motor insurance in place for the vehicle responsible but, for one reason or another, the insurers contend that it is insufficient to cover the accident. What happens then? Is such a claim still covered under the statutory indemnity imposed on all motor insurers under s151(5) of the 1988 Act or does it fall within the less advantageous scheme provided within the Uninsured Drivers Agreement 1999?

This article will consider statutory provisions that impose the duty to insure and the statutory right of indemnity conferred under Part VI of the 1988 Act. It will analyse the most recent attempt to interpret and apply Part VI of the 1988 Act by the Court of Appeal. It will review the conventional approach to interpreting victims’ rights under the Road Traffic Act 1988, it will then explain why a radically

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\(^{306}\) For example, in the 1999 Agreement, clauses 6 permits the MIB to exclude subrogated claims (otherwise recoverable under the common law against an insured driver) and 17 permits the deduction of any other sums received by the applicant as a consequence of the accident (this far exceeds the ambit of the common law ‘rule against double recovery’) of the 1999 Agreement.

\(^{307}\) ‘Why the Uninsured Drivers Agreement 1999 Needs To Be Scrapped’, Nicholas Bevan, JPIL [2011], issue no 2.
different approach is required if our national provision is to comply with Community law.

Whenever a UK court seeks to interpret either Part VI of the 1988 Act, the 2002 Regulations or one of the aforementioned agreements between the Secretary of State’s and the Motor Insurers Bureau, they must always be construed, as far as possible, purposively; not only in the light of the relevant EU Directives but also in accordance with any ECJ interpretation of those same Directives.

In *EUI Ltd v Bristol Alliance Ltd Partnership* [2012] EWCA Civ 1267 the Court of Appeal had to decide whether a claim fell under the statutory indemnity scheme or under the DfT’s extra statutory arrangement with the MIB. Unfortunately, as this article seeks to explain, it reached the wrong conclusion and in doing so has set a very unfortunate precedent that conflicts with superior Community law jurisprudence.

The EUI case involved an insured driver, a Mr Williams, who was suffering from acute depression. He determined upon a dramatic exit by deliberately crashing his car at a high speed into the prestigious House of Fraser store at the newly constructed Cabot Circus retail complex in Bristol. He left a trail of devastation in his wake, and the impact caused in excess of £200,000 damage to the store’s massive plate glass windows.

The property insurer Bristol Alliance Limited Partnership (BA) met the store’s repair bill and then claimed by subrogation against Williams and his insurers, EUI Limited Partnership (who trade as Admiral Group). Judgment was entered against Williams for damages to be assessed. However, EUI’s motor policy excluded cover for ‘damage...‘arising as a result of a...deliberate act caused by you...’ They claimed that they were not liable under s151 of the RTA 1988 to compensate BA.

What followed was in essence a dispute between two insurers. EUI argued that because its contractual liability did not extend to deliberate damage a proper construction of s151 meant that they were not obliged to provide statutory indemnity cover either. BA contended that a proper construction of s145, 151 and the EU Motor Vehicle Insurance Directives (MVID) means that EUI were obliged to honour its statutory indemnity and to satisfy its claim, regardless.
Master Eyre sensibly ordered a trial of this question as a preliminary issue. At first instance Tugendhat J found in favour of BA. He held that a proper interpretation of s145 (3), one that takes into account the objectives of the EU Motor Vehicle Insurance Directives, is that it requires a motor policy to provide statutory cover for any damage caused by the use of a vehicle on the road. The judge relied on the Court of Appeal’s reasoning in Charlton v Fisher [2000] QB 578 and on a European Court of Justice ruling in Ruiz Bernaldez [1996] ECR 1-1929.

Bernaldez\(^{308}\) featured a claim where a drunk driver crashed his car causing property damage. The vehicle’s insurance policy excluded cover where the driver was intoxicated and this exclusion was permitted under Spanish law. At first instance, his insurers were completely absolved from any liability to indemnify the accident damage and Bernaldez was held personally liable to compensate this in full. That decision was overruled after a reference to the European Court of Justice (ECJ) on whether such an exclusion of liability was lawful.

At that time, article 2 (1) of the Second MVID\(^{309}\) expressly provided that certain specific exclusions of liability (featuring persons not authorised to drive the vehicle, persons not holding a driving licence, persons in breach of the statutory technical requirements concerning the condition and safety of the vehicle) were void as against a third party claimant. It also set out a single instance where a policy exclusion is permitted. This was confined to a claim by a passenger that voluntarily entered the vehicle that caused his loss but only where the insurer can prove that he knew the vehicle was stolen

In essence, what the referring Court had sought to establish in Bernaldez was whether the list of invalid policy exclusions set out in article 2(1) was exhaustive or illustrative. Put another way, were other policy exclusions, not specifically made void by article 2 (1), permitted by the MVIDs?

In Bernaldez, after recounting the way in which the legislative objective of the MVIDs had developed\(^{310}\), the ECJ ruled as follows:

\(^{308}\) Criminal Proceedings against Bernaldez (C-129/94) [1996] E.C.R. I-1829
\(^{309}\) The identical provision is now to be found in article 13.1 of the consolidating Sixth MVID (2009/103/EC).
\(^{310}\) Bernaldez: see paragraphs 13, 15 and 16 and also 18 to 21.
• Article 3(1) of the First Motor Vehicle Insurance Directive, as developed and supplemented by the Second and Third MVID, must be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all the damage to property and personal injuries sustained by them.

• That this interpretation precludes an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle.

So according to Bernaldez, the list of void exclusions merely illustrated a general principle, namely that, subject only to the single instance of stolen vehicle exception, insurers are not able to exclude their liability to compensate a third party victim.

Nevertheless, in EUI the Court of Appeal distinguished Charlton and Bernaldez and upheld EUI's appeal. Ward LJ provided the only reasoned judgment and this was endorsed unanimously by the other two Lords Justices. However, in the writer’s respectful opinion, the ratio is seriously flawed. However, before we turn to consider where the Court of Appeal may have erred, it is worthwhile reviewing the reasoning within Ward LJ’s carefully argued judgment as this accurately reflects traditional perceptions about the restricted nature of the compensatory guarantee afforded under our national law provision.

**The Court of Appeal's reasoning in EUI:**

Seven principles can be distilled from Ward LJ’s judgment:

1. A third party victim’s right to claim against a defendant motor insurer does not depend on an interpretation of the insurance contract alone. His entitlement also rests instead upon the proper construction of s151. This confers an independent statutory right on a victim to recover an unsatisfied judgment arising out of a liability for which compulsory insurance is required under s143 and s145. [see para 33 of the judgment];

2. S143 and s145 when read together impose a duty on the user of a motor vehicle, as opposed to the insurer, to ensure that he has in place insurance
that covers any use actually made of that vehicle. It is up to the user to ensure that his use conforms to the cover provided under his policy; if he fails in this, he is driving uninsured. There is no concomitant requirement on the insurer to provide cover in respect of any and every use to which the user puts the vehicle. [38] The following factors were held to be consistent with this view:

- The wording within s 143 only imposes the duty to have insurance that provides cover ‘in relation to the use of the vehicle by that person’. That is a qualification that does not extend to any use. [36].

- S145 (4) lists liabilities that are not required to be covered by compulsory third party insurance, such as property damage in excess of £1,000,000 and damages to goods for hire or reward within the vehicle. Ward LJ construed this as being a non-exhaustive list on the ground that it that had been Parliament’s intention it would have said so. [39]

- The inference that policy exclusions are valid against a third party can be drawn from the fact that s148 only prevents an insurer from relying on a limited number of exclusions that are listed in s 148 (2) (such as the invalidation of any restrictions on the age or physical or mental condition of the driver) [42]. A similar conclusion arises under s151 (3) from the nullification of any restriction of cover to persons holding a driving licence. Whilst some limitations of liability are specifically expressed to be void; the correlative implication is that all other limitations are valid. [51]

- The recognition that some limitations on cover are permitted under s145 was considered by Ward LJ to be ‘time-honoured’ and ‘never doubted’. This was a point that BA conceded when it acknowledged that in the not altogether uncommon scenario where a car is put to business use or taxi hire under a motor policy that is in fact restricted to social and domestic use, then the vehicle’s use not being covered by that policy [53]. This is certainly borne out by a number of authorities, such as in Keeley v Pashen [2004] EWCA
Civ 1491.  *Keeley* featured a deliberate running down of a fare paying passenger by a taxi driver insured under a ‘social and domestic pleasure purposes’ restriction. [24] Fortunately for the victim, he was deemed to be entitled to recover from the driver’s insurers due to a convenient factual finding that contrived the driver’s use of the vehicle had reverted to ‘social and domestic’ use, by the time of the incident.

- Thus according to the Court of Appeal, the fact that a compulsory third party motor insurance policy has been issued and delivered under s145 and s147 is no guarantee that the policyholders’ liability is covered. Furthermore, it should also be noted that some events cannot be insured against as a matter of public policy: such as an intentionally criminal act, *Hardy v Motor Insurers’ Bureau* [1964] 2 All ER 742. The qualified nature of the statutory third party cover provided under Ward LJ’s interpretation seems to fly in the face of the underlying protective purpose of Part VI of the 1988 Act. There is a strong case to argue that properly construed, the legislative purpose of s143 and s145 is to provide statutory cover to innocent third parties, free from any contractual impediment that may exist between the insurer and its policyholder;

3. That it has ‘never’ been doubted ‘from the earliest days’ that the certificate of insurance does not trump the policy [40]. Although an insurer is required to state on its policy certificate that the policy ‘satisfies the requirements of the relevant law applicable in Great Britain’ (see The Motor Vehicles (Third Party Risks) Regulations 1972) this does not extend the policy cover to all or any uses. That remains true, even where the insurer does not set out the relevant policy restriction on the certificate.

4. S151 sets out four preconditions that a third party victim must establish if he is to exercise his statutory right against the defendant’s motor insurer [34]:

   a. that ‘a certificate of insurance has been delivered under section 147’ (section 151);
b. that ‘a judgment to which this subsection applies is obtained’ (section 151(1));

c. that the judgment relates ‘to a liability with respect to any matter where liability with respect to that matter is required to be covered by a policy of insurance under section 145’, (section 151(2)); and

d. that the liability is ‘covered by the terms of the policy … to which the certificate relates’, (section 151(2)(a));

Thus for the insurer to face any liability to indemnify its insured the liability must not only be one required to be covered by a policy of insurance under ss 143 and 145 but it must also be one that is actually covered by the policy to which the certificate relates; [52]

5. That Community law does not prevent a Member State’s freedom to determine the extent of compulsory insurance, citing Andrew Smith J in AXA Insurance UK plc v Norwich Union Insurance [2007] EWHC 1046 and Lord Clyde in the House of Lords ruling in Clarke v Kato 1998 1 WLR. Furthermore, that the European Court of Justices’ ruling in case C-129/94 Ruiz Bernaldez [1996] ECR 1-1929, which had influenced Tugendhat J below is confined to its facts and does not have a general application; [66 & 67]

6. If a use is made of the vehicle outside the terms of the policy cover then the vehicle is effectively uninsured and the compensatory needs of a third party victim are caught by UDA 1999. This reasoning is consistent with the dicta of Lord Hailsham of St Marylebone LC in the House of Lords in Gardner v Moore [1984] 1 AC 548; [23, 54 & 69]

7. The provisions of Part VI of the Road Traffic Act and the MIB Uninsured and Untraced Driver’s Agreements are sufficient to satisfy the spirit of the EU Motor Vehicles Insurance Directives as between them they ‘enable third-party victims of accidents caused by vehicles to be compensated for all the damage to property and personal injuries sustained by them’ as set out in paragraph 18 of the ECJ’s ruling in Bernaldez. [68]

All seven principles will be familiar to most lawyers practicing in this field.
The Court of Appeal’s judgment in EUI:

Applying these principles to the case facts, Ward LJ ruled that W should have restricted his use of the insured car so as to comply with the contractual limitations imposed by the insurance policy. By deliberately crashing his car, his use fell outside the policy cover; that made W, to all intents and purposes, an uninsured driver. Furthermore EUI were not liable as statutory insurers either as under s151 W’s actions were not a use ‘to which the certificate relates’. The fact that W could not have obtained insurance for his suicidal use was ignored. Accordingly the fourth criterion listed above under section 151 (2) (a) was not satisfied and thus BA were unable to recover from EUI under s151. Interestingly, the judgment does not reveal whether anyone thought to enquire whether the driver was mentally ill or otherwise incapable of forming the necessary intent to constitute ‘deliberate damage’.

As to BA’s potential right to claim from the Motor Insurers Bureau under the Uninsured Drivers Agreement 1999 Ward LJ opined that the MIB would not liable to meet such a claim, if presented. His explanation was that clause 6 of that agreement specifically excludes liability for compensating subrogated claims. Accordingly BA, whose locus standi was that of a subrogating insurer, was left empty handed.

Whilst this judgment offers a painstaking analysis of the conventional approach to construing s151, it fails to give the correct interpretation and in doing so it has seriously undermined the statutory compensatory guarantee for victims arising out of the use of motor vehicles. It should be considered per incuriam.

What went wrong

Where, in the writer’s opinion, the judgment comes to grief is in its selective treatment of both domestic law and Community law. After identifying the relevant Motor Vehicle Insurance Directives and conceding that if the ratio in Bernaldez had a wide application so that it applied to s 151 (2) (a) then ‘....the way the Road Traffic Act combined with the MIB scheme has always operated is not compliant with the Directives.’ [65] Ward LJ then appears to have sought a means of reconciling our national law provision with the relevant European law.
Rather than considering the extensive corpus of European jurisprudence, as was the court’s constitutional requirement, Ward LJ appears to have decided to look elsewhere to shore up the status quo. In doing so he followed very closely the line of obiter reasoning employed by a high court judge in a criminal appeal ruling in Singh v Solihull MBC [2007] EWHC 552 (Admin). That judgment referred to a number of decisions, now of questionable relevance and currency, and it is regrettable that Ward LJ incorporated these into his judgment [65 – 67]. As it happens, Collins J, arrived at the right conclusion in the Singh case. In that case he concluded that the wide scope that the Bernaldez interpretation gave to Article 3 of the First Directive did not have the effect of exculpating a defendant in a criminal prosecution for driving without insurance where he drove a car for commercial hire that was only insured for ‘social, domestic or pleasure purposes’. This was a valid position to take because the Motor Vehicle Insurance Directives do not seek to harmonise the criminal or civil law of Member States, except where they contradict or undermine the Directive’s legislative purpose. They grant Member States a wide discretion on how they choose to implement and enforce the obligation to insure against civil liability. However where the Directives touch upon the nature and extent of the compulsory insurance guarantee extended to third parties, as in the EUI appeal, then the Directives are most certainly binding on Member States (Article 288 Treaty on the Functioning of the European Union) and it should also be remembered that under Articles 220 and 234 The European Community Treaty the Court of Justice is the final arbiter on the interpretation of Community law (see also s3 (1) European Communities Act 1972). Accordingly it behoves any national court to interpret a Directive by considering first any relevant rulings by the Court of Justice, instead of referring to relatively obscure domestic decisions even if they may offer a more palatable construction.

In EUI it seems that whilst the Court of Appeal paid lip service to the importance of Bernaldez, it went on to disregard its implications. What makes this so odd is that Benaldez featured another ostensibly insured driver whose use contravened a limitation in his cover; the parallels with the EUI case are striking. Yet as Johnathan Swift wryly observed ‘there’s none so blind as those who will not see’.
**The wide import of Bernaldez**

There can be little doubt that *Bernaldez* has extended the scope of a Member State’s duty to ensure that civil liability is covered by insurance under Article 3 (1) of the First Directive. It achieved this by construing the list of void exclusions in Article 2 (1) of the Second Directive as amounting to no more than a restatement of the all encompassing duty imposed by the First Directive – and in doing so it has arguably taken the original meaning of the wording employed within Article 3 (1) beyond what many would consider to be its ordinary and natural meaning. However, this is hardly a new proposition: *Bernaldez* is now 16 years old! What is more, it has attracted its own coterie of like minded European Jurisprudence which uniformly endorses this interpretation. It has been followed in *Ferreira v Companhia de Seguros Mundial Confianca SA* 2000 ECR 1-6711; Case C-348/98; *Candolin* [2005] ECR I-5745;Case C-357/03; *Farrell v Whitty* 2007 ECJ Case C-356/05; and most recently in *Churchill v Benjamin Wilkinson and Tracy Evans* 2011 Case C-442/10 where various limitations in the insurance cover afforded to third parties were challenged successfully by the third party victims affected.

Of all the European Court rulings that follow in the wake of *Bernaldez*, perhaps the most relevant is *Candolin* where not only was the driver drunk but so were all three passengers. Finnish law permitted motor insurers to exclude liability to passengers who knew or ought to have known that their driver was intoxicated, unless special circumstances applied. That law was held to infringe the Motor Vehicle Insurance Directives. *Candolin* restated and affirmed the *Bernaldez* principle thus:

17 As a preliminary point it must be recalled that the First, Second and Third Directives are designed to ensure the free movement of vehicles normally based on Community territory and of persons travelling in those vehicles and to guarantee that the victims of accidents caused by those vehicles receive comparable treatment irrespective of where in the Community the accident has occurred (Case C-129/94 *Ruiz Bernáldez* [1996] ECR I-1829, paragraph 13).

18 In view of the aim of protecting victims, the Court has held that Article 3(1) of the First Directive 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 (Ruiz Bernáldez, paragraph 20).

19 The Court has also held that the first subparagraph of Article 2(1) of the Second Directive simply repeats that obligation with respect to provisions or clauses in a policy excluding from insurance the use or driving of vehicles in particular cases (persons not authorised to drive the vehicle, persons not holding a driving licence, persons in breach of the statutory technical requirements concerning the condition and safety of the vehicle) (RuizBernáldez, paragraph 21).

20 By way of derogation from that obligation, the second subparagraph of Article 2(1) provides that certain persons may be excluded from compensation by the insurer, having regard to the situation they have themselves brought about (persons entering a vehicle which they know to have been stolen) (RuizBernáldez, paragraph 21).

21 However, as it is a provision which establishes a derogation from a general rule, the second subparagraph of Article 2(1) of the Second Directive must be interpreted strictly.

The last point is made even more explicit in the Advocate General’s opinion in Bernaldez:

‘42. The Community legislature’s intention with this provision (i.e. the stolen vehicle exception in Article 2 (1)) was to provide for an exception to the rule that statutory provisions or contractual clauses in an insurance policy may not be relied on as against passengers and third parties who are the victims of an accident. This exception must be interpreted narrowly and as being exhaustive since it forms a departure from the general rule…..’

The ECJ judgment in Candolin goes on to state:

23 It follows that the second subparagraph of Article 2(1) of the Second Directive must be interpreted as meaning that a statutory provision or a contractual clause in an insurance policy which excludes the use or driving of vehicles from the insurance may be relied on against third parties who
are victims of a road accident only where the insurer can prove that the persons who voluntarily entered the vehicle which caused the injury knew that it was stolen.

…..

27 The Member States must exercise their powers in compliance with Community law and, in particular, with Article 3(1) of the First Directive, Article 2(1) of the Second Directive and Article 1 of the Third Directive, whose aim is to ensure that compulsory motor vehicle insurance allows all passengers who are victims of an accident caused by a motor vehicle to be compensated for the injury or loss they have suffered.

28 The national provisions which govern compensation for road accidents cannot, therefore, deprive those provisions of their effectiveness.

Other relevant Community law

Ward LJ’s judgment in EUI recites other ECJ rulings which endorse Benaldez but then appears to ignore the implications to be drawn from them, such as:

- The judgment cites the ECJ ruling in Churchill:
  
  ‘41. … 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 or unidentified or has not satisfied the insurance requirements referred to in Article 3(1) of the first Directive.’ [61]

- It also quotes from the Advocate General’s opinion in Churchill:
  
  ‘27. … The Court’s case-law teaches us that, unless one of the exceptions laid down by the Directive is applicable, the victims of an accident are always entitled to be compensated by the insurer’, (his emphasis) [62].

Paragraph 11 of the EUI judgment refers to the recital within the Second Directive, also quoted at paragraph 4 of the ECJ Churchill judgment:

‘… it is in the interest of victims that the effects of certain exclusion clauses be limited to the relationship between the insurer and the person
responsible for the accident; whereas, however, in the case of vehicles stolen or obtained by violence, Member States may specify that compensation will be payable by the abovementioned body;’

It is striking that the Court of Appeal should decide, contrary to established Community jurisprudence, that EUI’s exclusion of deliberate damage was valid, not just against their insured but also against any third party. , In Bernhard Pfeiffer and others v Deutsches Rotes Kreuz, and others ECJ 2004 C-297/01, paragraph 119 the Court of Justice prescribed the correct approach:

‘when hearing a case between individuals, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive.’

Whilst the Court of Appeal rightly took into account the First and Second Directives it erred in applying its own construction, since it is one that conflicts with a line of well established jurisprudence from the Court of Justice, which has precedence in matters of Community law interpretation.

**Revisiting the Court of Appeal’s Seven Principles**

It is perhaps worthwhile revisiting the seven principles set out in the first part of this article in the light of the Community law:

1. A third party’s statutory right to compensatory cover is indeed independent of the insurer’s contractual relationship with its insured. It is easy to mistakenly conflate the two: the MVIDs apply to the former; not the latter;

2. Whilst the contractual autonomy between the insurer and insured remains, the statutory rights of a third party remain inviolate. Consequently, restrictions in scope and use are not relevant to the statutory rights of a third party. Recital 7 to the Second MVID (84/5/EEC) clearly states that: ‘it is in the interest of victims that the effects of certain exclusion clauses be limited to the relationship between the insurer and the person responsible for the accident’;
3. It remains true that limitations and exclusions within a policy are not ‘trumped’ by the certificate, as between the contracting parties; when it comes to third party victims, they are most certainly trounced by Community law;

4. The Court of Appeal’s interpretation of s151 (2) (a), is inconsistent with what we have seen from the relevant Community law. The impact of Bernaldez in the way it has interpreted article 3 is clear. Its effect on our national law is that a third party victim is entitled to benefit from the statutory provision conferred by s 151 (5) free of any policy restrictions that apply against the insured, unless the stolen vehicle exception applies. This also accords with Lord Denning’s dicta in Hardy v Motor Insurers Bureau [1964] 2 QB 745 and Lord Hailsham’s concluding obiter statement in the House of Lords judgment in Gardner v Moore [1984] 1 AC 548;

5. The ECJ consistently refers to and applies the Bernaldez interpretation in its rulings whenever it considers on the nature and scope of the insurance cover required by article 3. It has consistently interpreted the MVIDs as conferring the widest extent of protection to third party victims; an interpretation that is starkly at odds with our national law provision. The plain fact of the matter is that, subject to the stolen vehicle exception, the UK Government has no choice but to ensure that any motor insurance policy issued in compliance with article 3 MVID is good for any use to which the insured vehicle it is put so far as a third party claim is concerned. The ECJ rulings leave no room for the UK to argue any discretion on this point. They afford no legal basis on which the UK can lawfully treat an underinsured or insufficiently insured vehicle as an uninsured vehicle for the purposes of a third party claim;

6. The use of a vehicle outside the scope of the policy terms does not convert a statutory insurance claim into a claim under the Uninsured Drivers Agreement 1999. See the ECJ Churchill dicta set out above;

7. The assertion that taken together Part VI of the Road Traffic Act and the MIB Agreements are sufficient to satisfy the UK Government’s obligations under the Directives is self evidently false. Firstly, we have seen that the Court of Justice has been expressly stipulated the wide ranging nature of
the insurance cover that must be provided to a third party by an insurer. Secondly, in *EUI*, the property insurer was denied any compensation on the grounds (i) that statutory insurance cover did not apply to deliberate damage as it was an excluded liability, and (ii) on the basis that any claim it might make to the MIB under the Uninsured Drivers Agreement 1999 was excluded under clause 6 as a subrogated claim. It is almost certain that the Court of Appeal was wrong on the first proposition and there is a very strong case to argue that it also erred on the second, hypothetical proposition. The excerpt from the Fourth Directive quoted at [70] of the *EUI* judgment in support of its arguments in favour of excluding subrogated claims actually refers not to MIB claims (which are dealt with in the Second Directive) but to the compensatory body appointed to deal with foreign claims. Subrogated claims are not mentioned in the earlier Directives. Nowhere in any of the six Motor Vehicle Insurance Directives do they contemplate that a third party victim should recover anything less than their full compensatory entitlement. The EUI judgment fails to cite the Court of Justice’s ruling on the principles of ‘equivalence’ and ‘effectiveness’ in *Evans v Secretary of State for Transport and the MIB 2003 ECJ Case C-63/01,* The Court of Appeal’s views on this point are obiter anyway. Furthermore there is no clear authority that supports the MIB’s claim to be entitled to deduct subrogated claims. The EUI judgment ignores the fact that in *McCall v Poulton* the Court of Appeal ordered this specific issue to be referred to the Court of Justice for a preliminary ruling, the claim was subsequently compromised.
Conclusion

Where the Court of Appeal is unquestionably right is in confirming that if *Bernaldez* does have the wide and general application, which our review of the authorities supports, then our national law provision under the Road Traffic Act and the MIB Agreements infringes Community law.

The implications flowing from Mr Williams’ attempted suicide are not limited to the injuries caused to himself and the other luckless driver, nor do they stop at the extensive damage to the House of Fraser store, or even the property insurers who were denied their compensatory entitlement. The contrasting outcome in the Court of Appeal, between the *EUI* decision and its two rulings in *Churchill*, have punctured any remaining complacency that our national law provision for third party victims is consistently interpreted and applied, still less fully compliant with Community law. If one compares Part VI of the 1988 Act with the MVID and the extensive body of ECJ rulings in this area, as one must, it is abundantly clear that our national law fails to confer the extensive level the protection to third party victims required by Community law.

Innocent victims will continue to fall through the gaps in the compensatory safeguards provided under our national law as long the Government continues to procrastinate over the long overdue reform of the Road Traffic Act 1988 and the MIB Agreements. This sorry state of affairs is compounded by what appears to be a widespread confusion in our profession as to the significance and applicability of Community law in this area. Unless the shortcomings in our national law are challenged, injustices will continue to be perpetrated.

Returning to the Department of Transport’s consultation, rather than restricting its review to peripheral, albeit important, procedural issues concerning its extra-statutory compensatory safety net for victims of uninsured and unidentified drivers, perhaps the Department of Transport would be better advised to review its entire provision in this area. It might also sensibly review whether the MIB Agreements, in their present highly unsatisfactory form, comply with the UK’s Treaty obligation to implement Community law that conforms to the legal certainty
principle\textsuperscript{311}. It would be also be interesting to know what is the enabling Act or other lawful provision or constitutional right that the MIB rely on to implement Community law, apparently independently of the Minister, within Article 75 of its Articles of Association\textsuperscript{312}. In the writer’s view, the UK’s arrangements for providing a compensatory guarantee are shambolic and require extensive and far ranging reform. If the Department ignores the calls for urgent reform it will be exposed to the risk of judicial review and the near certainty of an infringement complaint.

Leave to appeal has been sought in both \textit{EUI} and \textit{Churchill} but it is understood that the \textit{EUI} claim has been compromised, leaving us with an unsatisfactory Court of Appeal precedent that appears to have failed to apply the correct Community law. However, it is one that, in the writer’s respectful opinion, is of questionable authority


\textsuperscript{312} This question is relevant to the legality of the current arrangements for compensating victims of an increasing number of drivers who either have insufficient insurance cover for the use to which the vehicle is put or whose insurance cover is otherwise vitiated by the policyholders’ breach of contract. These arrangements do not appear to conform to the Government’s own recently launched Good Law campaign.
6. Tinkering at the Edges


Nicholas Bevan looks at the issue of motor insurance. He examines the history behind the introduction of compulsory motor insurance and the policy decisions which have shaped how it developed. He identifies the current issues arising from exclusions and limitations and illustrates how these are in breach of European requirements and describes how in his view the current system is unfit for purpose. He then discusses the reform necessary.

[Miuris Lyons, partner of Stewarts Law solicitors and general editor of JPIL]

Every motor liability practitioner knows that their clients’ compensatory recovery is predicated on motor insurance. We all pay a small fortune in premiums every year to ensure this. Unfortunately, as I hope to demonstrate, the product we are sold is not fit for purpose.

Compulsory third party motor insurance was introduced under the Road Traffic Act 1930 and over the years the scheme has been extended to include ancillary measures to protect innocent victims from the risk posed by uninsured and hit and run drivers. Now 84 years on the entire third party motor insurance is in a shambles and in urgent need of reform.

Origins

It is clear from the early case authorities and from Sir Felix Cassell’s *Board of Trade report of the Committee on Compulsory Insurance*, 1937 [Cmd. 5528] that the underlying objective of the 1930 legislation was as simple as it was compelling: to mutualise the financial hazard posed to private citizens from the risk of being injured by motor vehicles.

Instead of incepting a state run scheme, the government sensibly opted for a private sector solution that was already in place: one provided by a nascent motor insurance sector. The 1930 Act made it a criminal offence to use a motor vehicle on a road without third party cover. This pragmatic measure was intended to guarantee that motor accident victims were able to recover their full compensatory entitlement, independently of the wrongdoer’s ability to pay.

It was the mass production of affordable cars that made statutory intervention necessary. The arrival of the Austin 7 in 1922 and other reasonably affordable
vehicles transformed car ownership; it was no longer the preserve of the rich. This exposed members of the public to the increased likelihood that a wrongdoer might not be able to afford to satisfy the damages for which they were liable. The imposition of compulsory third party insurance was a common sense measure designed to bolster the civil law rights of motor accident victims.

Evolving Scope

Responsibility for overseeing this scheme has reposed in a long succession of ministers, currently the Secretary of State for Transport, Patrick McLoughlin. This responsibility has three important facets. First and foremost, the moral imperative of ensuring that the motor insurers, whom the department for Transport licences to operate in this captive market, honour the original 1930’s legislative objective of guaranteeing the compensatory entitlement of third party victims. Another is to modify our national law provision in this area so that it keeps pace with technological and social change. Thirdly, to honour the Government’s treaty obligation to take all appropriate measures, whether general or particular, to fully implement the six European motor insurance directives on motor insurance.

We might be excused for thinking that the quid pro quo for paying our expensive premiums under compulsion of the law is the knowledge that if we are unfortunate enough to be injured by a careless driver, then our full compensatory entitlement will be guaranteed, independently of the driver at fault’s ability to pay. What is not so readily appreciated is the haphazard way in which these provisions have evolved over the past 84 years has degraded the quality of the central social policy aim. They are in fact an eclectic mix of different statutory and extra-statutory initiatives, each developed and refashioned in response to various discrete issues and bolted on as accretions to the whole, sometimes without any apparent concern for the way they interact with one another. Small wonder then that such a regime should have its flaws or that some victims’ should fall through the gaps that such an empirically derived regime inevitably produces. Unfortunately, whilst government was quick to impose criminal sanctions on its citizens for driving without insurance it had been surprisingly reluctant to interfere with the insurers’ autonomy to play the system by hedging their risk through numerous preconditions of cover, restrictions in cover and exclusions of liability.
Recent events have forced the hand of the government. Two recent judgments have punctured any illusion the government may have entertained as to its domestic law provision in this area being compliant with the minimum standards of protection required under European law; it isn’t.

**Adverse influence**

The motor insurance industry has enjoyed its monopoly for over eight decades. And how it has prospered! It has grown into a multi-billion pound state sanctioned cartel that is able to indulge in lavishly funded advertising and lobbying of ministers and MPs to win concessions at the expense of the hapless premium paying public who are compelled by law to purchase their products. It also enjoys a strategic advantage over individual claimants in the way it can compromise claims that pose a threat to its commercial interests; which in turn, allows it to shape the common law by influencing the legal issues that are referred to the senior appellate courts. This confers a strategic and tactical advantage on insurers in any civil liability dispute that the courts are ill equipped to confront. So it should come as no great surprise to find that the simple inclusive nature of original 1930’s legislative objective has been compromised.

**A bad start**

Shortly after the Road Traffic Act 1930 came into effect, its shortcomings became apparent. A swathe of technical challenges were raised by different insurers, who relied on various contractual restrictions and exclusions of liability to avoid their contractual liability to indemnify their insured; something a third party victim has no control or influence over. It soon became clear that the legislative aim of the 1930 Act was being frustrated because it did not confer a direct and independent right on third party victims: ‘direct,’ in the sense of conferring on third party victims a direct right of action against the responsible drivers’ insurers; ‘independent,’ in the sense that the victim’s statutory right would be free from any defence that an insurer might have against its policyholder. This was because the 1930 Act did not attempt to interfere with the common law doctrine of privity of contract by which a contract does not generally confer rights or impose

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313 Part 1 of the Civil Procedure Rules seeks to put the parties on an equal footing. However, in individual cases, insurers enjoy a huge disparity in resources allied with decades of accrued specialist knowledge of an unnecessarily complicated and over technical medley of different legal provisions.

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obligations on those who are not party to the contract (the ‘third party rule’). Furthermore, in the exceptional instances where a third party is entitled to claim the benefit of a contract, such rights are deemed to be subject to any contractual conditions and defences that the promisee may have against the promisor. As Harman LJ so memorably put it, in *Post Office v Norwich Union fire Insurance Society Ltd* [1967] 2 QB 363, 376, a third party cannot ‘pick out the plums and leave the duff behind’.

Parliament’s reaction was to legislate again, unfortunately by half measures, so the Road Traffic Act 1934 proved to be something of a curate’s egg. On the positive side, section 10 gave every appearance of abrogating the third party rule. It provided that once an insurance policy has been issued and delivered and a relevant judgment obtained against the insured, ‘then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.’ This survives in section 151 of the Road Traffic Act 1988.

Unfortunately the third party rights that section 10 conferred was promptly qualified by two additional provisions. First of these was section 10(3) which enabled motor insurers to avoid their newly imposed statutory liability by allowing it to seek a court declaration that the policy was void for a material non disclosure or misrepresentation. That measure survives as section 152 Road Traffic Act 1988. Secondly, in section 12, by nullifying the effects of eight categories of policy restriction against a third party, it opened the door to the argument that by implication all other policy conditions and restrictions not so nullified remain valid against the very third party victims the system is supposed to protect. This survives in section 148 of the 1988 Act and this argument was deployed with devastating effect by insurers and most recently in the Court of Appeal in *EUI v Bristol Alliance Partnership* [2012] EWCA Civ 1267.

**Exclusions of liability**
In *EUI v Bristol Alliance Partnership* an ostensibly fully insured motorist attempted to commit suicide by driving his car into a department store in Bristol. He caused extensive damage to the building and badly injured another motorist. All three Lords Justices held that the insurer’s policy term that excluded liability for deliberate damage was effective against third party victims because it was effectively permitted by implication in the statute.

The ruling appears to give insurers a free hand to restrict or exclude their statutory liability to third party victims; save where expressly precluded from doing so by the Road Traffic Act 1988. Unfortunately the Act only addresses a limited number of specific exclusions, leaving insurers a free hand to hedge their liabilities elsewhere; at the expense of the law abiding road using community and the wider public interest.

The same court also came to the bizarre conclusion that whilst motorists must ensure that any use they actually make of a vehicle is always covered by third party insurance, there is no corresponding obligation on motor insurers to provide such a wide ranging scope of cover.

The result is that every year thousands of accident victims’ claims are treated as uninsured driver claims even though some motor cover is in place. Insurers exploit the restrictive nature of the protection afforded by the 1988 Act to evade liability in numerous scenarios. This would not matter quite so much if the government’s extra statutory regimes for uninsured and untraced drivers provided an equivalent level of protection but they don’t.

Both of the Uninsured and Untraced Driver Schemes are riddled with vicious, oppressive and disproportionate, strike out clauses that permit the MIB to escape any liability even for the smallest procedural infraction. They also exclude liability for certain heads of loss and permit deductions from an applicant’s proper compensatory entitlement in situations that would not be permitted in a normal civil action against an insured driver. These are decidedly third rate schemes.

This author provided a detailed critique of the judgment in EUI in this journal back in 2013314, arguing in robust terms that it was wrong both in law and logic. The fundamental failing is that Court of Appeal’s conclusions are impossible to

314 *Marking the Boundary*, Nicholas Bevan, JPIL [2013] issue no.3.

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reconcile with a long line of Court of Justice rulings referred to below. In the two years that have followed, not a single dissenting opinion has been published or otherwise made known to this author, yet the *EUI* decision endures as an unfortunate and misleading legal precedent.
Restrictions in the scope of cover

Another major flaw in our national law safeguards is the restricted geographic and technical scope of the third party insurance requirement. The statutory scheme only extends to the use of motor vehicles ‘on a road or other public place’. This excludes all private property, even forecourts and driveways leading onto public highways. The insurance requirement is also restricted to motor vehicles ‘intended or adapted for use on a road’. This anachronistic restriction exempts many off-road motor vehicles from the duty to insure, even when used on public highways.

APIL, PIBA, and MASS and a number of law firms joined this author in highlighting this problem in our responses to the minister’s abortive review of the MIB Agreements back in April 2013.

Better, simpler, fairer European law

The qualified and restrictive nature of our national law provision contrasts sharply with the European directives on motor insurance that the UK Government is obliged to implement.

A consistent line of Court of Justice rulings, originating in case Case C-129/94 Ruiz Bernaldez [1996] ECR 1-1929 and Candolin and Others v Pohjola and Others [2005] CJEU (Case C-537/03) through to Case C-442/10 Churchill Insurance Company Ltd v Wilkinson [2011] and Case C-409/11 Csonka v Allam [2013] confirms that under European law only one exclusion of liability is capable of affecting a motor insurer’s liability to compensate a third party. This single derogation from cover is limited to a passenger whom the insurer can prove knew the vehicle he was riding in was stolen.

315 Review of the Uninsured and Untraced Drivers Agreements, Department for Transport, February 2013
316 In Candolin and Others v Pohjola and Others [2005] CJEU (Case C 537/03) 23 the Court of Justice said: ‘It follows that the second subparagraph of Article 2(1) of the Second Directive must be interpreted as meaning that a statutory provision or a contractual clause in an insurance policy which excludes the use or driving of vehicles from the insurance may be relied on against third parties who are victims of a road accident only where the insurer can prove that the persons who voluntarily entered the vehicle which caused the injury knew that it was stolen.’
The basic premise of the European directives on motor insurance is that third party cover should to be good for any use made of the vehicle, provided it is consistent with its normal function, at least in so far as it concerns a third party victim’s claim. The directives stipulate that an insurer’s liability to compensate a third party victim is independent of any contractual restrictions between the insurer and the policyholder. So under European law (and subject to the single proviso mentioned above) provided the vehicle has some insurance in place, the insurer on risk must satisfy a third party claim, regardless. Furthermore, the MIB has no authority to deal with the non-contractual use of an ostensibly insured vehicle; except in that single instance.

All this makes perfect practical sense from a social policy perspective. It protects local authorities and the State from the risk of incurring responsibility for funding the extensive long term care of seriously injured but destitute motor accident victims.

The obligation imposed on member states is to put in place suitable measures to ensure that third party victims' compensatory entitlement is guaranteed. Unfortunately, there are over forty instances where our defective national law fails to fully implement this simple imperative.

**Ministerial inaction**

I have been campaigning for reform in this area for some time now and the Minister for Transport is well aware of the many defects in the national law provision for he is responsible for and how this exposes accident victims to the risk of either of being undercompensated and in extreme cases to recovering nothing at all.

In early 2013 an Under Secretary of State for Transport initiated what was possibly a well intentioned but misconceived consultation on reforming both MIB Agreements. A number of law firms and claimant representative organisations joined me in explaining why the proposals did not go nearly far enough and in calling for a much wider ranging review of the Governments provision in this area. My consultation response provided a detailed critique of the defective national law provision for third party victims. He was informed that the geographic and technical scope of the duty to insure and the nature and extent of the insurance requirement specified within the Road Traffic Act 1988 was far too narrow to
conform with the minimum standards imposed under European law. He was provided with chapter and verse for the numerous unlawful exclusions, limitations and restrictions of liability under both MIB Agreements.

His response was to reject calls for a dialogue and later to simply abandon the review, without offering any explanation. Later on he blocked the involvement of the Law Commission when it offered its assistance.

It seemed that the minister was unequal to the task of bringing the powerful insurance lobby into line. The only people who benefit from these flaws in the UK implementation of European law are the motor insurance companies, who exploit the numerous loopholes. The minister was warned that if he did not act, others were ready and willing to encourage him.

A detailed infringement complaint has been lodged at the European Commission. And now two judgment’s that vindicate some of these earlier criticisms look set to finally force the minister’s hand: one delivered by the Court of Justice of the European Union\textsuperscript{317}, the other by a brilliant High Court judge\textsuperscript{318}, and recently upheld by the Court of Appeal\textsuperscript{319}.

**The Vnk ruling**

In September last year, in *Damijan Vnuk v Zavarovalnica Triglav d.d.* [2014] CJEU Case C-162/13, the Court of Justice confirmed that the third party insurance requirement extends to:

- **any** motor vehicle,
- to **any** use made of it (provided its use is consistent with its normal function) and
- that this applies to **any** location, whether on public or private property.

Compare this to the qualified and geographically restricted scope of the third party insurance requirement that we have become so used to working with under our statutory and extra-statutory provision in the UK. At the very least, we are bound to see some changes to Part VI of the Road Traffic Act 1988 being proposed

\textsuperscript{317} *Damijan Vnuk v Zavarovalnica Triglav d.d.* [2014] CJEU Case C-162/13  
\textsuperscript{318} *Delaney v Secretary of State for Transport* [2014] EWHC 1785 (QB)  
\textsuperscript{319} *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172
sometime this year. This is one infraction that the European Commission cannot ignore.

The same court also elevated the importance of the protective aim of the directives on motor insurance to joint equal place with the liberalisation of the movement of people and vehicles across the European Union. This means that any failure by a member state to fully implement the objectives of a directive in this regard will almost certainly be treated as a serious breach of European law. This has implications for state liability in a Francovich action.

The Delaney decision

In March this year the Court of Appeal upheld a first instance finding by Mr Justice Jay that the Department for Transport was guilty of a serious breach of European law when it introduced a new exclusion of liability in the Uninsured Drivers Agreement 1999. He held that the meaning of the European directives on motor insurance would have been clear and obvious back in 1999 and that minister had no discretion to introduce his own idiosyncrasies into what is a highly regulated regime for guaranteeing victims compensatory rights. The Department was held liable to compensate the victim under the Francovich principle. This writer has provided a detailed commentary on this case in this Journal320.

Of even greater significance is the way the Court of Appeal upheld the first instance finding to the effect that the protective principle which the Court of Justice announced in Bernaldez has a wide and general application. This is impossible to reconcile with its earlier judgment in EUI.

Stark contrasts

Vnuk and Delaney leave us in no doubt that our national law, as interpreted and applied by the Court of Appeal in EUI is inconsistent with the superior and binding effect of the Court of Justice’s ruling in Bernaldez nineteen years ago and as such it is bad law. Similarly there can be little doubt that sections 143, 145, 185 and 192 of the 1988 Act are all inconsistent with Vnuk. Unfortunately the UK’s defective implementation of the European directives on motor insurance is not confined to the geographic and technical scope of the compulsory third party


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motor insurance requirement imposed under article 3 of the Sixth consolidated directive, they are legion.
European law in a nutshell

The European third party motor insurance requirement can be summarised in the following six core principles:

1. The duty to insure and the scope of third party motor insurance cover are coextensive. In other words, authorised motor insurers must provide third party cover that is fit for purpose.

2. The nature of the third party cover is wide and inclusive and it extends to:
   - almost any use;
   - almost any motorised vehicle;
   - anywhere on land.

3. Member states have no discretion to introduce their own exclusions or restrictions of liability.

4. The Motor Insurers Bureau’s role, as the article 10 compensating body is strictly circumscribed. It is a last resort, only to be utilised where:
   - the vehicle responsible for causing the loss or injury is untraced, or
   - where there is absolutely no insurance in place, or
   - where the insurers can prove the claimants had actual knowledge at the time they entered the vehicle in which they was riding that it was stolen, where the insurer has also excluded that particular liability in its policy terms

5. The Motor Insurers Bureau must compensate at least up to the limits of the third party motor insurance obligation. In doing so it must apply the EU law principles of equivalence and effectiveness.

6. The Motor Insurers Bureau can only exclude liability to compensate a victim of an uninsured driver where it can prove that the victim had actual knowledge at the time they entered the vehicle in which he or she was riding that it was uninsured.

The irony

The legislative objectives of the European directives on motor insurance bear a very close affinity to the original social policy aims that engendered the passing
of the Road Traffic Act 1930, which coined the very concept of compulsory third party motor insurance.

Unfortunately over the past eight decades, a well resourced and highly influential motor insurance lobby has managed to extract numerous concessions from a succession of credulous and easily manipulated ministers, beginning as we have seen in 1934\textsuperscript{321} and more recently in a series of unlawful revisions to its arrangements for victims of untraced drivers\textsuperscript{322}. This has undermined the effectiveness of the 1930’s objective of protecting accident victims. For all its many faults, the European Union is less susceptible to this kind of unconstitutional interference. We have every reason be grateful to these sensible and pragmatic directives and the European law remedies that enable us to challenge the longstanding indifference of successive ministers and the insurance industry that cynically exploits this captive market for its own ends.

**Lack of legal certainty**

Meanwhile, we cannot take our national law at face value. Incompatibility defects riddle Part VI of the Road Traffic Act 1988. They also infest the European Communities Rights Against Insurers Regulations 2002 and both the Uninsured Drivers Agreement 1999 and the Untraced Drivers Agreement 2003. All of this law fails to fully implement the European Directives on motor insurance. The

\textsuperscript{321} See above under ‘A bad start’.

\textsuperscript{322} In *Byrne v Secretary of State for Transport & MIB* [2008] EWCA Civ 574 Mr Justice Flaux held that the MIB’s strict and arbitrary three year limitation period imposed in clause 4(3) for bringing a claim infringed the European law principle of equivalence and wrongly denied a minor from bringing a claim when section 28 of the Limitation Act 1980 would have stopped time running in a normal civil action against an identified driver. That was subsequently amended by a supplemental agreement that is only available on request or from the MIB website. However, nothing was done to strike out the arbitrary and draconian strike out penalty for failing to report the accident to the police under clause 4 (c) that clearly infringe the principles that underscore rationale from *Bernaldez*. Then In 2011 the 2003 Agreement was amended again to exclude property damage for the vast majority of claims by the deviously way it defined ‘significant personal injury’ (intended by the European Council simply to refer to an injury of sufficient note to result in an independent record being made of the incident - as a means of enabling Compensating Bodies to counteract the risk of fraud in untraced driver claims) with what is in effect a grievous injury requirement. It achieved this by substituting the natural meaning of ‘significant’ with ‘serious’ by restricting property damage to claims that feature a ‘bodily injury resulting in death or for which 4 days or more of consecutive in-patient treatment was given in hospital, the treatment commencing within 30 days of the accident.’
government’s failings are so egregious and wide-ranging as to be unsustainable in the face of a properly prepared legal challenge.

The inevitability of reform

It is no longer a question of whether there will be reform, only the form it will eventually take: whether by the government’s own initiative or as a result of a succession of legal challenges that apply a European law consistent interpretation of our defective national law provision.

The Department for Transport has revealed that it is planning to amend the geographic scope of the duty to insure and the insurance requirement in Part VI of the Road Traffic Act 1988, in the light of the Vnuk decision. One would expect that a minister acting in good faith in the light of the Delaney decision will remove all the unlawful exclusions and exceptions of liability within the Uninsured and Untraced Drivers Agreements. The shameful fact remains that the minister was warned about these very defects in explicit terms in his own consultation exercise back in February 2013 but chose to do nothing. If the minister confines his reforms to the immediate and obvious implications of Vnuk and Delaney, he will simply be tinkering at the edges of the problem. Profound and widespread revision is necessary if he is to avoid further costly legal challenges in the years ahead.

Recipe for reform

The scale of the reform is indicated by the following non-exhaustive mandatory to do list:

- Removal of the unlawful geographic and technical restrictions in the scope of the duty to insure and the insurance cover required under sections 143, 145, 195 and 192 of the Road Traffic Act 1988 as well as in the corresponding provisions in both MIB Agreements. Regulation 2 of the European Communities Rights Against Insurers Regulations 2002 should have the United Kingdom restriction removed.

- The abolition of every exclusion or restriction of liability to third party victims: whether contained within our UK statutory provision, within the minister’s arrangements with the Motor Insurers Bureau or in the motor insurance policies that the minister is responsible for regulating. This
should encompass revising section 151 (4) of the 1988 Act and discarding the nullifying provision in section 148 and the car sharing exception in section 150. All those offensive and oppressive procedural conditions precedent of MIB liability that enable the MIB to evade any liability to compensate for the most trivial procedural infraction should be excised, along with those absurd exclusion in clause 13 of the 1999 agreement and clause 4 of the 2003 Agreement for failing to report the incident to the police. Indeed any exclusion or restriction of liability not expressly permitted by European law should be removed, with retrospective effect in view of the fact that they have been clearly in conflict with European law since the Bernaldez ruling 1996, in which the UK government intervened unsuccessfully. The common law policy of \textit{ex turpi causa non oratur actio} will need to be reviewed in the light of the Court of Justice’s comments in \textit{Candolin}^{323} and \textit{Churchill Insurance v Wilkinson; Evans v Equity Claims CJEU 01.12.2011 C-442/10}^{324}. The notional wording added to section 151 (8) of the Road Traffic Act 1988 as part of the emergency repair effected by the Court of Appeal in \textit{Churchill Insurance v Wilkinson; Evans v Equity & Secretary of State for Transport} [2012] EWCA Civ 1166 will need to be incorporated into the amended statute and an explanation of precisely what is meant by a proportionate reduction would also be helpful.

- The abolition above involves the abrogation of the common law third party rule in so far as it affects the right of third party motor accident victims to exercise the free standing direct right of action conferred under article 18 of the Sixth European directive on motor insurance. This will require statutory provision to amend section 153 of the 1988 Act and possibly also

\footnotesize

\begin{itemize}
\item The Court of Justice ruled, at paragraph 28 of its judgment in \textit{Candolin}, that ‘\textit{The national provisions which govern compensation for road accidents cannot, therefore, deprive those provisions of their effectiveness’}. It also ruled, in the context of a case where the victims were passengers who had knowingly entered a vehicle driven by someone whom they knew to be intoxicated ‘\textit{It is only in exceptional circumstances that the amount of the victim’s compensation may be limited on the basis of an assessment of his particular case.’}’

\item Where the Court of Justice ruled, in the context of a policyholder who had knowingly permitted an uninsured / unauthorised individual to drive him, that: ‘\textit{national rules, formulated in terms of general and abstract criteria, may not refuse or restrict to a disproportionate extent the compensation to be made available to a passenger by compulsory insurance against civil liability in respect of the use of motor vehicles solely on the basis of his contribution to the occurrence of the loss which arises.’}’ [para 49].
\end{itemize}

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the Third Parties (Rights Against Insurers) Act 2010, when that eventually comes into force. It will require regulation 3 of the aforementioned 2002 Regulations to be amended as it wrongly dilutes the direct right of action by expressly permitting the insurer to raise any defence it has against its policyholder against a third party claimant.

- Attention will need to be given to section 144 of the 1988 which exempts certain legal persons from the compulsory insurance obligation, to ensure that unauthorised use of such vehicles is covered by the MIB Agreements.

- The commonplace practice whereby motor insurers treat statutorily insured claims as uninsured claims under the prejudicial terms of the Uninsured Drivers Agreement 1999 needs to be abolished.

- Minors and other protected parties should no longer be prejudiced by the absence of any effective safeguards for their fair treatment. The minister would be well advised to study the Supreme Court’s judgment in Dunhill v Burgin [2014] UKSC 18. Over the years, many thousands of settlements have been concluded without any independent approval mechanism, raising serious doubt as to their validity.

- All unauthorised deductions from the compensatory entitlement of victims of uninsured and untraced drivers should be abolished and those affected reimbursed.

This seems to be an opportune moment to rescind both MIB Agreements and to substitute them both by a much shorter, clearer codified scheme. The operative provisions for compensating uninsured drivers should be confined to no more than two A4 sides of paper and both agreements need to be in plain English, easily available from a government website and regularly updated. The governance of the MIB could also be improved and made more accountable, as suggested in 2011 by this writer within this very journal325.

325 Why the MIB Uninsured Drivers Agreement 1999 needs to be scrapped, Nicholas Bevan, JPIL [2011] issue no 3.
The Uninsured Drivers Agreement 2015

My original article was submitted on 15 June, since when the Government has announced its new scheme for uninsured drivers. This development warrants further comment by way of a post script.

Don’t be fooled, its business as usual

Any hopes of a Damascene change of mind by the Department for Transport in the wake of the Vnuk and Delaney decisions appear to have been misplaced.

After a delay of more than two years from its aborted 2013 consultation, the Government announced on 6th July that it had agreed a new scheme with the MIB. The new agreement was presented as a fait accompli; coming into effect on 1 August. The timing is noteworthy. The surprise 2013 consultation was announced just weeks before what many in our blighted sector have since dubbed ‘Jackson day’: when our profession was preoccupied fire-fighting the government’s botched implementation of the most extensive and damaging civil justice reforms in living memory. Now, the announcement just happens to coincide with the summer vacation.

The new agreement is misleadingly presented as the product of the 2013 consultation exercise; it is nothing of the kind. It is a chimera made up of (i) the MIB’s original proposals, (ii) the minimum changes necessary to implement the more obvious implications Delaney without risking an outright accusation of bad faith and (ii) new provisions that present the MIB with further opportunities for windfalls that clearly conflict with European law.

The minister has studiously ignored the numerous calls for wide-ranging reform to bring our statutory and extra statutory implementation of the European directive on motor insurance into line with the minimum standards of compensatory protection required under that law. Not only does this new scheme fail to remove all the clear and obvious obstacles to full compliance in its 1999 predecessor but it compounds its default by introducing entirely new infractions.

Some welcome changes

One significant innovation is the excision of the two unlawful passenger exclusion clauses which it was warned about in the consultation responses. Yet these are
presented as being introduced so as to comply with the Court of Appeal’s ruling in Delaney; as though to demonstrate the 2013 consultation was a sham.

Another welcome change includes the removal of the MIB’s ability to strike out valid claims for trivial procedural infractions and the simplification of the claims process, which are both positive steps and they make the agreement that much shorter. This is gratifying for someone who has campaigned for the removal of these pointless and unjust anachronisms for several years\textsuperscript{326}. However, they should never have been permitted in the first place. Nothing has been done to revoke their application to the thousands of claims left to run under the current discredited regime that remains in force for all accidents predating 1 August 2015.

**Serious flaws**

Unfortunately the Uninsured Drivers Agreement 2015 contains a number of serious flaws and basic drafting blunders. These include a number of exclusions of and restrictions in the MIB’s liability to compensate that are not only unjust in so far as they prejudice the legal entitlement of accident victims but they also conflict with European law. Take for example the unlawful concession in clause 6 that allows the MIB to offset life assurance or other such payments triggered as a result of the same accident in circumstances that are ignored under normal civil law quantification rules.

Then there is the flagrant introduction of the terrorism exclusion in clause 9. It doesn’t make any sense in policy terms. Presumably car bombs are the chief threat it envisages but as such use is clearly inconsistent with the normal function of a motor vehicle it is excluded from the insurance requirement under European law anyway. What possible public good is achieved from the arbitrary distinction that allows a claim by a child cyclist who is grievously injured by an uninsured get-away driver escaping from a bank heist where a cashier has been murdered but not where the uninsured driver is an anti-abortionist lunatic who has just assassinated a physician at a local clinic?

There are also grave concerns about the way clause 17 removes the right to appeal the reasonableness of the MIB’s decisions to the Secretary of State for

\textsuperscript{326} See Nicholas Bevan,“Why the Uninsured Drivers Agreement 1999 needs to be scrapped” [2011]J.P.I.L123.
Transport and substituting this with a paper appeal process to an arbitrator whose decision will be final and determined on the strict wording of the agreement without reference to the European law context. This offends basic rule of law and HRC principles. So it has been distressing to see at least one well known practitioner in this field provide an ill considered endorsement of the new regime.

We have been here before

This agreement’s much discredited predecessor was introduced in 1999 without proper consultation and that agreement contained numerous drafting errors and bodges along with provision that conflicted with the minimum standards of protection required under the European directives on motor insurance. See my earlier articles here and elsewhere. That agreement needed immediate rectification and a number of its provisions were later successfully challenged and either amended by the courts applying a European law consistent interpretation or they were the subject of a award in damages against the Secretary of State for Transport under Francovich principles.

It seems that history is repeating itself. The minister has, once more without proper consultation, approved a bodged scheme in which the MIB has abrogated to itself powers to exclude claims and to restrict its liability in circumstances that clearly contravene European law.

Call to action

The Government is clearly unequal to the task of standing up to the undue influence exerted by the powerful insurance lobby. It is therefore down to the legal profession to uphold the legal rights of our fellow citizens and to challenge the infractions in the new 2015 Agreement and its predecessor as well as the numerous breaches of European law that infest Part VI of the Road Traffic Act 1988, the EC Rights Against Insurers Regulations 2002 and the Untraced Drivers Agreement 2003.

Our national law provision is so defective that it cannot be taken at face value. Competence in this area of practice requires a working knowledge of basic European law principles, a detailed knowledge of the consolidated directive on motor insurance (2009/113/EC), the extensive corpus of Court of Justice rulings
interpreting its meaning and effect and the relevant remedies under European law.

The author's public training on the new Uninsured Drivers Agreement 2015 is provided through the Association of Personal Injury Lawyers.

The author

Nicholas Bevan is an award winning solicitor, legal commentator and mediator. He has been campaigning for extensive reform to our statutory and extra-statutory provision for motor accident victims for many years and his blog, Nota Bene (http://nicholasbevan.blogspot.co.uk/), is devoted to this issue. In 2013 he was consulted by the Law Commission on the reforms needed. His numerous articles in the Journal Of Personal Injury Law and The New Law Journal anticipated Vnuk and Delaney.
Ongoing developments in the United Kingdom resulting from the Government’s failure to fully implement the sixth European directive on motor insurance (2009/103/EC)

Introduction

The European Council Directive 2009/103/EC on motor insurance (the Directive) requires every member state to ensure that the compensatory entitlement of individuals who sustain injury or other loss caused by the use of motor vehicles in their territory should safeguarded. They are to realise this objective primarily through civil liability insurance. Where the responsible vehicle is uninsured or unidentified the compensatory safeguard is achieved by the adoption or inception of a compensatory body to assume the role of an insurer.

It is the responsibility of member states not only to implement that law but to make sure that none of its domestic laws and provision undermine the effectiveness of the Directives’ legislative aims. It is well known that a directive is only binding as to the result to be achieved, they often confer a wide discretion on the member states as to how their aims are implemented. This is probably the

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327 The BILA Journal is the official journal of the British Association of Insurance Lawyers
328 First published by BILA Journal online in January 2016, and republished in Italy in Direitto Del Mercato Assicurativo E Finanziario, Edizioni Scientifiche Italiane, issue 1 of 2016
330 Case C 537/03 Candolin and Others [2005] ECR I 5745, paragraph 17
331 Article 288 of the Treaty on the Functioning of the European Union 2012/C 326/01
The basic premise is that citizens depend on their member state transposing a directive into its domestic law provision before they can assert the rights conferred on them through it.

To properly implement a directive member states must ensure that the legal rights conferred under it are transposed in such a form as to be sufficiently precise and clear and that individuals are made fully aware of all their rights and, where appropriate, that they can rely on them before the national courts. Most personal injury representatives are aware of the Directive, at least in broad terms, and that our national law provision in this area is supposed to implement this European law. However what is not so well known is the egregious extent to which the United Kingdom’s (UK) implementation fails to meet the minimum standard of protection required under this European law. One explanation for this might be a trusting faith in the Department for Transport’s good offices. Another might have something to do with the fact, after lecturing on this theme for nearly a decade now, that the vast majority of personal injury practitioners this author has encountered have not thought it necessary to acquaint themselves the Directive, still less the extensive body of rulings from the Court of Justice of the European Union (CJEU) that has been so instrumental in shaping the significance and extent of its scope.

This paper focuses on two particular aspects of the Directive: namely the third party motor insurance obligation, imposed under Article 3 and the provision for authorised compensating body for victims of unidentified and uninsured vehicles under Article 10. It will begin by summarising the minimum standard of compensatory protection imposed by the Directive for third party victims of motor accidents, explaining how this has evolved into a widely scoped protective principle. It will then briefly outline the UK’s domestic transposition of this law. A comparative law analysis is then offered of some of its provisions to indicate the nature of the gaps in protection that span the UK’s entire national law


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transposition of the Directive, before moving on to the various ways in which these infractions are being challenged. Finally, it will consider some emerging issues in this dynamic area of the law and it will outline the alternative routes to redress for individuals adversely affected by the UK’s incomplete implementation.

**The Directive**

The Directive creates the legal framework for ensuring that persons injured or suffering loss caused by the use of a motor vehicle, wherever registered in the Community, are guaranteed that they will either be able to recover their full compensatory entitlement from the responsible vehicle’s insurers or, failing that, from the relevant authorised compensating body set up in each member state for compensating victims of uninsured or unidentified vehicles. These legislative objectives have an important role in furthering the European Union’s policy of promoting the free movement of persons, goods, services (and implicitly, vehicles) within the European Union. The Directive does not seek to alter the domestic laws and rules relating to civil or criminal liability.

**An evolving legislative scope**

The Directive consolidates five earlier directives and it is the product of an evolving policy to facilitate the free movement of people and vehicles.

**First tentative steps**

The process began with Council Directive 72/166/EEC (the First Directive) which first set out in broad terms the obligation to take out civil liability insurance for motor vehicle use within the relevant territory of each member state. This measure, which survives as article 3 of the (sixth) Directive, had relatively limited ambitions.

Article 3 of the First Directive provided:

> 1. Each Member State shall, subject to Article 4, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the
liability covered and the terms and conditions of the cover shall be
determined on the basis of these measures.

2. Each Member State shall take all appropriate measures to ensure that
the contract of insurance also covers: - according to the law in force in
other Member States, any loss or injury which is caused in the territory of
those States;

Article 1 defined a ‘vehicle’ as:

‘any motor vehicle intended for travel on land and propelled by mechanical
power, but not running on rails, and any trailer, whether or not coupled’

This Article 3 cover was restricted to personal injuries, initially.

The First Directive also required member states to designate a national guarantee
fund to be set up for each member state, to (i) facilitate the free movement of
people and vehicles throughout the European Community (by discarding the
need to display a green card and to take out separate cover to driver abroad
within the EC) and (ii) facilitate the compensation of victims in cross border claims
within the European Union.

The UK was at this stage arguably ahead of the game, so to speak, in its national
law provision for guaranteeing the compensatory entitlement of victims of road
accident. Compulsory insurance had been in force since 1930 and the first
Uninsured Drivers Agreement dated back to 1946.

Unfortunately the First Directive provided a wide margin of discretion on member
states as to how its legislative objective was implemented both in form and
substance. This resulted in considerable disparities in the levels of protection
between the different member states in a number of areas. For example, there
was no attempt to harmonise the way member states defined the terms of cover.
This left them free to permit contractual preconditions to cover\textsuperscript{333}; restrictions in
cover\textsuperscript{334}; exclusions of liability\textsuperscript{335}, financial limits to the cover and to determine the

\textsuperscript{333} For example, relating to the state of health of the user or requiring the vehicle insured
to be a road worthy.

\textsuperscript{334} For example, restricting the cover to social and domestic use. In some jurisdictions,
third party cover for passengers was confined only to those parts of the vehicle equipped
with seating.

\textsuperscript{335} For example, where the driver responsible was intoxicated or claims by passengers
or relatives of the responsible driver.
amount of any excess. Whilst this wide degree of autonomy was entirely justifiable between the contracting parties themselves, as it enabled insurers to offer differentiated pricing of their policies, it left third party victims exposed to considerable uncertainty because their entitlement to cover was dependent on a contract to which they were neither a party and on circumstances that they in a position to control or influence. Furthermore this wide discretion on implementation also permitted significant variations in the degree of protection afforded across the European Community.

The Second Directive

As these variations were perceived as undermining the effectiveness of the legislative aims of this legislation, the Second Council Directive 84/5/EEC (the Second Directive) had three principle aims in this regard. The first being to impose a degree of conformity in the amount of cover; the second, to restrict the ability of the contracting parties (the insurer and policyholder) from excluding their liability to the third party victims and the third, was to require each member state to approve or institute a compensating body responsible for meeting the claims of victims of uninsured and unidentified drivers.

As to the first aim, Article 1 extended the third party cover to embrace property damage and it imposed minimum financial levels of cover and set a limit on the policy excesses.

The second objective was addressed in Article 2(1) which was drawn in very specific terms to nullify the effect of certain types of exclusion clause, as follows:

‘Each Member State shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy

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336 Property damage is now incorporated into the definition of insurance within the Article 3 of the Directive.
337 Third party excesses were subsequently abolished by the Fifth Directive, save in relation to a claim in respect of an unidentified vehicle where the compensating body can apply a property damage excess of EUR 500 where it cannot exclude such loss entirely under Article 6. This provision survives in Article 10.3 of the Sixth Directive.
338 This survives as Article 13.1 of the Directive.
issued in accordance with Article 3(1) of Directive 72/166/EEC, which excludes from insurance the use or driving of vehicles by:

- persons who do not have express or implied authorisation thereto, or
- persons who do not hold a licence permitting them to drive the vehicle concerned, or
- persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned,

shall, for the purposes of Article 3(1) of Directive 72/166/EEC, be deemed to be void in respect of claims by third parties who have been victims of an accident.’

The same provision continued by specifying a single permitted exclusion of liability:

‘However the provision or clause referred to in the first indent may be invoked against persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen.’

This produced a degree of ambiguity. Whilst, on the one hand, there is a strong argument to the effect that, properly construed in a European purposive manner, Article 2(1) requires every other statutory or contractual exclusion to be deemed void against third parties – as from the implementation date set for the UK, in 1987, on the other hand, the natural implication of a finite list of exclusions deemed to be void against third parties is that all other exclusions are prima facie permitted.

However, an important and possibly decisive indication is provided within the prefatory recitals, of which the following is particularly noteworthy:

‘Whereas it is in the interests of victims that the effects of certain exclusion clauses shall be limited to the relationship between the insurer and the

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339 This is also included in Article 13.1.
340 The reference to “the first indent” is to the immediately preceding paragraph quoted above that nullifies the effect of the three categories of contractual or statutory exclusions against third party victims.
341 Recitals are intended to explain the rationale underlying the objectives set out in the articles of a Directive.

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person responsible for the accident; whereas, however, in the case of vehicles stolen or obtained by violence, Member States may specify that compensation will be payable by the aforementioned body;’

Article 3 of this Second Directive provided that ‘members of the family of the insured person, driver or any other person who is liable under civil law’ should not be excluded from cover in respect of their personal injuries solely on account of that relationship. Here again, the draftsman ship is somewhat ambiguous as if the natural meaning of the recital quoted above is that Article 2 should be construed as limiting the discretion of member states to permit any other exclusion of liability, what purpose does Article 3 serve other than perhaps to illustrate the principle?

The third measure was to require the authorisation of a compensating body in each member state. Article 1 provided the following:

‘4. Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied ...

The victim may in any case apply directly to the body which, on the basis of information provided at its request by the victim, shall be obliged to give him a reasoned reply regarding the payment of any compensation.

However, Member States may exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured.

Member States may limit or exclude the payment of compensation by that body in the event of damage to property by an unidentified vehicle.

...

Furthermore, each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by this body, without prejudice to any other practice which is more favourable to the victim.’
It is now well established that the compensating body’s role is governed by the European law principles of equivalence and effectiveness\textsuperscript{342}. These principles require member states to ensure that proceedings intended to ensure the legal protection of rights which individuals derive from Community law must be no less favourable than the rules governing similar domestic actions (equivalence) and neither must they render virtually impossible or excessively difficult the exercise of such rights (effectiveness). This was specifically considered by the Court of Justice in relation to the UK’s compensating body in \textit{Evans v Secretary of state for Transport and the Motor Insurers Bureau} [2003] where the court ruled:

‘[27] It is thus clear that the Community legislature’s intention was to entitle victims of damage or injury caused by unidentified or insufficiently insured vehicles to protection equivalent to, and as effective as, that available to persons injured by identified and insured vehicles.’

...  

‘[34] 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, provided that that agreement is interpreted and applied as obliging that body to provide victims with the compensation guaranteed to them by the Second Directive and as enabling victims to address themselves directly to the body responsible for providing such compensation.’

On the equivalency principle, the Court ruled that the compensating body did not necessarily have to be on the same footing as a defendant of an identified and sufficiently insured vehicle\textsuperscript{343}. It remains to be seen how the subsequent introduction of the Article 18 direct right\textsuperscript{344} has altered this, as this now offers a direct procedural comparator that did not exist at the time of the \textit{Evans} ruling.

It is also worth noting that the Second Directive sets out the only two permitted exceptions\textsuperscript{345} to the obligation to protect and guarantee payment of the

\textsuperscript{342} See \textit{Evans v Secretary of State for Transport and MIB} 2003 ECJ Case C-63/01, paras 45 and 46.

\textsuperscript{343} \textit{Evans}, para 28.

\textsuperscript{344} The direct right was first introduced in Article 3 of the Fourth Directive 2000/26/EC.

\textsuperscript{345} Whilst these are the only permitted exclusions of any liability, certain restrictions in liability are allowed by the directives, such as (i) financial limits exceeding the minima prescribed by Article 2 of the Second Directive as updated by Article 1 of the Fifth Directive (now set out in article 9 of the Sixth Directive) and (ii) the property damage...
compensatory entitlement of accident victims. Both exceptions (one restricted to the insurance policy, the other to the compensating body’s duty to compensate) are restricted to passengers who bear a high degree of responsibility for their loss by agreeing to ride in a motor vehicle either in the knowledge that it has been stolen or that it is uninsured.

**The Third Directive**

It is clear from the recitals to the Council Directive 90/232/EEC (the Third Directive) that the First and Second Directives still allowed too wide a discretion for member states to introduce their own idiosyncratic variations. This directive continued the work of its immediate predecessor in restricting the discretion of individual member states to restrict or exclude liability.

In its third recital it acknowledged the fact that considerable disparities existed in the insurance cover provided for under different member states’ national law. Its fifth recital went on to declare the following aim:

‘Whereas there are, in particular, gaps in the compulsory insurance cover of motor vehicle passengers in certain Member States; whereas, to protect this particularly vulnerable category of potential victims, such gaps should be filled.’

In its sixth recital it declared an objective of removing any uncertainty as to the geographic scope of insurance policies required by article 3 of the First Motor Insurance Directive (MID); cover should not be restricted to the territory of individual member states. This does not appear to be addressing the topical scope of cover within individual member states territory; it’s aim is extra-territorial. It explains the requirement in Article 2 that a policy issued in one member state should extend to the entire territory of the Community, without the need for a separate premium charge.

exclusion permitted to the compensating body in respect of unidentified vehicles by Article 1.4 of the Second Directive, as amended by Article 2 of the Fifth Directive that removed this exclusion where a significant injury had been sustained in the accident, which now survives in Article 10.3 of the Sixth Directive.

346 It is arguable that the very existence of this recital militates against a construction of Article 2(1) of the Second Directive as imposing an outright ban on any exclusions of liability in cover other than that expressly provided there. However, it is clear that the Third Directive has an entirely different focus, such as the need to harmonise the provision for the territorial scope of cover in cross border incidents within the Community. It does not mention exclusions of liability.
In its thirteenth recital it explains its objective of extending the mandatory cover to all passengers in terms of providing ‘a high level of consumer protection’. This indicates that, by this stage at least, directives were perceived as not only providing protection for accident victims but also ‘a high level of consumer protection’ to the individuals purchasing the third party motor insurance cover required by article 3 of the First MID\(^{347}\).

Article 1 of the Third Directive provides:

‘Without prejudice to the second subparagraph of Article 2(1) of Directive 84/5/EEC, the insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle.’

The recitals to the Second Directive set out two important underlying principles:

(i) to ensure the free movement of vehicles normally based on territory of the Union, as well as the people on board and

(ii) to ensure that that accident victims caused by those vehicles receive comparable treatment.

These first three directives introduced the concept of a European wide requirement for third party motor cover and then proceeded to harmonise some of this provision across the different member states by locking down the ability of individual member states to allow their own limitations, exclusions and restrictions in the compensatory protection afforded to third party victims. Their effect was to oblige all motor vehicles in the European Community to be covered by compulsory third party insurance and ensure the abolition of border checks on insurance so that vehicles can be driven as easily between Member States as within one country. They also progressively enhanced the compensatory safeguards for victims of accidents, including those caused by unidentified or unidentified vehicles. All passengers in the vehicle (including the family of the driver) were expressly required to be covered by compulsory insurance.

**The Fourth Directive**

\(^{347}\) The use of the phrase ‘consumer protection’ is missing in the Sixth Directive 2009/103/EC.
Council Directive 2000/26/EC (the Fourth Directive) established mechanisms to increase the speed with which claims are settled for accidents in any given Member State involving a victim who is a citizen of another Member State (“visiting victims”). This complements the first three Directives and it also ensures that local victims should be compensated for accidents where the responsible party is from another Member State.

Recital 27 introduced the first mention (omitted from the first three MID) of subrogated claims. It provides that subrogated parties (e.g. other insurance undertakings or social security bodies) should not be entitled to present the corresponding claim to the compensation body. There is no corresponding provision in the operative part of the Fourth MID. It is unclear whether this applies only to the direct right conferred under the Fourth MID or generally; quite possibly the latter. The provision is incorporated in the Sixth MID as recital 49.

Article 18 conferred a direct right of action against the responsible party’s motor insurers. This was transposed into UK law by the European Community Rights Against Insurers Regulations 2002.

The Fifth Directive

The Council Directive 2005/14/EC (the Fifth Directive) increases the minimum compensatory levels and it extends the right of direct action provided for by the Fourth Directive to all injured victims, whether the accident occurs at home or abroad in a foreign EU or EEA member state. It also amended the Third Directive by inserting the following provisions:

‘Member States shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy which excludes a passenger from such cover on the basis that he knew or should have known that the driver of the vehicle was under the influence of alcohol or of any other intoxicating agent at the time of an accident, shall be deemed to be void in respect of the claims of such passenger.\(^{348}\)

‘The insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover personal injuries and damage to property suffered by pedestrians,\(^{348}\)

\(^{348}\) Article 4.1 of the Fourth Directive.
cyclists and other nonmotorised users of the roads who, as a consequence of an accident in which a motor vehicle is involved, are entitled to compensation in accordance with national civil law. This Article shall be without prejudice either to civil liability or to the amount of damages.  

Unlike its immediate predecessor, the Fifth Directive does address exclusions of liability. This time in the context of declaring void exclusions of liability to passengers who knew or should have known that the driver was intoxicated. Whilst this might at first glance appear to cast doubt on the absolute and free standing nature of the compensatory cover required for third party victims, it is just as arguable that this is no more than an emphatic statement. This is because it is highly likely that it was made in the knowledge that the Court of Justice was at that time considering a case on all fours with this scenario, namely: Katja Candolin and Others. v Vahinkovakuutusosakeyhtiö Pohjola and Others [2005].

Candolin featured a claim where the responsible driver and all the other passengers were drunk and where it was established that they knew the driver was highly intoxicated. Under the relevant Finnish law applicable to the date of the accident such culpable knowledge coupled with their conduct in allowing themselves to be driven by someone in that state constituted gross negligence and furthermore it which allowed the third party motor insurers to exclude any liability to compensate them, unless special circumstances justified a different outcome.

The Court of Justice, after quoting extensively from its earlier ruling in Ruiz Bernaldez [1996] ruled as follows. Firstly, that in permitting an exception to the general compensatory principle against a passenger who knows the vehicle is stolen, as this “establishes a derogation from a general rule, the second subparagraph of Article 2(1) of the Second Directive must be interpreted strictly”.  

349 Artile 4.2 of the Fourth Directive.
350 See recitals 15 and 16 and the extract quoted above from the Fifth Directive.
351 Katja Candolin and Others. v Vahinkovakuutusosakeyhtiö Pohjola and Others [2005] CJEU Case C-537/03
352 The Finnish law on motor vehicle insurance (Liikennevakuutuslaki (279/1959), Paragraph 7(1) and (3).
353 Ruiz Bernaldez [1996] CJEU (C-129/94) E.C.R. I-1829, see the commentary on this case below under the Purposive interpretation heading.
Secondly, that member states “must exercise their powers in compliance with
Community law and, in particular, with Article 3(1) of the First Directive, Article
2(1) of the Second Directive and Article 1 of the Third Directive, whose aim is to
ensure that compulsory motor vehicle insurance allows all passengers who are
victims of an accident caused by a motor vehicle to be compensated for the injury
or loss they have suffered.” Thirdly, that national provisions of member states
which govern compensation for road accidents “cannot deprive the directives on
motor insurance of their effectiveness”.

Accordingly these principles, based on the first three directives, preclude any
national rule that allowed an insurer to refuse to compensate a third party victim
or to limit the compensation in a disproportionate manner on the basis of the
passenger’s contribution to the injury or loss he has suffered.

Although the Court’s judgment on 30 June 2005 post dated the passing of the
Fifth Directive on 11 May 2005 by several weeks, the accident date in April
1997 required the Court to decide the issue without reference to the Fourth
Directive. In the circumstances it would seem that Article 4.1 of the Fifth Directive
in 2005 is no more than an elucidatory statement of existing principles based on
the first three directives.

Consolidation not rearticulation

One of the problems with the present form of the (Sixth) Directive (2009/103/EC),
is that it is essentially a reassemblage of its five predecessors. For the purposes
of this paper, its core provisions are to be found first in Article 3 which repeats
the insurance obligation\(^{354} \) from the First Directive and secondly in Article 10 that
defines the role of the authorised body responsible to compensating victims of
uninsured and unidentified vehicles\(^ {355} \). One must look to Article 9 for the
minimum levels of cover\(^ {356} \); Article 12 for the wide and inclusive categories of
passenger and ‘other road users’ covered by the protective principle\(^ {357} \); Article 13
for the permitted and void exclusions\(^ {358} \) and finally Article 18 for the direct right of

\(^{354}\) Originally conferred under Article 3 of the First Directive.
\(^{355}\) Originally conferred under Article 1.4 of the Second Directive.
\(^{356}\) Originally imposed by Article 1 of the Second Directive
\(^{357}\) Introduced under both the Third and Fifth Directives.
\(^{358}\) Originally set out in Article 2 of the Second Directive

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This approach has perpetuated certain differences of emphasis and terminology, such as the retention of potentially restrictive terms introduced in the later Directives such as ‘accident’ or ‘road’ that were absent from the First. Certain other provisions, particularly the list of exclusions deemed void against third party victims in Article 13 and the clarification of the inclusive nature of the categories of third party victims subject to the protective principle in Article 12 - now appear rather anachronistic if not entirely redundant in the light of the Court of Justice rulings interpreting the meaning and scope of the protective purpose.

A purposive interpretation

The Directive cannot be properly understood without an appreciation of to the extent to which its legislative objectives have been further enhanced by the Court of Justice’s purposive interpretation. Three judgments are of particular note.

Bernaldez

The first landmark ruling was in Ruiz Bernaldez [1996] CJEU (C-129/94) E.C.R. I-1829, nearly two decades ago. That case featured a claim where a drunk driver crashed his car in Spain causing extensive property damage. A civil award of damages was made within the prosecution proceedings that followed. The driver sought indemnity from his insurers. However, the vehicle’s insurance policy excluded cover where the driver was intoxicated and this was permitted under the national law. At first instance, his insurers were absolved from any liability to indemnify the policyholders’ accident damage and so the third party was unable to look to the motor insurers to recover their loss.

That decision was appealed and the case was referred to the CJEU for guidance. It will be recalled that, Article 2(1) of the Second Directive expressly provided that certain specific exclusions of liability were void as against a third party claimant. It also set out the single instance where a policy exclusion is permitted by the Directives: namely where the insurer can prove that the passenger knew that the vehicle is stolen.

In essence, what the referring Court sought to establish in Bernaldez was whether the list of invalid policy exclusions set out in the Directive was exhaustive or

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359 Introduced under the Fourth and Fifth Directives.
illustrative. Put another way, were any other policy exclusions, not specifically made void by article 2(1), permitted by the Directives?

The Court ruled, as follows:

- Article 3(1) of the First Motor Vehicle Insurance Directive, as developed and supplemented by the Second and Third MID, must be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all the damage to property and personal injuries sustained by them.\(^{360}\)

- That this interpretation precludes an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle\(^{361}\).

- That the list of void exclusions merely serves to illustrate the comprehensive nature of the insurance requirement imposed by article 3(1)\(^{362}\).

- That any other interpretation would have the effect of bringing about disparities in the treatment of victims depending on where the accident occurred, which is precisely what the directives intend to avoid\(^{363}\).

- That this did not preclude the insurer pursuing a claim against its insured\(^{364}\).

So according to Bernaldez, article 2(1) of the Second Directive did not confine the instance of void exclusions to those instances specifically listed\(^{365}\). Instead, the comprehensive nature of the insurance requirement imposed by article 3(1) of the First MID was emphasised. The Court ruled that subject to the single instance of the stolen vehicle exception, insurers could not rely on a contractual or statutory exclusion of their liability to compensate a third party victim.

\(^{360}\) Bernaldez, para 18.
\(^{361}\) Bernaldez, para 20.
\(^{362}\) Bernaldez, para 21.
\(^{363}\) Bernaldez, para 19.
\(^{364}\) Bernaldez, paa 22.
\(^{365}\) Contrast this interpretation with that given by the UK Court of Appeal in EUI v Bristol Alliance Partnership in 2013, considered below under The United Kingdom’s transposition / Limitations in cover headings.
A raft of subsequent Court of Justice rulings have consistently and uniformly endorsed the general application of the comprehensive principle first propounded in *Bernaldez*. Its ratio has been followed and recited with approval in *Ferreira v Companhia de Seguros Mundial Confiança* SA 2000 CJEU (Case C-348/98) ECR 1-6711; *Candolin* [2005] CJEU (Case C-537/03) ECR I-5745 (where its passages were quoted from extensively); *Farrell v Whitty* 2007 CJEU (Case C-356/05); and more recently in *Churchill v Benjamin Wilkinson and Tracy Evans* [2011] CJEU (Case C-442/10).

The case of *Farrell* is particularly significant in the way it resulted in the Irish Republic’s compensating body being held liable to compensate a victim of an uninsured driver in circumstances where the national law did not require third party cover for those parts of a vehicle not equipped for seating. In the words of one English High Court judge, ‘*Farrell is the taking of the final short step - the express application of the comprehensive code principle to Article 1.4 cases* - left untaken in *Candolin*’.  

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366 In *Ferreira* the Court of Justice ruled (i) that a Portuguese law that allowed liability to be apportioned to take account of the responsibilities of the parties involved did not infringe the protective principle of this insurance.

367 See above for the commentary on *Candolin* under The Fifth Directive heading.

368 *Farrell* concerned a passenger claim that had been rejected by the Irish Republic’s compensating body on the ground that as the victim was travelling in part of a van not designed to accommodate passengers. The Irish MIB claimed that it was not liable to compensate because the Irish legislation imposing compulsory third party insurance did not extend to that part of the vehicle. The Court of Justice ruled that the right to derogate from the obligation to protect accident victims is defined and circumscribed by the directives on motor insurance and that member states are not entitled to introduce additional restrictions to the compulsory insurance cover to be accorded to passengers under that Community law.

369 In *Churchill* the Court of Appeal in the UK was confronted by two competing statutory provisions in the Road Traffic Act 1988. Section 151(5) imposed a statutory duty on motor insurers to satisfy third party claims and S151(8) conferred on such an insurer a right to recover that outlay from its policyholder. The case featured a claimant who was both policyholder and passenger where it was established that he knew his driver was uninsured. Here the Court of Justice referred to *Bernaldez* and *Candolin* and ruled that the only situation in which a third party who has been a victim of an accident may be excluded from insurance cover is that specified in the second subparagraph of Article 2(1) of the Second Directive (ie where the passenger knew it was stolen – now set out in Article 13 of the Sixth Directive). According any national rule that automatically excluded such a passenger from cover was not permitted.

370 i.e. responsible to compensate victims of uninsured and unidentified vehicles under Article 10 of the Directive.


372 Jay J in *Delaney v Secretary of State for Transport* [2014] EWHC 1785 (QB), in which the UK Government was held liable under Francovich principles for permitting its...
The second landmark judgment was delivered in September in Damijan Vnuk v Zavarovalnica Triglav d. d. [2014] CJEU (Case C-162/13). Its significance derives from two aspects of the judgment, the first relates to the way it elevated the status of the protective purpose of the directives on motor insurance, the second is the holistic manner in which it defined the scope of the insurance obligation itself.

On the first point, the Court of Justice ruled that the Directives on motor insurance have a dual purpose, firstly of facilitating free movement of people and vehicles throughout the Union and secondly the protection of those affected by the use of motor vehicles. It went on to indicate that that the latter social policy aim was of equal importance to its twin objective.

The case featured a Slovenian farmworker had been knocked off a ladder by a reversing tractor and trailer, whilst he was stacking bales of hay in a barn loft. The incident occurred in a farm yard on private property. The claim against the driver’s motor insurers failed at first instance. It held that the duty to insure did not extend to the use of motorised machinery. When he appealed the Slovenian Supreme Court referred the case to the Court of Justice of the European Union to determine whether the duty to insure ‘the use of vehicles’ within the meaning of Article 3(1) of the First Directive on motor insurance (72/166/EEC) covered the accident circumstances.

The Court of Justice, after considering and explaining the importance of the protective purpose of the directives, proceeded to rule that the accident circumstances were capable of falling within the scope of insurance cover required under the directives. It also ruled that even though the tractor was being used as a piece of farm machinery and not to transport people, that use was covered by the motor insurance obligation, which extended to ‘any use of a vehicle that is consistent with the normal function of that vehicle’.
Prior to Vnuk it had been feared by some that the reassembled provisions within the codifying Sixth Directive may have introduced a degree of unwelcome inconsistency in the way they set out the protection to be afforded to passengers and other especially vulnerable categories of victim set out in within Article 12 of the Directive (see under Consolidation not rearticulation above). This is because sub paragraph 3 of that Article states:

‘The insurance referred to in Article 3 shall cover personal injuries and damage to property suffered by pedestrians, cyclists and other non-motorised users of the roads who, as a consequence of an accident in which a motor vehicle is involved, are entitled to compensation in accordance with national civil law.’ 373

It is worth noting that the use of the term ‘road’ was not employed throughout the first three EU Motor Insurance Directives that introduced and then refined the concept of compulsory third party insurance. However, post Vnuk, it would seem that Article 12 is to be construed as amounting to no more than a non-exclusive illustration of the type of cover to be included within Article 3, in much the same way that the list of void exclusions within Article 13 has been held by the CJEU to be a non-exclusive reaffirmation of Article 3’s predecessor (Bernaldez, para 21). In which case it would seem that the qualified nature of the compensatory protection under our National law and its restrictive territorial scope conflicts with the absolute and extensive remit of the EU law requirement.

Csonka

Gábor Csonka v Magyar Állam [2014] CJEU (Case C-409/11) was a reference from the Hungry to the CJEU concerning a number of cases where ostensibly insured motorists found themselves personally liable for the claims arising out of the road accident that they had caused because their motor insurer, MÁV General Insurance Company, became insolvent374. The victims sought to recover their compensatory entitlement from the Hungarian Article 10 authorised body375. The Hungarian government wanted to know whether the directives were intended to

373 Bold text added for emphasis.
374 In the UK when an insurer goes bust its liabilities are met in full by the FSA under the Financial Services & Markets Act 2000. Independent Insurance and Quinn were covered by a similar scheme under the Policyholders Protection Act 1975.
375 The Kártalanítási Számlát Kezelő MABISZ GKI.

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confer a complete long stop guarantee or whether (what is now the article 10 duty to compensate) was restricted in a way that would prevent recovery from their compensating body.

The Court ruled that a member state’s obligation under Article 3 of the First (and Sixth) Directive is to ensure that the use of motor vehicles in its territory is insured against civil liability at least to the minimum levels prescribed under the Directive. This had been complied with. The obligation of the compensating body to compensate under Article 10 is confined to specific, clearly identified, sets of circumstances: first, and in the context of this case, to compensate a victim of motor vehicle use of ‘a vehicle in respect of which no insurance policy exists’; secondly, where the vehicle responsible is unidentified. Clearly in the \textit{Csonka} case a policy of insurance did exist. The Hungarian compensating body was not therefore obliged to compensate victims of policyholders whose insurers have become insolvent.

The significance of this case lies in the fact that that the Court of Justice found it necessary to define the circumscribed role of the compensating body. In paragraph 31 it stated:

‘As regards the determination of the actual circumstances in which the insurance obligation laid down in Article 3(1) of the First Directive may be regarded as not having been satisfied, it is significant – as the Advocate General stated in point 32 of his Opinion – that the European Union legislature did not confine itself to providing that the body must pay compensation in the event of damage caused by a vehicle for which the insurance obligation has not been satisfied in general, but made it clear that that was to be the case only in relation to damage caused by a vehicle for which the insurance obligation provided for in Article 3(1) of the First Directive has not been satisfied, that is to say, a vehicle in respect of which no insurance policy exists.’

This suggests that the Article 10 compensating body is not intended to provide a catch-all fund to meet claims where some motor insurance is in place but it is inadequate to meet the risk that has eventuated. The compensating body’s role

\footnote{Csonka, para 31.} \footnote{Csonka, para 30.}
is confined to situations where the vehicle responsible has absolutely no insurance in place at all or where an insurer has excluded liability to passengers who know the vehicle has been stolen and the insurers are able to prove this. The corollary of this is that provided the vehicle responsible for causing the third party victim’s loss or injury has some insurance in place, then regardless of its contractual liability to its policyholder, its third party cover must be good for any use actually made of the vehicle. Accordingly, insurers cannot use the compensating body, whether as a mutualised fund or otherwise, to compensate victims of insufficiently insured vehicles or in situations where they have cover in place notwithstanding that the policyholder is otherwise in breach of a policy term that would otherwise entitle the insurer to avoid the policy\textsuperscript{378}.

The implication of \textit{Bernaldez} and \textit{Csonka} combined, augmented by the new gloss bestowed on the protective purpose by \textit{Vnuk}, means that the compensatory protection afforded to third party victims of motor vehicle use under Article 3 of the Directive is a free-standing entitlement under European law. This is consistent with the recital considered above in the Second Directive\textsuperscript{379}, now incorporated in the Sixth Directive as Recital 15.

\textsuperscript{378} The only conceivable exception to this principle is the Article 13.1 permitted exception that can be relied on against a passenger whom the insurer can prove voluntarily entered the vehicle in the full knowledge that it was stolen.

\textsuperscript{379} ‘Whereas it is in the interests of victims that the effects of certain exclusion clauses shall be limited to the relationship between the insurer and the person responsible for the accident.’

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The culminating principles

When the Directive is read in the light of the underlying principles that feature in the *Bernaldez* and *Vnuk* judgments, its various provisions are capable of being distilled into the following colligate propositions:

**On the duty to insure and the third party cover required under Article 3**

1. Third party cover must be good for:
   - Any motor vehicle conforming with the article 1 definition
   - Any use consistent with the normal function of the vehicle
   - Anywhere on land

2. The duty to insure and the scope of cover are coextensive

3. Member states have no discretion to introduce new restrictions, exclusions or limitations.
   - Only one exclusion of cover is permitted: this applies to passenger who voluntarily enters the vehicle knowing that it has been stolen.

**On the Compensating Body—Article 10**

1. The compensating body has a strictly circumscribed role. It can only deal with:
   - Unidentified vehicle claims, or
   - Claims where no insurance in place at all

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380 The Article 1 definition of "Vehicle" means any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled.

381 *Vnuk*, paras 56 and 59.

382 *Vnuk*, para 59.

383 This is the inescapable implication of *Bernaldez*, *Candolin*, and *Farrell* and it is subject only to the single exception permitted by Article 13.1 of the Directive.

384 See ante, for the commentary on *Bernaldez* and *Candolin*.

385 *Churchill Insurance Company Limited v Benjamin Wilkinson and Tracy Evans v Equity Claims Limited* [2011] CJEU Case C-442/10, para 41; *Csonka*, paras 31 and 32.
o Subject only to the passenger exclusion that applies to someone who voluntarily enters the vehicle knowing that it is uninsured

2. It must compensate at least up to the level of TP cover requirement for identified insured drivers\textsuperscript{386}

3. It must apply EU law principles of equivalence and effectiveness\textsuperscript{387}

It follows from the above that member states retain a relatively wide discretion as to how they choose to implement the Directive and whilst it does not directly interfere with the autonomy of the insurer and policyholder to agree terms of cover between themselves, when it comes to the substantive law rights that this cover confers on third party victims there is very little, if any discretion, for member states to permit variations in what is now a highly prescriptive social policy objective of protecting their compensatory entitlement.

\textsuperscript{386} Evans, para 66.
\textsuperscript{387} Evans, paras 45 and 46.
The United Kingdom’s transposition

The UK’s compensatory guarantee is currently delivered by a curious blend of closely interlinked statutory and extra-statutory provisions. The former consist of the statutory duty to insure the use of a motor vehicle on a road or other public place against third party liabilities under section 143 of the Road Traffic Act 1988 (RTA), along with the terms of cover required under section 145 RTA together with a corresponding statutory obligation imposed by s151 RTA on motor insurers to satisfy third party judgments relating to an event subject to the insurance obligation. The European Communities (Rights Against Insurers) Regulations 2002 are considered below.

The extra-statutory provision is contained in a series of agreements between the Motor Insurers Bureau (MIB) and the Secretary of State for Transport on behalf of the UK Government. There are separate schemes: the first is intended to protect victims of uninsured drivers (currently set out in the Uninsured Drivers Agreements 1999 & 2015); the second, unidentified drivers (currently set out in the Untraced Drivers Agreement 2003 as amended by five successive supplementary agreements). The insurance industry’s collective liability to meet these uninsured losses is a mutualised one: every authorised insurer contributes to a central fund that is managed by the MIB under its contractual arrangement with the Department for Transport. The MIB also investigates and settles individual claims under the Untraced Drivers Agreement 2003.

Antecedent origins

Compulsory third party motor insurance was introduced under Part II of the Road Traffic Act 1930, long before the UK’s accession to the European Community. The underlying objective of the 1930 legislation (including its sibling measure: the Third Party Rights Against Insurers Act 1930) was as simple as it was compelling: to mutualise the financial hazard posed to individuals from the risk of...
being injured by motor vehicles; so no victim should be left uncompensated. The focus was on protecting victims; not policyholders, nor motor insurers\textsuperscript{390}.

**A flawed execution**

Two statutory provisions in the RTA lie at the heart of the UK national law provision for guaranteeing the compensatory entitlement of third party victims:

- The first of these are Sections 143 and 145. Section 143 imposes on users of motor vehicles to insure against third party liability. Its sibling, Section 145, defines the nature and scope of the third party cover required under Section 143. These are original to the 1930 Act. These provisions bear a very close resemblance to the original 1930 wording\textsuperscript{391}.

- The second duo, consist of Section s148 and 151. These were an afterthought, introduced under sections 10 and 12 of the Road Traffic Act 1934. Section 148 lists of eight different types of exclusion of liability made ineffective against third party victims. Section 151 is an odd medley of different provisions but chief amongst these are (i) the insurer’s duty to satisfy judgments in favour of third parties, (ii) a provision that expressly authorises insurers to exclude liability to passengers who know or ought to know that the vehicle in which they are riding is stolen or unlawfully taken, and (iii) two further instances where a breach of policy term is ineffective against third party victims.

What is not so readily appreciated is that the piecemeal way in which these provisions have evolved over the past 84 years has detracted the central social policy aim of protecting motor accident victims. Take for example, Section s 148 and 151, these were a stop gap measure. They were introduced in 1934\textsuperscript{392} to address a fundamental flaw in the new regime: the lack of any free-standing direct right of action\textsuperscript{393}. Unfortunately, they failed to address the underlying problem.

\textsuperscript{390} This objective is clearly discernible from the 1930 Act itself, the early case law such as Lord Denning’s judgment in *Hardy v MIB* 1964 2 All ER 587 and also Lord Hailsham’s judgment *Gardner v Moore* [1984] A.C 548 and also from Sir Felix Cassell’s 1937 report reviewing the national law provision in this area.

\textsuperscript{391} Sections 35 and 36 of the Road Traffic Act 1930.

\textsuperscript{392} In sections 10 and 12 of the Road Traffic Act 1934.

\textsuperscript{393} Except where the Third Party Rights Act 1930 applied to transfer an insolvent policyholder’s rights.
The Third Party Rule, a common law anachronism

Problems surfaced almost immediately the Road Traffic Act 1930 was implemented. Its legislative aim was compromised by common law rules that allowed insurers to avoid compensating third parties. This was achieved through the simple expedient of insurers (i) restricting their contractual liability to their policyholders and then arguing that the claim was not covered by the policy, and (ii) by refusing to settle claims direct, as the victims were non-contracting parties and the legislation did not confer a direct right on third parties.

These failings arose out of the common law rules on privity of contract under which the actionable benefits and burden of a contract are generally confined to the contracting parties. So whilst a contract’s performance may be intended to benefit a third party, the general rule was (and remains) that it cannot not be enforced by a third party\(^ {394} \). This is usually referred to as the Third Party Rule.

The harsh effect of the Third Party Rule has long been criticised and a number of exceptions\(^ {395} \) have evolved over the years but it was upheld by the House of Lords in 1915 when it ruled that it was a fundamental principle of English law that only a party to a contract who had provided consideration could sue on it\(^ {396} \); and again in 1965\(^ {397} \). As recently as 1983, Lord Diplock referred to the Third Party Rule as ‘an anachronistic shortcoming that has for many years been regarded as a reproach to English private law’, see Swain v Law Society\(^ {398} \).

Some of these concerns were remedied by the Contracts (Rights of Third Parties) Act 1999 that conferred on non-contracting third parties a statutory right to enforce a contract that purports to confer on them a benefit in certain specified

\(^{394}\) Tweddlev Atkinson [1861] 1 B & S 393; 121 ER 762

\(^{395}\) Not least being Lord Atkins landmark tort law ruling in Donoghue v Stevenson [1932] AC 562 where the manufacturer of a ginger beer was liable to a non-contractual consumer; Ross v Caunters [1980] Ch 297 where solicitors were held liable to a beneficiary for not warning the testator about formal witnessing requirements, to a failure to draw up a will

\(^{396}\) Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847.

\(^{397}\) Midland Silicones Ltd v Scruttons Ltd [1962] AC 446 (Lord Denning dissenting) note also and Beswick v Beswick [1968] AC 58 in which the House of Lords upheld the third party rule but then opened the door to the possibility of specific performance serving as a remedy for enforcing promises made contracts for a third party’s benefit, where the third party rule would otherwise produce an unjust result.

\(^{398}\) [1983] 1 AC 598, 611.
circumstances. However this measure did not address a further difficulty with the Third Party Rule.

Even where Contracts (Rights of Third Parties) Act 1999 Act applies so as to allow a non contracting party to enforce a term that “purports to confer a benefit on him”, that entitlement is a subrogated one. In the context of a contract of insurance, the subrogated third party is deemed to stand in the insured party’s shoes. The problem with this being that the transferee is generally entitled to no more than the transferor’s contractual entitlement. Accordingly where an insurer has a contractual defence against its policyholder this will hold good against a subrogated party. As Harman LJ so aptly put it, in Post Office v Norwich Union Fire Insurance Society Ltd,[404], “One cannot ...pick out the plums and leave the duff behind.”

It is interesting to note that the Third Party Rights Against Insurers Act 2010,[402] which has been sitting in the wings for the past five years in a perpetual state of imminent but unrealised implementation, preserves the common law policy of subjecting transferred rights to the same defences that the insurer had against its policyholder.[403] The same doctrine applies to the European Communities (Rights Against Insurers) Regulations 2002[404] and, as we have seen, the Contracts (Rights of Third Parties) Act 1999. Whilst this is eminently justifiable in ordinary arms length private contract law, it undermines the social policy objective that underscores the compulsory third party motor insurance regime.

A wrong turn in 1934

Returning the insurers’ legal challenges that followed the wake of the Road Traffic Act 1930, Parliament reacted with surprising speed: it passed a new Road Traffic Act 1934 to bolster the protection conferred under the original scheme.

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399 Section 1 of the 1999 Act requires, inter alia, either an express term conferring a right to enforce the contract on the third party or a term that purports to confer a benefit on him.
400 This paraphrases Lord Denning MR’s observation in Post Office v Norwich Union Fire Insurance Society Ltd [1967] 1 All ER 577 at 374.
401 Post Office v Norwich Union Fire Insurance Society Ltd [1967] 1 All ER 577 at 376.
402 The 2010 Act continues the work of the Third Parties Rights Against Insurers Act 1930
403 See Section 1 (5) of the 1999 Act.
404 See regulation 3(2) ...‘that insurer shall be directly liable to the entitled party to the extent that he is liable to the insured person’.
It is interesting to note from the official note of a Cabinet Office\textsuperscript{405} meeting on 11 January 1934 recorded by the Minister for Transport\textsuperscript{406}, that the Government wanted the insurance companies to agree to the following amendments to the Road Traffic Act in 1934:

“ a) Right of action shall not abate on the death of the insured;

b) Where a certificate of insurance has been issued, purporting to cover the driver in the circumstances of any particular accident, it shall not be open to the insurer to repudiate liability on the ground of misrepresentation or non-disclosure in the proposal form;

c) Any condition in a policy to the effect that the insurer is not liable if the vehicle is driven when unsafe or damaged shall be void, so far as any third party is concerned who has suffered personal injury or death;

d) The injured party shall have a direct remedy against the insurer;

e) ....

As regards (b), (c) and (d), that there should be a right of recovery by the insurer against the insured.”

Unfortunately the Government’s will did not prevail. The proposals at (b), (c) and (d) appear to anticipate the European directive by several decades.

Section 10 of the 1934 Act imposed a new statutory duty on motor insurers to satisfy judgments “notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy”, (under what is now Section 151 of the RTA). This statutory duty was qualified by what is now set out in Section 152 of the RTA: requiring notice of commencement of proceedings; exempting policies surrendered before the event giving rise to the claim and also where the insurer obtained a court declaration that the policy was void for non disclosure or misrepresentation of a material fact.

\textsuperscript{405} Mr Matthew Channon, research PhD student at the Faculty of Law in Exeter, is thanked for supplying the author with the relevant papers.

\textsuperscript{406} None other than Mr Leslie Hore-Belisha, who gave his name to the distinctive pedestrian crossing indicator.
Section 11 of the 1934 Act shored up third parties rights against insurers by providing that the bankruptcy or insolvency of the insured party would have no affect on insurable liability under section 36 of the 1930 Act⁴⁰⁷.

Whilst there is little that is intrinsically wrong with any of the above, the following measure contained a serious flaw in the comprehensive nature of the protection it afforded to third party victims. Section 12 listed eight types of policy restriction that were deemed to be void against a third party. This survives as Section 148 (1) and (2) in the RTA. Arguably, this particular provision was unnecessary, given the widely scoped wording of section 10 and the anomaly of its complete absence in the Road Traffic (Northern Ireland) Order 1981⁴⁰⁸. According to Sir Felix Cassell's 1937 report⁴⁰⁹, these contractual restrictions and exclusions had all been previously upheld against third party victims. It seems plausible that far from seeking to limit the scope of protection to third parties, the aim of Section 12 had been to shore up their protected status under the newly coined direct right under Section 10 by overthrowing those decisions.

Unfortunately, the necessary implication of the Section 12 wording is that by providing a finite list of nullified restrictions, it made it possible to argue that all other policy limitations and exclusions, not so nullified, remained effective against a third party and serve as an effective bar the new statutory remedy under Section 10.

It soon became apparent that instead of providing for a new independent statutory right to compensation (free from any contractual restrictions or exclusions), Parliament appears to have endorsed a qualified entitlement. This exposed third party victims to the vagaries of the insurer / policyholder relationship; a matter over which they had absolutely no knowledge or control.

When Sir Felix Cassell’s reviewed these arrangements in his 1937 report he identified this failing and he recommended that Section 12 be replaced by a short list of permitted exclusions⁴¹⁰; the default position being that no other restrictions

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⁴⁰⁷ Section 36 of the 1930 Act specified the requirements for the third party policies made compulsory by section 35 (1) of that Act.
⁴⁰⁸ The 1981 Order is designed to replicate in Northern Ireland our national provision for compulsory third party insurance.
⁴⁰⁹ Board of Trade report of the Committee on Compulsory Insurance, 1937 [Cmd. 5528]
⁴¹⁰ Such as use of the vehicle by unauthorised persons and a short list of unauthorised uses, such as speed testing and racing.
or exclusions should be effective against a third party. Unfortunately, his recommendations were not adopted.

A very British muddle

As previously stated, our modern domestic law provision for guaranteeing third party compensatory protection is set out in an eclectic mix of different statutory and extra-statutory initiatives\(^1\), each developed and refashioned in response to various discrete issues and bolted on as accretions to the whole, sometimes without any apparent concern for the way they interact with one another. The end result of this convoluted assortment of residual common law, legislative and executive provision is that it has attracted its own extensive body of case authorities that more often than not fails to interpret it properly\(^2\). Small wonder then that such a regime should have its flaws or that some victims’ should fall through the gaps that such an empirically derived regime inevitably produces.

So whilst law abiding, insurance premium paying members of the public might be excused for thinking that the *quid pro quo* for their expensive premiums is the reassuring certainty that if they are unfortunate enough to be injured by a careless driver, then their full compensatory entitlement is guaranteed, independently of the driver at fault’s ability to pay, the reality is rather different. What began as a legislative measure devoted to protecting accident victims has, in its application, become increasingly biased towards enhancing the commercial interests of motor insurers, at the expense of the original social policy objective.

Restrictions in the geographic scope of cover

With the benefit of hindsight, we can now see that the precision with which the Parliamentary draftsmen defined the geographic and technical scope of the third party insurance requirement was overly prescriptive. Both the statutory and extra statutory schemes are restricted to the use of motor vehicles ‘on a road or other public place’. This excludes private property, forecourts and shared parking areas, farm lanes and driveways leading onto public highways. The exactitude employed within the statute has prevented the common law from adapting the

\(^1\) Part VI of the RTA and the Uninsured Drivers Agreements 1999 & 2015 and the Untraced Drivers Agreement 2003.

\(^2\) See below under Exclusions of Liability and Duty to apply a European law consistent interpretation.
scope to accommodate new hazards introduced through technological and social change413.

Limitations in cover

The extent to which the underlying social policy aim of the 1930 legislation has been compromised is vividly illustrated by the Court of Appeal in *EUI v Bristol Alliance Partnership* [2012] EWCA Civ 1267. This case is the unfortunate legacy of Section 12 of the 1934 Act; now Section 148 of the RTA.

In *EUI* an ostensibly fully insured motorist determined on his suicide by deliberately driving his car at a very high speed into a department store in Bristol. Mercifully he failed in his bid but the ensuing collision not only caused extensive damage to the building he had targeted but it also seriously injured another motorist. The Court of Appeal held, unanimously, that the insurer’s policy term that excluded liability for deliberate damage was effective against third party victims because it was not one of the exclusions expressly nullified by the RTA. The Court of Appeal justified its reasoning by relying on the well established proposition that policy exclusions are valid against a non contracting party; first from the fact that this is the position at common law and secondly inference from the way the RTA only nullifies certain specific exclusions414. The correlative logic of these specific exceptions is that all other contractual limitations were deemed to be valid against third party.

So the property insurer came away empty handed in *EUI* because not only did the Court deem the driver to be uninsured but also it opined the loss was of a kind that fell outside the remit of the Uninsured Drivers Agreement 1999, which purports to exclude subrogated claims415.

413 Such as the present ubiquity of 4x4 recreational vehicles and other off-road motor vehicles such as motorised go carts, quad bikes, golf buggies, ride on mowers and even hoverboards. See also the comments on *Clarke v Kato* under Limits to consistent interpretation.

414 Section 148 RTA prevents an insurer from relying on a limited range of exclusions against third parties and these are listed in subsection 2 (such as the invalidation of any restrictions on the age or physical or mental condition of the driver) The only other nullifications are set out in section 151. Section 151 (2) applies to unauthorised users and 151 (3) makes void any restriction of cover to persons holding a driving licence.

415 See clause 6(1)(c)(ii) of the 1999 Agreement.
The ruling appears to give insurers a free hand to restrict or exclude their statutory liability to third party victims; save where expressly precluded from doing so by the RTA.

**A frustrated policy aim**

One wonders how these limitations in the protective measures for third party victims can possibly serve the wider public interest. They expose seriously injured accident victims to the risk of remedial destitution and long term dependency on the uncertain good offices of the National Health Service, increasingly hard pressed local authority social services and on the charity of friends and relatives. Not only is it not possible to reconcile these deficiencies with the original Parliamentary intention of the 1930s but it clearly and unequivocally undermines the effectiveness of the comprehensive protective principle required by the Directive. The only beneficiaries of these failings seem to be the authorised motor insurers that operate in this highly regulated captive market.

**Simpler, clearer, fairer European law**

It will be readily appreciated from the preceding sections that the qualified and restrictive nature of our national law provision contrasts sharply with the legislative aim of the European directives on motor insurance that the UK national law provision is supposed to implement.

As we have noted above\(^{416}\), the basic premise of this European law is that third party cover should be good for any use made of motor vehicle, provided that use is consistent with its normal function\(^{417}\).

The directives do not seek to interfere with the ability of the contracting parties to set limits on the contractual scope or extent of the indemnity. This enables an insurer to impose almost any conditions it likes on its insured, provided however that they do not undermined the effectiveness of the protection extended to third

\(^{416}\) See above under the heading *Culminating principles*.

\(^{417}\) See *Damijan Vnuk v Zavarovalnica Triglav d.d.* [2014] CJEU Case C-162/13, considered below.
party motor victims. Insurers therefore retain the ability to differentiate the contractual risk and to set appropriate premiums.

The directives expressly stipulate that an insurer’s liability to compensate a third party victim is independent of any contractual restriction between the insurer and the policyholder\(^{418}\). So under European law (and subject to one proviso, mentioned below) as long as the vehicle has some insurance in place, the insurer on risk must satisfy a third party claim, regardless of any contractual law defence it may have against its policyholder. This necessarily confines the scope of the MIB’s role, as Article 10 compensator, to two scenarios: (i) where there was absolutely no insurance in place and (ii) claims featuring unidentified vehicles\(^{419}\).

As previously indicated under ‘A purposive interpretation’ a consistent line of Court of Justice rulings, originating in Bernaldez [1996] and Candolin [2005] through to Case C-442/10 Churchill [2011] confirms that under European law only one exclusion of liability is capable of affecting a motor insurer’s liability to compensate a third party. This single derogation from the mandatory third party cover requirement is confined to a passenger whom the insurer can prove actually knew the vehicle he was riding in was stolen\(^{420}\).

All this makes perfect practical sense from a social policy and common sense perspective. It protects the state as well as the victims’ immediate family from having to support and care for innocent victims who might otherwise be left destitute. It also furthers the twin European legislative objectives of facilitating free movement between different member states and protecting victims.

The obligation that these European directives impose on every member state is to put in place suitable measures to ensure that third party victims’ compensatory entitlement is guaranteed. It is a commonplace that the Road Traffic Act 1988 and both MIB Agreements are intended to implement this European law. Unfortunately, there are over 50 instances where our defective national law fails to fully implement this simple imperative.

\(^{418}\) See Recital 15 in the Sixth consolidating European Directive on Motor Insurance (2009/103/EC)

\(^{419}\) See above under the subheading Csonka beneath the A purposive interpretation heading and Churchill Insurance Company Limited v Benjamin Wilkinson and Tracy Evans v Equity Claims Limited [2011] ECJ Case C-442/10, para 41.

\(^{420}\) See the second sub paragraph of Article 13 of the Sixth Directive (2009/103/EC).
Comparative law analysis

The United Kingdom’s failure to fully implement the minimum standards of compensatory protection are not confined to the limited geographic scope of the insurance obligation and the ability of insurers to compromise the third party protection by imposing contractual restrictions in cover.

These failings can conveniently be listed under ten broad categories. What follows is offered as an illustrative appraisal; not an exhaustive statement.

1. Restrictions in scope

The geographic restriction has already been alluded to. This is incompatibility with the Article 3 requirement\(^ {421}\) applies not just to the duty to insure and the extent of cover required under Sections 143 and 145 of the RTA but it also effects the UK implementation of the Article 18 direct right of action in Regulation 2 European Community (Rights Against Insurers Regulations) 2002 as well as both MIB schemes as they rely on the RTA definitions when stipulating the MIB’s duty to compensate. What is striking about this irregularity is that it seems fairly clear that the Parliamentary draftsman are well aware of the need for a wider scoped geographic definition. That much is evident from the Regulation 2 (2) (ii) of The Financial Services and Markets Act 2000 (Fourth Motor Insurance Directive) Regulations 2002 \(^ {421}\) that defines a “relevant contract of insurance” as a contract of insurance against damage arising out of or in connection with the use of motor vehicles on land (other than carrier’s liability)”. It is difficult to conceive of a scenario where the Department for Transport’s legal advisors, in counselling the minister to depart from the standard UK formula that restricted to the geographic scope of the insurance obligation imposed under the European law, failed to alert him about the basic incompatibility of its existing provision under the RTA that is supposed to implement the same European law.

It is also worth noting that Regulation 2 also wrongly restricts the direct right of action to accidents occurring in the United Kingdom. Furthermore the requirement in Regulation 2(3) that the insurance policy must comply with Section 145 RTA prevents a foreign registered insurer of a vehicle responsible for causing

\(^ {421}\) Of the Directive.
an accident in the UK from being the subject of the direct right of action. This is because this requires the insurer to be a member of the MIB.

The compulsory insurance requirement imposed by section 143 RTA is further restricted in the way it only applies to motor vehicles that are ‘intended or adapted for use on a road’\(^{422}\). This exempts many off-road motor vehicles from the duty to insure, even when used on public highways.

The geographic and technical limitations both conflict with the \textit{Vnuk} decision.

\section*{2. Exclusions of liability}

Unlawful exclusions of liability pepper the UK’s statutory and extra statutory implementation of the Directive. There is only space to allude to a handful of these instances.

Section 151.4 allows a motor insurer to exclude its statutory liability to compensate a third party passenger who

\begin{quote}
‘at the time of the use which gave rise to the liability, was allowing himself to be carried in or upon the vehicle and knew or had reason to believe that the vehicle had been stolen or unlawfully taken, not being a person who—

(a) did not know and had no reason to believe that the vehicle had been stolen or unlawfully taken until after the commencement of his journey, and

(b) could not reasonably have been expected to have alighted from the vehicle.’
\end{quote}

This exclusion is much wider in scope than the single permitted contractual exclusion permitted by Article 2.1 of the Second Directive, now Article 13 of the Directive. It has three defects: (i) its remit extends beyond actual knowledge to embrace constructive knowledge or negligent ignorance, (ii) it permits a temporal shift as to the time when that state is to be judged, not just at the time of entering the vehicle but subsequently and (iii) it also applies to knowledge that the vehicle has been unlawfully taken or borrowed\(^{423}\).

\footnote{\(422\) Sections 143 and 145 RTA use the definition of motor vehicle given in section 185. \(423\) See above for the discussion on \textit{Candolin} under the subheading \textit{The Fifth Directive} under the \textit{An evolving legislative scope} heading.}

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Another unlawful statutory exclusion is to be found in the over-prescriptive car sharing provisions within Section 150 RTA. Here, any car sharing arrangement that does not conform to its highly prescriptive terms is deemed to constitute business use and as such is an excluded liability under the standard terms of the vast majority of all motor insurance policies issued in the United Kingdom. The unfortunate legacy of the unanimous of decision of the Court of Appeal in EUI has already been considered above under the Limitations in cover subheading.

All three current MIB Agreements (the Uninsured Drivers Agreements 1999 and 2015 and the Untraced Drivers Agreement 2003) unlawfully exclude liability where there is constructive knowledge or negligent ignorance that the vehicle is uninsured. These agreements are infested with numerous conditions exclusions of liability that conflict with the single permitted exclusion referred to above. These are also sometimes described as conditions precedent to liability, such as the unlawful requirement in clause 13 of the Uninsured Drivers Agreement 1999 that the victim must have reported the responsible driver to the police if no insurance information is provided, or the strictly enforced requirement under clause 4.3(c) Untraced Drivers Agreement 2003 that the victim must have reported the accident to the police within 5 days (for property claims) or 14 days (for injury claims) or as soon as reasonably possible thereafter on penalty of the entire claim being excluded. To this author’s personal knowledge this has been applied against a four year old infant so as to bar any entitlement to compensation under the 2003 Agreement, in a decision that was later upheld on appeal to the arbitrator.

There is also the exclusion of liability under both MIB schemes where the death, bodily injury or damage to property was caused by, or in the course of, an act of terrorism. The problem here is that the UK statutory definition of ‘terrorism’ is so widely drawn that it is capable of applying against a victim escaping from a fleeing anti GM crop activist who has committed arson. This is capable of producing perverse anomalies and is in any event unlawful as it does not conform to the single permitted exception in Article 13 of the Directive.

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424 Which are restricted to social domestic and recreational use.
425 See section 1 of the Terrorism Act 2000.
Unlawful exclusions of liability are also rife within the motor insurance policies, as the discussion above under the ‘Limitations in cover’ heading. It is unfortunate that the Court of Appeal’s decision in EUI v Bristol Alliance Partnership was not appealed and so this misconceived ruling remains as an unwelcome obstacle to further legal challenges due to the UK common law principle of stare decisis.

The problem is also found in the common law policy precept of ex turpi causa non oritur action that operates as a complete bar to any claim where the claimant’s criminality has caused the injury. Whilst there is much to commend in this judicially devised pragmatism, its application as an automatic and complete bar to any compensation appears to be at odds with the CJEU’s judgment in Candolin\(^{426}\).

### 3. Procedural mechanisms that undermine the effectiveness of the directives

Section 152(2) RTA enables an insurer to apply to the court for an order declaring the policy void, after the event giving rise to the claim.

For policies issued on or before 5 April 2013

This statutory remedy is highly prescriptive. The insurer commences an action for a declaration that it is entitled to avoid the policy for material non disclosure or misrepresentation, or to confirm that it has avoided the policy on these grounds. The application must be made before, or within three months after, the commencement of the proceedings in which the judgment was given.

A material non disclosure used to be perceived to be fatal to any claim under the policy because, under the common law (now amended by the Consumer Insurance Act 2013) an insurance contract was deemed to be a contract of utmost faith, uberrima fides, this vitiated the policy ab initio at common law. Any risk that influenced or induced the insurer to underwrite the risk or which influenced the

\(^{426}\) See above under The Fifth Directive subheading under the An evolving legislative scope heading.
premium and its conditions was deemed a ‘material’ risk that entitled the insurer to avoid the contract.

As the non disclosure and misrepresentation provisions of s152 reflect the common law and because the European directives on motor insurance do not seek to harmonise the civil law provision of the member states, this provision does not conflict with the protection required under the directives on motor insurance in as obvious a manner as some of the other infringements considered above and below. This provision made it relatively easy for motor insurers to avoid liability by seeking a s152 declaration that the policy was void and then to rely on the exemption from the s151 statutory indemnity (set out in s151(2)) by complying with the notice requirements in s151(3).

However there are increasing concerns expressed by some academics and practitioners that this remedy is capable of being abused by insurers imposing preconditions of cover to reduce their risk of exposure and only raising these points when a claim was presented.

In Delaney v Pickett [2011] EWCA Civ 1532 the defendant insurers, Tradewise, successfully obtained a declaration under s152 on the ground the claimant had failed to disclose the following material facts: that he was a diabetic, he was suffering from depression and that he had a cannabis dependency. According to widely published statistics there are thought to be over 4.7 million individuals suffering from depression\(^{427}\) and 3 million diabetics\(^{428}\) in the United Kingdom.

For policies issued after 6 April 2013

Avoidance under s152 has been made a little more difficult for insurers following the coming into force of the Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA 2012) on 6 April 2013. This act replaces the common law and the previous statutory provision that governed insurance contracts generally (the Marine Insurance Act 1906) and it applies to all consumer insurance contracts entered into after that date.

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\(^{427}\) BBC website, [Depression up ‘by half a million’](http://www.bbc.co.uk/; date: October 2012

\(^{428}\) BBC website, [Diabetes cases in UK hit high of three million](http://www.bbc.co.uk/; date: March 2013

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Section 1 defines a consumer insurance contract as one entered into by “an individual who enters into the contract wholly or mainly for purposes unrelated to the individual’s trade, business or profession.”

This definition excludes policies issued to motor trade dealers and car hire companies, who are now covered by the Insurance Act 2015.

The 2012 Act makes important changes to the s152 RTA 1988.

The act does not dispense with the need for an insurer to commence the s152 application before or within 3 months of the commencement of the claimant’s action under s153 (2) and to notify the claimant of the s152 declaration, if made, within 7 days of the claimant issuing proceedings, s152(3).

The overwhelming majority of motor policies are issued to private consumers. Henceforth it will be possible, albeit probably difficult, for a consumer insurance policyholder to argue that an undisclosed material fact did not, in the circumstances, amount to a misrepresentation.

This act provides a more nuanced approach. It imposes a duty of the consumer ‘to take reasonable care not to make a misrepresentation to the insurer before the contract is made’. There is no longer the ‘duty of utmost good faith’, the uberrima fides common law principle no longer applies. Section 2(4) goes as far as to explicitly override the old law by expressly stating that it replaces ‘...any duty relating to disclosure or misrepresentation by a consumer to an insurer which existed in the same circumstances before this Act applied.’

The 2012 Act also abolishes the policyholder’s obligation to disclose all material facts.

The Act distinguishes between:

- a careless misrepresentation
- and a reckless or deliberate representation.

The Act prevents an insurer from avoiding a contract for misrepresentation except where:

- It was careless and the insurer would not have entered the contract at all had the truth been known or it would have done so only on different terms
- It was deliberate or reckless
A qualifying misrepresentation is only deliberate or reckless if the consumer—

(a) knew that it was untrue or misleading, or did not care whether or not it was untrue or misleading, and

(b) knew that the matter to which the misrepresentation related was relevant to the insurer, or did not care whether or not it was relevant to the insurer.

The burden of proving these matters is on the insurer. However the consumer's conduct is judged by an objective standard and, furthermore, he is presumed to understand that where the insurer has put a clear specific question on any issue, that this is a relevant to the insurer, see s5(4) of the Act. Otherwise the misrepresentation is deemed to be careless.

The Insurer can avoid the policy and retain the premium, unless it would be unjust to keep it, where the consumer’s misrepresentation was deliberate or careless.

Where the misrepresentation was only careless, then the insurer can only avoid the policy if it can show that it would not have entered the contract on any terms had it known the relevant facts. In which case it must return the premium.

Where a careless misrepresentation does not as fundamental to the contract, so the insurer is left arguing that it would have insisted on different terms, then the Act deems the contract to be been agreed on those different terms. It imposes a formula that allows the insurer to make a reduction in its liability by applying the following: \[ X = \frac{\text{Premium Actually Charged}}{\text{Higher Premium}} \times 100 \]

The standard of care is an objective one, namely that of the reasonable consumer. Furthermore, instead of a material misrepresentation, we now have a new term: a ‘qualifying misrepresentation’ which is defined as either ‘deliberate or reckless” or “careless’.

Insurers have become adept at asking pertinent questions in their online and telephone sales and in requiring the consumer to check the accuracy of the policy statements on receipt of the certificate. Obviously much will turn on whether an insurer will able to prove a misrepresentation to be reckless or deliberate. Otherwise, it will only be able to obtain a s152 declaration where it can satisfy the court that it would not have offered any cover, had it known the truth.
We are likely to see a raft of cases that will clarify the practical implications of this reform. Even so, the power of a court to declare a policy void ab initio after the accident giving rise to the third party’s claim appears to conflict with the overriding protective purpose of the Directive and in particular recital 15:

‘It is in the interest of victims that the effects of certain exclusion clauses be limited to the relationship between the insurer and the person responsible for the accident. …’

In *Evans v Secretary of state for Transport and the Motor Insurers Bureau* [2003] Case C-63/01 the Court of Justice was asked to decide, amongst other things, whether the UK’s Untraced Drivers Agreement was consistent with the Second Directive and in particular whether the lack of provision for interest on damages was lawful. Its ruling was grounded on a basic Community law principle, without explicit reliance on the equivalency principle, to the effect that compensation must take into account the passing of time as this can reduce the value of the principle sum. It then ruled that the Second Directive should be interpreted as requiring the compensating body, in effect, to pay interest on its compensatory awards but left it to the UK to implement this requirement. The Agreement was subsequently amended to allow interest.

Raising a European law challenge against an ostensibly unfair procedural provision on the other hand is more problematic because the Directive confers a reasonably wide discretion as to the procedural rules and form in which its objectives are implemented. In *Evans* the court explained the European law principle of equivalence at para 45:

“It is settled case-law that in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the

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429 The 1972 version of the Untraced Drivers Agreement applied to the claim.
430 At paragraph 68 of *Evans*. 

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principle of effectiveness) (see, in particular, Case C-120/97 Upjohn [1999] ECR I-223, paragraph 32)."

This somewhat abstruse explanation is put into the context of an MIB claim under the Untraced Drivers Agreement\(^{431}\) by the Court's prefatory observations at paragraph 28:

“It must nevertheless be emphasised that, to meet the requirements of the Second Directive, the body responsible for awarding compensation does not necessarily have to be placed, as far as civil liability is concerned, on the same footing as a defendant such as the driver of an identified and sufficiently insured vehicle.”

The House of Lords has provided some welcome additional insight to the application of the equivalence principle in *Preston & Others v. Wolverhampton Healthcare N.H.S. Trust & Others* [2001]\(^{432}\):

“25. In deciding that question "the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national court (Levez v T H Jennings (Harlow Pools) Ltd (Case C-326/96) [1999] ICR 521, 545, paragraph 44): see [2000] ICR 961, 999.

The court further ruled, at pp 999-1000:

"62. It follows that the various aspects of the procedural rules cannot be examined in isolation but must be placed in their general context. Moreover, such an examination may not be carried out subjectively by reference to circumstances of fact but must involve an objective comparison, in the abstract, of the procedural rules at issue.

"63. In view of the foregoing, the answer to the third part of the second question must be that, in order to decide whether procedural rules are equivalent, the national court must verify objectively, in the abstract, whether the rules at issue are similar, taking into account the role played

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\(^{431}\) As Mr Evan’s injury was sustained on Christmas Day in 1991 his claim would have been presented under the terms of the Untraced Drivers Agreement 1977.

by those rules in the procedure as a whole, as well as the operation of that procedure and any special features of those rules.”

The Evans case featured an untraced driver claim where there was no obvious comparable procedure. This was due to the complete absence of any identifiable defendant who could be pursued through legal process. This presented obvious difficulties in identifying a suitable comparator by which to measure the equivalency of the provision under the Untraced Drivers Agreement. That difficulty has been mitigated by the introduction of what is now the Article 18 of the Directive which confers the direct right of action against the insurer, where the procedural roles of the insurer and the compensating body share many common factors.

On the issue of whether the private contract format of the Untraced Drivers Agreement was capable of implementing the Second Directive’s objectives relating to the compensating body, given that the agreement itself conferred no right of action on the victims it is intended to benefit, it ruled:

‘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, provided that that agreement is interpreted and applied as obliging that body to provide victims with the compensation guaranteed to them by the Second Directive and as enabling victims to address themselves directly to the body responsible for providing such compensation.’

It went on to qualify this by restating the importance of conformity with the European law principle of legal certainty:

‘...it is essential for national law to guarantee that the national authorities will effectively apply the directive in full, that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of all their rights and, where appropriate, may rely on them before the national courts (Case C-365/93 Commission v Greece [1995] ECR I-499, paragraph 9, and Case C-144/99 Commission v Netherlands [2001] ECR I-3541, paragraph 17)’

433 At paragraph 34 of Evans.
On the basis of the apparently limited and arguably one sided account of the way the Untraced Drivers Scheme operated, the Court concluded that its procedural arrangements and in particular its arbitral appeal procedure did not render it practically impossible or excessively difficult for applicants to exercise their right to compensation under the Second Directive.

This makes it very difficult for UK legal practitioners to challenge the numerous procedural knock out provisions in both MIB compensation schemes. However, where a procedural requirement amounts to a substantive law infraction then a legal challenge is much easier to substantiate. Examples of which are clause 13 of the Uninsured Drivers Agreement 1999\(^\text{434}\) and clause 4(3) of the Untraced Drivers Agreement 2003\(^\text{435}\). These provisions appear to impose a clear and unequivocal impediment on a claimant’s right to compensation.

4. Insurers’ right of recovery

In *Churchill Insurance v Wilkinson*\(^\text{436}\) [2011] the Court of Justice was asked to rule on whether Section 151.8 RTA conflicted with the Directives protective purpose. This was a conjoined appeal in which the common facts in both cases were that the persons injured were travelling as passengers in vehicle that they owned and which they were insured to drive, but the negligent drivers of these vehicles were not insured. In Ben Wilkinson’s case that permission was given in the knowledge that the driver was uninsured; in Tracey Evans’s case the permission was given without any thought to that question.

The key issue concerned a preliminary point of law on the interpretation of Section 151(8) RTA. This enables an insurer to recoup its outlay where it has

\(^{434}\) Clause 13 entitles the MIB to refuse to compensate a claimant who has failed to request insurance information from the defendant driver or for failing to use all reasonable endeavours to obtain this information or to report the failure to provide that information to the police. This subverts the parliamentary objective behind s 154 of RTA 1988 which is to increase, not diminish, the prospects of a victim recovering their compensatory entitlement. The 1999 Agreement remains in force for all accidents that predate 1 August 2015.

\(^{435}\) Clause 4.3 (c) Imposes as a condition precedent of any MIB liability a requirement that the applicant has reported the accident to the police with 5 days (property) or 14 days (injury) or as soon as reasonably practicable thereafter. A High Court judge has upheld an arbitrator’s finding that ‘reasonable practicability’ has nothing to do with the victims’ belief that the driver has been properly identified; even where such a belief was reasonably held. It has also been applied against an infant.

\(^{436}\) *Churchill Insurance v Wilkinson; Evans v Equity Claims* [2011] CJEU C-442/10
acted as a statutory insurer under Section 151 where the policyholder caused or permitted the vehicle’s use by the uninsured driver. Were the injured passengers in these cases, (who were entitled to be compensated by their negligent drivers but where those drivers were not covered to drive the vehicle under the terms of the insurance policy in place) in effect to be denied their statutory guarantee of payment under section 151(5) of RTA because they, as policyholders, are in breach of their policy terms for permitting their vehicles to be driven by an uninsured driver?

The Court of Justice’s ruling responded to the specific questions that the Court of Appeal had referred to it. It ruled as follows:

- “The only situation in which a third party who has been a victim of an accident may be excluded from insurance cover is that specified in the second subparagraph of Article 2(1) of the Second Directive” [para 38]

- The Directives must be interpreted as precluding “national rules whose effect is to omit automatically the requirement that the insurer should compensate a passenger who is a victim of a RTA when that accident was caused by a driver not insured under the insurance policy and when the victim, who was a passenger in the vehicle at the time of the accident, was insured to drive the vehicle himself and who had given permission to the driver to drive it.” [para 44]

The Court observed that it was irrelevant whether the insured victim was aware that the person to whom he gave permission to drive the vehicle was not insured to do so, whether he believed that the driver was insured or whether or not he had turned his mind to that question.

When the case was referred back to the Court of Appeal Section 151.8 RTA was purposively construed so as to add notional wording not present in the original text to restrict the insurer’s right of recover to an amount proportionate to the circumstances of the case. No explanation has been give as to what “proportionate” means in practical terms.

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437 Now Article 13 of the Directive. This sets out the knowledge that the vehicle is stolen vehicle exclusion.
438 Evans, para 47.
It is noteworthy that section 148.4 RTA provides an almost identical claw back provision that applies where the effect of an exclusion clause is nullified against a third party victim in one of the eight types of exclusion clause listed there. This provision has not been modified; notionally or otherwise despite this being drawn to the minister’s attention.

5. Direct right against insurers

Deficiencies in the European Communities (Rights Against Insurers) Regulations 2002 have already been alluded to above under the following headings: The Third Party Rule, a common law anachronism and under Restrictions in geographic scope.

Regulation 3 (2) ECRIR 2002 confers a qualified right to compensation: a claimant enjoys no greater right against an insurer than its insured, in keeping with the common law rule considered above. It provides, amongst other things that:

‘...(the) insurer shall be directly liable to the entitled party to the extent that he is liable to the insured person’.

This appears to conflict with recital 15 in the Directive and the raft of CJEU rulings from Bernaldez in 1996 to Vnuk in 2014, also considered above.

6. No provision for victims of derogated vehicles

Section 144(1) RTA allows the minister to exempt a body that provides security of £500,000 from the duty to insure under s143. It is not known whether this power has ever been exercised. However the amount is clearly insufficient to satisfy the minimum cover requirement imposed under article 9.

Section 144(2) provides an extensive list of derogated bodies that are also exempted from the duty to insure under section 143. However there is no national law provision that extends to the Article 3 compensatory protection to a third party victim injured or suffering loss through the unauthorised use of such vehicles as the Uninsured Drivers Agreement 1999 only meets claims in circumstances

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439 In the author’s detailed response to the minister’s own 2013 consultation on the MIB Agreements.
where the RTA require third party motor insurance. There appears to be no other alternative provision for these such claims.\(^{440}\)

Article 5.2 of the Directive allows member states to derogate certain categories of motor vehicle from the insurance obligation provided suitable provision is made for the compensating body to compensate third party victims. The MIB Agreements do not extend to vehicles that do not conform to the Section 185 RTA definition of ‘motor vehicle’.\(^{441}\) The author’s own enquiries of the Department for Transport reveal that no vehicle types have been identified as exempted from the duty to insure under article 5.2. This exposes victims to the hazard posed by numerous off road vehicles which under our national law are not subject to the third party cover requirement.

7. Misallocation of insured claims as uninsured claims

In *EUI v Bristol Alliance Partnership*\(^ {442}\) (see above under Limitations in cover) the Court of Appeal court also came to the conclusion that whilst motorists must ensure that *any* use they actually make of a vehicle is always covered by third party insurance\(^ {443}\), there is no corresponding obligation on motor insurers to provide such a wide ranging scope of cover. One obvious flaw here is that the common law precludes insurance for illegal or bye purpose, so the driver in *EUI* would not have been able to obtain insurance to cover the consequences of his suicide attempt. Whilst Ward LJ’s decision in *EUI v Bristol Alliance Partnership* makes complete sense when viewed from the perspective of the contracting parties, it has the effect of undermining the consistency of the compensatory protection afforded to the third party victims.

Every year thousands of motor victims’ claims are treated by insurers as though they were claims against completely uninsured drivers. These claims are commonly described Article 75\(^ {444}\) claims and run by the insurer on risk for the

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\(^{440}\) In which case this fails to comply with Article 5 that requires member states to set up appropriate measures to ensure compensation is paid.

\(^{441}\) See above under the subheading Restrictions in scope.

\(^{442}\) *EUI v Bristol Alliance Partnership* [2012] EWCA Civ 1267, paragraphs 68 and 69

\(^{443}\) At paragraph 38.

\(^{444}\) Article 75 of the Articles and Memorandum of Association of the Motor Insurers Bureau is a private intra-insurer arrangement and is regularly misconstrued as imposing an obligation on third party victims of insufficiently insured drivers to pursue their claim for compensation under the highly prejudicial terms of the Uninsured Drivers Agreement 1999; whereas there is no legal basis for this position.
vehicle concerned, nominally as the MIB’s agent, under the terms of the Uninsured Drivers Agreement 1999 or 2015, even though some insurance cover was in place at the time of the incident giving rise to the claim. Judges up and down the country routinely describe these scenarios as ‘Article 75 claims’, lending credibility to the insurer’s pretentions. However there is no basis in law to justify a third route.

Arguably a modicum of authority for the UK’s approach is to be found in the highly influential opinion of Advocate General Lenz. In his opinion to the Court of Justice in Bernaldez he expressed the view that if the Court minded to rule that a policy term that excluded cover where the driver is intoxicated was permitted by the Directives, contrary to his advice, then member states would be free to extend the competence of the compensating to act as a fail-safe measure to ensure victims are compensated. However this was an entirely hypothetical postulation premised on a scenario that ran counter to his explicit advice that the protective aim of the directives required contractual exclusions to be invalid against third party victims. Unfortunately this hypothetical opinion was adopted by Jay J in his attempt to square the circle of the UK’s non conformity with the Directive in the following passage in Delaney v Secretary of State for Transport [2014] EWHC 1785 (QB)

“Were it not for the manner in which the MIB operates in this jurisdiction, this state of affairs would have the tendency to place the UK in breach of its obligations under the Directives - if that were not already clear enough from the wording of the Directives themselves, a swathe of ECJ decisions state that (subject to specified exceptions) any attempt by an insurer to avoid third-party liability is of no effect.”

Later on in the same judgment he paraphrases the Advocate Generals thesis:

“...although the scheme of the Second Directive is such that the insurer (if it exists) and not the national body should pay compensation, provided

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446 Namely that the compensatory protection of third party victims are capable of being affected by contractual terms agreed between the policyholder and the insurer.
447 Delaney v SoS for Transport, paragraph 21. See also paragraphs 66 & 67 of Ward LJ’s judgment in EUI v Bristol Alliance Partnership [2012] EWCA Civ 1267 in which a unanimous Court of Appeal expressed a similar view.
that the system as a whole ensures complete protection for victims there may be no objection in principle to the national body having an enhanced role. This is exactly the position which obtains in this jurisdiction on account of section 152(2) of the RTA 1988. However, the logical corollary must evidently be this: that the national body, here the MIB, must pay compensation in circumstances where the insurer - “for whatever reasons”, which must include the avoiding of the insurance policy for misrepresentation or non-disclosure by the insured - owes no liability in respect of the victim’s claim.”

This disregards the Advocate General’s clearly articulated view, following a review of the way the motor insurance requirement had evolved, that:

“the body is in no way conceived as a general catch-all, providing compensation upon the occurrence of any excluded events. Nor does the provision simply refer to the absence of insurance to which the national court alludes. Everything therefore indicates that, within the framework established by the directives, the person who has suffered harm as a result of an accident must recoup his loss from the insurer.”

As we have seen from the review of the Bernaldez case above, the Court of Justice did not need to consider the Advocate General’s hypothesis as it adopted his primary position. However, it is worthwhile repeating the following extract from this seminal judgment:

“18. In view of the aim of ensuring protection, stated repeatedly in the directives, Article 3(1) of the First Directive, as developed and supplemented by the Second and Third Directives, must be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all the damage to property and personal injuries sustained by them, up to the amounts fixed in Article 1(2) of the Second Directive.

19. Any other interpretation would have the effect of allowing Member States to limit payment of compensation to third-party victims of a road-

\[448\] At paragraph 39.
traffic accident to certain types of damage, thus bringing about disparities in the treatment of victims depending on where the accident occurred, which is precisely what the directives are intended to avoid. Article 3(1) of the First Directive would then be deprived of its effectiveness.

20. That being so, Article 3(1) of the First Directive precludes an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle."

It is a regrettable fact that the Court of Appeal’s unanimous decision in *EUI v Bristol Alliance Partnership* accurately reflects long established UK jurisprudence and practice in this area. This enables insurers to qualify the compensatory protection conferred on third parties by permitting reliance, against third parties, of contractual exclusions and restrictions in cover save, where expressly precluded from doing so within the RTA.

As we have seen above, this approach is incompatible with the Directive, as interpreted by the CJEU. Where a responsible vehicle is identified then there are only two permitted routes to the compensatory guarantee. First, if there is some Article 3 cover in place that cover should fit for purpose to meet a third party claim (subject to the single exception in Article 13). The second route is reserved for vehicles that have no insurance in place at all, only then can the claim be categorised as an uninsured claim, in which case it must be handled by the Article 10 compensating body (the MIB). European law imposes a stark binary scenario; there is no third way.

This misallocation of claims might not matter quite so much if the government’s extra statutory regime for uninsured drivers provided an equivalent level of protection to a fully insured defendant but it doesn’t. Unfortunately the Uninsured and Untraced Driver Schemes are riddled with vicious, oppressive and disproportionate, strike out clauses that permit the MIB to escape any liability even for the smallest procedural infraction. They also exclude liability for certain heads of loss and permit deductions from an applicant’s proper compensatory

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449 See *Churchill v Wilkinson* [2011] CJEU Case C-442/10, para 41 where the CJEU described the Article 10 body “as a measure of last resort.”

450 See below under *Unlawful deductions.*
entitlement in situations that would not be permitted in a normal civil action against an insured driver. These are decidedly inferior schemes which insurers regularly exploit to evade or reduce their liability to third parties in numerous scenarios.

This practice survives in the UK, notwithstanding its obvious non-conformity with European law, seemingly for no other compelling reason that it something a great many practitioners have become used to over a very long time.

8. Discrimination of minors and protected parties

Of grave concern is the complete absence of any proper safeguards to ensure that children and the mentally incapacitated are treated fairly by the MIB. The MIB have admitted to settling numerous children’s personal injury claims without any independent legal advice having been given; let alone court approval being sought. 451

In *Dunhill v Burgin* 2014 UKSC 18 The United Kingdom Supreme Court ruled that in a normal contentious claim governed by the Civil Procedure Rules children and other protected parties are entitled to a sophisticated multi-faceted degree of protective measures. It ruled that these were necessary not just to protect these vulnerable individuals against their opponents but also from their own legal representatives.

Claims under the Untraced Drivers Agreement are not classed as contentious claims but this ruling clearly applies to equivalent scenarios, such as a direct action under Article 18 of the Directive and to a settlement in a claim under the Uninsured Drivers Agreement 1999 because those are contentious claims that are subject to by the Civil Procedure Rules. So there are clear comparators by which the equivalency and effectiveness of this process is to be judged.

Clause 3 of the Uninsured Drivers Agreement 1999 and clause 2 of the Untraced Drivers Agreement 2003 impose a binding authority on the representative of a child or mentally incapacitated claimant/applicant to make decisions and to conclude agreements: ‘...as if it had been done to or by, or made to or in respect

451 In a letter to the author dated 4 February 2014 the MIB stated “For the years 2011 – 2013 inclusive we have paid a total of 2,259 claims from infants under the Untraced Agreement. Of those, ... 72 cases which were neither seen by an arbitrator nor a solicitor.”
of an applicant of full age and capacity'. This contrasts with the common law position and the Civil Procedure Rules and so appears to conflict with the equivalence principle.

The absence of any provision for (i) independent legal representation and (ii) court approval of settlements - for children and mentally incapacitated applicants under the 2003 Agreement for untraced driver claims also appears to conflict with European law equal treatment and equivalence principles and arguably with the European Convention on Human Rights 452.

9. Unlawful deductions from or reductions in compensation

Mention has already been made of the purported exclusion of MIB liability for subrogated claims which are expressly excluded under the Uninsured Drivers Agreement 1999 and impliedly so under the Uninsured Drivers Agreement 2015 and the Untraced Drivers Agreement 2003. Furthermore, the Agreements also purport to entitle the MIB to deduct any other sums received by the claimant by as a result of the accident.453 It is extraordinary, shocking even, that these particularly vulnerable individuals should be exposed to decisions made by unqualified insurance personnel who have had no judicial training and where there is a complete absence of any supervision or control454.

Article 10 of the Directive requires the authorised body to compensate victims 'at least up to the limits of the insurance obligation for damage to property or personal injuries'. However the very same provision goes on to qualify the equivalent compensation principle by stating that it is:

"without prejudice to the right of the Member States to regard compensation by the body as subsidiary or non-subsidiary and the right to make provision for the settlement of claims between the body and the person or persons responsible for the accident and other insurers or social security bodies required to compensate the victim in respect of the same

453 Clause 17 Uninsured Drivers Agreement 1999; Clause 6 Untraced Drivers Agreement 2003 and Clause 6 *2) and (3) Uninsured Drivers Agreement 2015.
454 In a letter to the author dated 29 July 2013 the Department for Transport stated: “The MIB is an independent organisation and is neither controlled nor supervised by the Department for Transport.”

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accident.’ There is no definition or case law on what is meant by ‘subsidiary’.

Even so, Article 10 does not appear to envisage the victim being left undercompensated in comparison to an equivalent claimant in an action against an identified and fully insured defendant. Under UK common law, certain insurance payments are disregarded when assessing damages, for example an accident, health or life insurance policy or pensions or mortgage protection plan which the victim has funded in kind, through services or where he has paid the premiums. One obvious point to mention here is that the payments made under these policies are not deemed in law to be payments made ‘to compensate the victim’ for the accident. Such payments are in reality an independently predetermined contractual sum conferred under a policy term that happens to be triggered by the accident; there is a world of a difference. It cannot be the objective of the Directives to discriminate against victims of uninsured and untraced drivers in this way.

Similar issues arise elsewhere, such as under Section 1(4) Third Party Rights Act 1930 and Section 10 Third Party Rights Act 2010 (not yet in force) which preserve an insurer’s right to plead breaches of warranty or condition by its policyholder against a third party.

10. Lack of legal certainty

The author has notified the Secretary of State for Transport and the European Commission of at least eighty instances where the UK national law provision appears to conflict with the minimum standard of compensatory protection required under the Directive. Some of these inconsistencies represent different aspects of a single breach. However in this author’s view approximately fifty of these constitute, separate and potentially actionable infringements of European law in the sense that these inconsistencies are capable of either reducing or extinguishing completely a third party victim’s entitlement to compensation in circumstances not permitted by the Directive. It follows from this that the UK transposition of the Directive is so extensively flawed that it simply cannot be taken at face value.

The fact that some provisions are so obvious or egregious that they are capable of being remedied by a Court applying a European consistent interpretation does little to address the problem. Such is the complexity that it is unlikely that no well educated and informed lay person could reasonably be expected to discern their true legal entitlement from reading the convoluted and highly technical and in places contradictory provisions of the UK implementation of this Directive. Furthermore, it is unreasonable to expect a lay person to succeed where so many eminent jurists from the senior appellate courts have so signally failed.456

Ongoing developments

The UK’s failure to properly implement the Directive has been the subject of a number of different initiatives that are part of a wider campaign for comprehensive reform. This paper will review these developments roughly in chronological order but a degree of artificiality cannot be avoided as some of them overlap or are concurrent.

1. The ongoing public awareness campaign for law reform

On 6 June 2007 the legal profession was given a timely reminder, in Mr Flaux J’s judgment in Byrne v MIB & Secretary of State for Transport [2007] EWHC 1268 (QB), that it was possible to challenge provisions in the MIB Agreements on the ground that they conflicted with superior European law in the form of the European Council’s directives on motor insurance.457 This led to private discussions with the MIB which the author participated as a member of a working party set up by the Association of Personal Injury Lawyers in 2007. The primary

456 See for example the Court of Appeal’s approach in Delaney v Pickett [2011], where the Court elected to ignore the possibility that the RTA might not conform to the minimum standards required under the Directive, or Byrne v MIB & Secretary of State for Transport [2007] EWHC 1268 (QB) where the Court appears to have been misled on the European jurisprudence affecting the proper construction of the Untraced Drivers Agreement or the wrong turn taken by the Court of Appeal in EUI v Bristol Alliance.

457 Flaux J held that the strict and absolute three-year time limit for applying to the MIB under the Untraced Drivers Agreement 1972 was not consistent with European law that required a limitation period no less favourable than that which applies to the commencement of proceedings by minors for personal injury in tort against a traced driver i.e the limitation provision in s 28 of the Limitation Act 1980. See paragraph 37 of the judgment. It was unfortunate that the judge took the view that it was not open to him to undertake a Marleasing style purposive construction of the agreement, see below under the Emerging issues heading.
concern was with the numerous procedural anomalies that provided insurers and the MIB with compensatory windfalls at the expense of third party victims. However, even at that stage the MIB was asked to ensure that its national law provision conformed to the minimum standards of protection required under the relevant Directives on motor insurance. Nothing came of those meetings. Consequently the author determined on raising awareness within the legal profession about the potential procedural pitfalls and substantive law irregularities to be found in the UK transposition of these directives through his lectures and articles. Eventually this lead to a more holistic review of the UK’s transposition of the Directive published in the New Law Journal in February 2013 that attracted the attention of the Law Commission. The Law Commission later consulted the author who prepared a detailed paper setting out the infringements of European law and making recommendations. Unfortunately the Law Commission’s further involvement was blocked by the Department for Transport.

2. The Department for Transport’s Review of the MIB Agreements

In late February 2013 the Secretary of State for Transport published a consultation paper setting out his proposals for reforming the MIB Agreements. The proposals included some elements of the procedural changes that had been raised with the MIB back in 2007 but it failed to deal with the substantive law defects. A campaign was organised and a number of special interest groups who supported the author’s call for wide ranging reform right across the UKs national law measures implementing the directives on motor insurance. These calls were ignored. In July 2013 the Department for Transport issued a statement indicating that it was constrained in what it could do by its need to secure the cooperation of the MIB. Calls for a dialogue with the minister to discuss the need for reform were made by a number of parties, including the author, but these approaches were also ignored.


459 Published in serial form as four separate articles in the New Law Journal On The Right Road? Nicholas Bevan 8-21 February 2013

460 The Law Commission is an independent body created by the Law Commissions Act 1965 to keep the law under review and to recommend reform where it is needed.
4. Infringement Complaint

When the Department for Transport failed even to implement its own proposals, the author filed a formal infringement complaint with the European Commission. The complaint was lodged in August 2013. It presented a detailed comparative law analysis of the UK’s transposition of the Directive and it set out and explained numerous instances where UK national law is inconsistent with the minimum standards of compensatory protection required under the Directive. It asked the Commission to persuade the UK Government to remedy these defects rather than take legal action.

The UK’s failure to fully implement the Directive extends to its predecessors and it is a phenomenon that goes back over a quarter of a century. It undermines the legal entitlement of millions of citizens in the UK as well as the rights of visiting foreign EU nationals. The list of incompatible provisions has been updated from time to time and now exceeds 80 instances.

It is also worth noting that a number of the issues complained of have since been vindicated in the clearest possible way by the Court of Justice’s rulings in Csonka and Vnuk and by the UK Court of Appeal’s Francovich award in Delaney v Secretary of State for Transport 2015 EWCA Civ 172.

It is understood that the Commission has communicated its concerns to the UK Government and embarked on a preliminary investigation.

4. Revisions to the Uninsured and Untraced Drivers Agreements

Any hopes of a Damascene change of mind by the Department for Transport in the wake of the Vnuk and Delaney decisions appear to have been misplaced.

After a delay of more than two years from its aborted 2013 consultation, the Government announced on 6th July that it had agreed a new scheme with the MIB. The new agreement was presented as a fait accompli; coming into effect on 1 August.

However, by approving the latest version of the Uninsured Drivers Agreement the Secretary of State introduced entirely new unlawful provisions that breached the Directive as well as perpetuating numerous others. What is truly extraordinary

\[461\] The complaint was registered under CHAP(2013)02537 and its reference under the EU Pilot scheme for handling complaints is 5805/13/MARK.
about its release was that, despite its ongoing discussions with the Commission arising out of the complaint, the Commission was kept completely in the dark. The first the Commission knew about this unlawful agreement was when it was announced to the general public on 6 July 2015. In the writer’s view, this exposed the minister’s bad faith. By introducing new and clearly unlawful provisions and failing to rectify numerous longstanding infractions that he was warned about not only in response to his own consultation in April 2013 but also presumably once more by the Law Commission sometime in late 2013 or early 2014 and again by the Commission itself, he was effectively flouting the authority of the Commission and the European law it is tasked with enforcing.

The new agreement was presented as the product of the 2013 consultation exercise, this is misleading. It is probably best described as a chimera made up of (i) the MIB’s original proposals, (ii) the minimum changes necessary to implement the more obvious implications Delaney without risking an outright accusation of bad faith and (ii) new provisions that present the MIB with further opportunities for windfalls that clearly conflict with European law.

The official statement announcing the changes studiously ignores the numerous calls for wide-ranging reform to bring the UK’s statutory and extra statutory implementation of the European directive on motor insurance into line with the minimum standards of compensatory protection required under that law. Not only does this new scheme fail to remove all the clear and obvious obstacles to full compliance in its 1999 predecessor but it compounds its default by introducing entirely new infractions.

Some welcome changes

One significant innovation is the excision of the two unlawful passenger exclusion clauses which it was warned about by a number of parties in the consultation responses. Yet these are presented as being introduced solely to comply with the Court of Appeal’s ruling in Delaney; which rather suggests that the 2013 consultation was no more than window dressing.

Other welcome changes include the curbing of some of the MIB’s powers to strike out valid claims for the least trivial procedural infraction. For example, the draconian strike out rules for not providing the MIB with various notices as the claim progressed are removed, as is the bizarre condition precedent in Clause

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13 that barred any claim if the victim failed to report the uninsured driver to the police. The unnecessarily complicated claims process has also been simplified and brought much closer into line with a normal civil claim. Claimants are no longer confronted by the misleading similar but subtly different notice requirements between Sections 152 and Clause 9, which the MIB exploited for decades to full effect to reject numerous claims. The excision of these provisions is a positive step and they make what was a tediously prolix and Byzantine claims scheme that much shorter and simpler.

Whilst this is gratifying for those who have campaigned for the removal of these disproportionately harsh anachronisms, they should never have been permitted in the first place. No attempt has been made to revoke their application to the thousands of claims left to run under the current discredited regime that remains in force for all accidents predating 1 August 2015.

**Serious flaws**

Unfortunately the Uninsured Drivers Agreement 2015 contains a number of serious breaches of European law as well as some basic drafting blunders for good measure. These include a number of exclusions of and restrictions in the MIB’s liability to compensate that are not only unjust, in so far as they prejudice the legal entitlement of accident victims, but they also conflict with European law. Take for example the unlawful provision in Clause 6 that purports to allow the MIB to offset life assurance or other such payments, discussed above.

Then there is the flagrant introduction of the terrorism exclusion in Clause 9, also mentioned above. It is hard to see how this makes any sense in policy terms. Presumably car bombs are the chief threat it envisages but as such use is clearly inconsistent with the normal function of a motor vehicle, we know from *Vnuk*, that it is excluded from the insurance requirement under European law anyway. It is hard to envisage what public good is achieved from the arbitrary distinction that allows a claim by a child cyclist who is grievously injured by an uninsured get-away driver escaping from a bank heist where a cashier has been murdered but not where the uninsured driver is an anti-GM crop saboteur who has just fired a warehouse containing a consignment of GM seed corn.

There are also grave concerns about the way Clause 17 removes the right to appeal the reasonableness of the MIB’s decisions to the Secretary of State for
Transport and substituting this with a paper appeal process to an arbitrator whose decision will be final and determined on the strict wording of the agreement without reference to the European law context. This offends basic rule of law and HRC principles.

5. Indecision by the European Commission

The Commission has been asked to escalate its investigation of the infringement complaint against the UK, to reach a determination and to enforce compliance of the Direction by legal action if necessary. No discernible progress has been made.

The Commission’s own protocol requires it to reach a determination on a complaint within one year of the complaint being accepted⁵⁶; now over two years ago. Thus far the Commission has declined even to express a view on any of the issues raised in the complaint.

One of the Commission’s primary roles is to enforce compliance with European law. It can discharge this role in several ways. If persuasion fails, it can make a determination, issue an infringement action or refer an issue to the European Court of Justice. It has been confronted with longstanding and apparently deliberate failure by a member state to properly implement the Directive after having been exhaustively briefed on each and every defect. The issues raised concern readily accessible conflicts of law, they do not require extensive investigation, merely an appraisal of the comparative law analysis already undertaken on its behalf. So far all the Commission has done is to hold a series of private discussions and meetings with the UK officials.

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⁵⁶See: Updating the handling of relations with the complainant in respect of the application of Union law, Brussels, 2.4.2012, COM(2012) 154 final, see subheading 8. Time limit for investigating complaints.
Possible consultation on the Untraced Drivers Agreement and the implications of Vnuk

In its July 2015 announcement the Department for Transport announced that it was in discussions with the MIB with a view to agreeing a new Untraced Drivers Agreement. There has also been some mention, unofficially, that the Department intends to consult on the implications flowing from the Vnuk ruling on the technical and mechanical scope of the insurance requirement. As indicated above, the UK has not elected to derogate any unusual vehicle types from the insurance obligation. Given that it was warned about this back in early 2013 and then failed to act, no early announcement is anticipated.

7. Judicial Review

The Secretary of State on being informed that his 3 July revisions to the MIB Agreements included provisions that were unlawful chose to do nothing. His department wrote to indicate that there were no plans to introduce any changes.

Public law actions challenging a decision by the executive must be brought before the court very promptly. Fortunately, a road safety charity (which had joined the author in calling for wide ranging reform of the UK transposition of the Directive back in 2013) agreed to apply to the Administrative Court for permission to judicially review the minister’s actions.

The proceedings challenge his decision to approve the changes to the MIB Agreements without first undertaking a comparative law review of its entire implementation of the Directive and for authorising provisions that were unlawful. The author has an advisory role and is constrained from divulging any further particulars at this juncture other than to indicate that the application has been issued and the proceedings are ongoing.

8. Emerging issues

When a member state fails to properly implement a European directive in a way that impinges on the legal rights conferred on individuals so as to cause them loss, it is well established that there are three potential routes to redress under European law.
The curative effect of consistent interpretation

The first recourse is to challenge the provision in the national courts by seeking a European law consistent interpretation, applying the Marleasing\textsuperscript{463} principle as developed by Pfeiffer\textsuperscript{464}. In this way a European directive is said to be capable of having indirect effect. Churchill Insurance v Wilkinson, considered above under the Insurers’ right of recovery heading, demonstrates just how far a consistent interpretation can go in remedying an inconsistent domestic provision.

Unfortunately, the UK’s track record in this area is inconsistent. Mention has already been made of EUI v Bristol Alliance above under the Limitations in cover heading. Other unsatisfactory outcomes are not difficult to find. In Byrne v MIB & Secretary of State for Transport [2007] EWHC 1268 (QB) an experienced High Court judge came to the erroneous conclusion that the court’s duty to apply a Marleasing style purposive construction did not apply to the Untraced Drivers Agreement. His judgment is notable for its absence of any mention of Pfeiffer.

In Pfeiffer the CJEU ruled that national courts have a positive duty when construing a national law or rule intended to give effect to a Directive \textsuperscript{465} to “presume that the Member State, following its exercise of the discretion afforded it under that Article, intended entirely to fulfil the obligations arising from the Directive”. Furthermore it has to consider “the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive.”

Unfortunately neither the first instance trial judge nor the three appellate judges in Delaney thought it necessary to apply a European law consistent interpretation. One of the practical difficulties in enforcing a reliable and constant approach to interpretation of EU law in UK jurisprudence is the passivity rule that confines a judge’s role to determining only those issues raised by the parties. The UK judiciary have limited training outside the extensive expertise acquired in their

\textsuperscript{463} Case C-106/89Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-4135 -
\textsuperscript{464} Case C-397/01 to C-403/01, Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV; [2004] ECR 1-8835
\textsuperscript{465} Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV; [2—4] CJEU Case C-397/01 to C-403/01 para

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earlier careers as advocates. It is unclear whether a UK court has the power, of its own motion, to impose a European law consistent interpretation against the will of the parties.

**Seeking compensation from the state**

The second remedy is to bring a claim in damages against the UK Government, as occurred in *Byrne* and *Delaney*. However, for the average private citizen, this is an exceedingly time consuming, costly and uncertain endeavour. Funding such a claim is beyond the means of most private citizens, especially now that state funded legal aid has been all but abolished and, not being a personal injury action, qualified one way cost shifting is not there to protect the individual from the risk of facing a potential liability for ruinous legal costs. It also requires specialist expertise in public law and European law challenges and even if a claimant succeeds in establishing personal loss caused by a clear breach of a directive, one that is unconditional and sufficiently precise in its conferral of rights on individuals so that it is capable of having direct effect, his right to damages is still subject to extraneous considerations that determine whether the breach is sufficiently serious to warrant state liability; on this latter point, the observations of the Court of Justice in *Evans* are worth quoting:

> ‘[86] In that connection, all the factors which characterise the situation must be taken into account. Those factors include, in particular, the clarity and precision of the rule infringed, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law...

> [87] Those criteria must in principle be applied by the national courts in accordance with the guidelines laid down by the Court...’

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466 In *Evans*, see below, this appears to have been the outcome of this claimant’s unequal contest, first with the MIB, then with the Secretary of State. Although he won the right for victims of hit and run drivers to recover interest on their general damages, he lost on other issues; the effect of which was to wipe out his personal entitlement.
In the UK this guidance is to be found in the House of Lords ruling in *R v Secretary of State for Transport, ex parte Factortame Ltd and others ([2000] 1 AC 524)*. In Lord Clyde’s judgment he sets out the following multi-factored objective test, it is a nuanced test where no one factor is likely to be decisive by itself. These factors include the following considerations: (i) the importance of the principle breached; (ii) the clarity and precision of the rule breached; (iii) the extent to which the breach is excusable; (iv) the existence of settled Court of Justice case law; (v) the behavior of the infringer, after it was clear that an infringement had occurred; (vi) The persons affected by the breach, and (vii) the position taken by a European Union institution.

Clearly, a privately funded citizen will be at a significant disadvantage when confronted by the ample financial resources and expertise of that the State can call upon. He is unlikely to be able to discover, without considerable time and expense, the degree of compliance in other member states, whereas the State is likely to have this information at its finger tips. In the *Evans* case, the claimant was injured on Christmas day in 1991 by a hit and run driver but he did not receive his *Francovich* award for being wrongly refused interest on his award until after the Court of Justice’s ruling of 4 December 2003; some 12 years later. The UK is celebrating the 800th anniversary of the Magna Carta this year and one of its principles seems particularly apt: ‘that Justice delayed is Justice denied’. There have been other litigation ‘nightmares’ associated with bringing a *Francovich* claim against the state. The technical ability to present a *Francovich* claim is no proper answer to a member state’s failure to fully implement a directive or to satisfy legal certainty in so doing.

*Direct effect against the authorised body*

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467 In *Evans v Secretary of State for Transport* [2001] EWCA Civ 32 judge JL delivering judgment in the Court of Appeal described the case as an interminable nightmare for the claimant.

468 See for example *Spencer v Secretary of State for Work and Pensions* [2008] EWCA Civ 750, which was a conjoined appeal in which Steven Moore’s Francovich action was dismissed, 11 years after his running down injury, on the uncertain ground that the six year limitation period for bringing such a claim began at the date of the accident instead of the MIB’s erroneous determination of his claim under the Untraced Drivers Scheme.
The third remedy is potentially even more problematic and it is the subject of an ongoing reference to the Court of Justice. This route involves seeking direct effect of all the rights conferred under Articles 3 and 10 of the Directive against the Article 10 compensating body, which in the UK is the MIB.

If direct effect of the Directive does apply to a public body such as the MIB, then is capable of influencing the MIB’s liability not just for matters falling within the compensatory role that the MIB agreed to discharge under the various compensation schemes with the Secretary of State for Transport but also, so it seems, for the State’s transposition failings, even though these are matters that the MIB has no constitutional authority to influence or control. In the latter case, for example, this involves the UK’s evident failure to fully implement the Directive’s proper geographic and mechanical scope of cover. This exposes victims to the risk of falling between two stools, as it were, protected neither by the State’s provision for compulsory third party motor insurance nor the MIB’s safety net.

Direct effect involves making the MIB liable (‘vicariously’ so to speak) to compensate motor accident victims where a European law consistent interpretation of both the RTA and the relevant MIB Agreement establish that the event giving rise to the claim ought to have been subject to the duty to insure but wasn’t. One then applies the wording of article 10 to arrive at the proper role of the MIB. If the Directive requires the circumstances that gave rise to liability in the claim to be covered by insurance and, for whatever reason, the incident was not, then the natural corollary of this is that it is an uninsured driver claim. It is then but simple logic that the MIB is liable to discharge its compensatory role under Article 10 in those circumstances.

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469 Elaine Farrell v Alan Whitty, The Minister for the Environment and the Attorney General Case C-413/15
470 That is to say within the Uninsured Drivers Agreements 1999 and 2015 and the Untraced Drivers Agreements 2003 as amended by five supplemental agreements, and potentially their predecessors.
471 And in cases where there is some cover but it is insufficient in circumstances where the requires such cover, such as in EUI v Bristol Alliance.
472 As interpreted by the CJEU and shaped by the various European law principles considered above, such as the Directives protective objective and the principles of equivalence and effectiveness.
Direct effect allows individuals to rely on the precise wording Articles 3 and 10, purposively construed, in preference to any inconsistent wording in the MIB agreement itself, to compel the MIB to respond to a claim that falls outside the scope of its contract with the Secretary of State, where the Directive requires it. The Courts have a positive duty when construing a national law or rule intended to give effect to a Directive \(^{473}\) to “presume that the Member State, following its exercise of the discretion afforded it under that Article, intended entirely to fulfill the obligations arising from the Directive”. Furthermore it has to consider “the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. In the main proceedings.”

The chief difficulty with this alternative route to redress is that in June 2007 Flaux J, a High Court judge with considerable experience in public international law, ruled unequivocally that the MIB is not an emanation of state and that the Directive is not capable of having direct effect against it\(^{474}\). Furthermore, his decision drew on the weighty support of a number of authoritative \textit{obiter dicta} by several senior appellate jurists.

That said, it is this author’s view that the learned judge’s decision is, quite simply, wrong. An article is in preparation\(^{475}\) that argues that the judge failed to consider all of the relevant European law, that the European law principles he did apply\(^{476}\) were subordinate to the superior governing principles he left out of account\(^{477}\) and, in any event, they were applied too rigidly\(^{478}\) and furthermore, that had he been properly appraised of the full facts and circumstances relevant to the proper classification of the MIB, he would have come to a different view, notwithstanding his strict adherence to the yardstick guidance he used to determine the issue.

\footnotesize{\begin{itemize}
\item \textit{Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV: [2—4]} \textit{CJEU Case C-397/01 to C-403/01 para}
\item \textit{Byrne v MIB & Secretary of State for Transport [2007] EWHC 1268 (QB)}
\item Which the author commits to offer for publication in the British Insurance Law Association Journal within the next three months.
\item \textit{Case C-188/89 Foster v British Gas [1991] ICR 84.}
\item \textit{Case 8/81 Becker v. Hauptzollamt Muenster-Innenstadt [1982] ECR 53}
\item For the correct, nuanced, approach to applying the \textit{Foster} guidelines, see Blackburn J Griffin \textit{and others v. South West Water Ltd} [1995] IRLR 15.
\end{itemize}}
It is also relevant to note that that this very issue, whether the Article 10 authorised body is an emanation of state, is the subject of a referral by the Irish Republic’s Supreme Court to the Court of Justice in *Elaine Farrell v Alan Whitty, The Minister for the Environment and the Attorney General*, 1997/10802P. The injured claimant is no longer involved as she was fully compensated by the Irish MIB after Birmingham J ruled in the Irish High Court that the Irish MIB was an emanation of state. This enabled here to be compensated by the Irish MIB even though she was a passenger in part of a vehicle which under Irish national law did not require third party motor insurance cover. That decision was delivered in January 2008 and now in 2015 the remaining protagonists are the MIB and the Irish Government. The reason for this prolonged litigation probably arises from the fact that the remaining parties recognise the wider implications of Birmingham J’s decision, especially following the *Vnuk* ruling which has exposed many member states implementation of the geographic and technical scope of Article 3 as wanting. This is in fact the second reference to the Supreme Court in this case. The Court of Justice’s judgment is imminent but it is very unlikely to result in any decisive conclusion on the status of the Irish MIB. As it pointed out in the first reference in this case in its judgment of 19 April 2007, it is not the role of the Court of Justice to make findings of fact.

It is however worth ending this paper with Waller JL’s observation, when he sought guidance from the Court of Justice back in July 2008: ‘It is difficult to think that a body such as the MIB or its equivalent should be an emanation of the state in one member country and not in another.’

**Nicholas Bevan, Solicitor, 29 November 2015**

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479 On how to apply the guidance in *Foster v British Gas*.
480 *Elaine Farrell v Alan Whitty, The Minister for the Environment and the Attorney General* Case C-413/15, which asks the Court of Justice to elucidate on how the *Foster* test is to be applied.
481 Case C-356/05 *Elaine Farrell v Alan Whitty & Others* 2007, paragraph 44.
482 *McCall v Poulton & Ors* [2008] EWCA Civ 1263; this case was settled before the issue could be considered by the Court of Justice.
483 Ibid, paragraph 47.
8. Bridging the gap.

BILA Journal, issue 129, October 2016

Abstract

This article argues the case for the application of direct vertical effect of Article 10 of the European Council Directive 2009/103/EC on motor insurance against the UK’s Motor Insurers’ Bureau (MIB). It discusses the European doctrine of state liability under the principles formulated by the Court of Justice of the European Union in *Becker*, *Johnston* and *Marshall* and the proper approach to fixing liability on public authorities and other emanations of the state, considering the criteria devised by the Court of Justice in *Foster v British Gas plc* The article recommends an approach that concentrates primarily on the public service delegated to the body, rather than the organisation itself; contending that the doctrine of state responsibility, properly applied, extends to the MIB.

Preface

In *Mind the Gap*, this author reviewed the minimum standard of protection imposed by the European Council Directive 2009/103/EC on motor insurance (the Directive), explaining how the European insurance requirement has evolved over the years into a widely scoped free-standing principle. It then identified ten different areas of nonconformity in the UK’s domestic transposition of that law and attempted to explain the underlying causes of that disparity. It considered

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484 First published by BILA journal online in March 2016
485 *Ursula Becker v Finanzamt Münster-Innenstadt* [1982] CJEU Case 8/81
487 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] Case C-271/91
488 *Foster and others v British Gas plc* [1990] CJEU Case C-188/89
490 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

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the various obstacles to legal redress, including the evident reluctance by successive UK governments to remedy these longstanding infringements of European law.

The extensive cost, litigation risk and delay involved in presenting a *Francovich* action for damages against the state for failing to fully implement the Directive can be a daunting prospect for an individual. Furthermore, as we shall see from the analysis of *Byrne v MIB* and the recent decision in *UK Insurance v Holden* below, the UK courts cannot be relied on to cure defective national law provisions through a European law consistent interpretation. This paper identifies what promises to be a more direct and certain route to redress that enables motor accident victims to access their full legal entitlement under European law. It allows individuals adversely affected by legislation or other national law provisions that fail to properly implement the Directive, to rely directly on the wording of the Directive itself against the MIB, in its capacity as the UK’s authorised compensating body.

**On the nature of the MIB**

The issue as to whether or not the MIB is an emanation of the state is said to determine whether individuals can rely directly on the wording of the Directive in a civil action against the MIB, instead of indirectly through the national law provisions that are supposed to implement that law. The Department for Transport and the MIB itself both contend that the MIB is merely a private company contracting at arm’s length with the State to discharge various outsourced public services. Their common position is that the MIB’s responsibilities are defined by its contractual obligations to the state and no more.

It is certainly true that the MIB is a privately owned corporation limited by guarantee. From the little we know of its day to day affairs, it would appear that

491 *Francovich and Others* [1991] CJEU Joined Cases C-6/90 and C-9/90

492 *Francovich* claims can be hazardous. They are public law actions where a claimant does not enjoy the protection conferred by qualified one-way cost shifting that the Civil Procedure Rules impose in a normal personal injury claim; if pursued as a separate action, it can add years to the litigation; it usually features a significant disparity in the respective parties’ resources and know-how, and the *Factortame* criteria for assessing whether a breach of European law was sufficiently serious often confers a wide discretion on the court. Another potential disadvantages is that the award is assessed on a loss of chance basis rather than the tort law *restitutio in integrum* principle, which can result in a lower award.
these are conducted and managed free from any overt state control. It is a consortium: one exclusively owned and managed by every motor insurer authorised by the government to provide insurance in the UK. In this sense the MIB is indisputably an emanation of the commercial interests of what collectively could be described the motor insurance industry. It is said to discharge its role as the body appointed by the State to compensate victims of uninsured and untraced drivers by fulfilling its contractual obligations to the Secretary of State for Transport, in keeping with many other outsourced service providers. The contractual arrangements are found in a succession of private law contracts with the Secretary of State for Transport.

This has led a number of senior judges to opine that the MIB is no more than a privately owned and managed contractor. Few could be more eminent or emphatic than Hobhouse LJ’s obiter comments in the conjoined appeal in Mighell v Reading. When considering whether the Directive was capable of direct effect against the MIB in an untraced driver claim, he said:

“In my judgment the correct view to take of the role and status of the Bureau is that it is a private law contractor and no more and as such is not capable of being covered by any direct effect the Directive may have.”

“The Bureau is not constitutionally an emanation of the state: it is a private law company. It is not functionally an emanation of the state: it acts on its own behalf in the commercial interest of its members not on behalf of the state or as a delegate of the state. It enters into commercial private law contracts with inter alia the Secretary of State.”

493 The Secretary of State for Transport is responsible for regulating every motor insurer in the UK, membership of the MIB and contributing to its compensation guarantee fund are preconditions of their authorised status.

494 Currently the Untraced Drivers’ Agreement 2003 and the Uninsured Drivers’ Agreements 1999 and 2015.

495 Mighell v Reading and Another; Evans v Motor Insurers’ Bureau; White v White and Another (1998) Times, 12 [1999] 1 LLR 30


497 Mighell, p. 1272
Although his colleagues, Schiemann and Swinton Thomas LJJ, were less strident in declining to classify the MIB as an emanation of state, they nevertheless supported the view that the Directive’s predecessors were not capable of direct effect against it.

These weighty opinions were a highly influential factor in the deliberations of an able High Court judge, experienced in public international law. Flaux J had been specifically tasked with establishing whether the MIB was an emanation of the state and thus subject to the direct effect of the Directive. In June 2007 he ruled in Byrne v MIB that, not only was the Untraced Drivers’ Agreement 1972 no more than a private law agreement, but that as such it was not subject to a Marleasing style European law consistent construction. He also held that as the MIB was not an emanation of the state the Directive was incapable of having direct effect against it. As this decision remains the only UK authority on these points, it presents an obstacle to victims seeking to cure the numerous unlawful exclusions and restrictions in MIB liability in the two schemes it operates.

Against this orthodoxy, it is just as clear that the MIB also possesses characteristics in keeping with a public body, a state agency and even a public authority. For a start, its genesis predates its formal constitution as a private limited company in 1946 and it is one that has a distinctly public service nature. The MIB owes its existence to an accommodation reached in 1945 between the state and every motor insurer then authorised by the state to conduct business in the UK. This agreement is usually referred to as the “Principal Agreement”, by which the motor insurance sector collectively agreed to incept and become members of a “central body” with the express purpose of entering into a subordinate agreement with the state with the ultimate aim of funding the obligations imposed under it to compensate victims of uninsured vehicles.

[498] If only because of the ambiguity as to what constitutes an emanation of state
[499] Byrne (a minor by his litigation friend, Byrne) v Motor Insurers Bureau and another [2007] EWHC 1268 (QB)
[500] Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-4135 - Case 106/89, where the CJEU ruled that: ‘… in applying the national law, whether the provisions in question were adopted before or after the Directive, the national court called upon to interpret is required to do so, as far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of article 189 [now art 249 EC].

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The Principal Agreement requires the “central body”, subsequently incorporated as the MIB, to fulfil two separate public service roles. First, to satisfy any outstanding judgment in respect of a liability which is required to be covered by a policy of insurance or security under what was then Part II of the Road Traffic Act 1930 but is now Part VI of the Road Traffic Act 1988; whether or not any insurance was in place for the vehicle responsible, whenever a relevant judgment is outstanding for seven days. Its secondary role was to compensate victims of foreign visiting motorists.

This focus of this paper is the domestic arrangements for guaranteeing the compensatory entitlement of motor accident victims other than the responsible driver. The first of these subordinate agreements was the Uninsured Drivers’ Agreement of 1946. There are now two sets of agreements that set out successive compensatory regimes: currently the Untraced Drivers’ Agreement 2003 and the Uninsured Drivers’ Agreements of 1999 and 2015.

The Principal Agreement anticipates the MIB’s obligation to compensate third party victims as being distinct from the obligations of the contracting parties, where such a policy existed. It expressly preserves the contractual autonomy of authorised insurers to agree terms with their policyholders as well as affirming an insurer’s right to recoup its outlay outside the scope of cover from a defaulting assured party.

Important features of the Principal Agreement are that the subordinate agreement it anticipates must be in a form approved by the Minister for War Transport and that disputes about the reasonableness of a requirement imposed by the MIB that any particular step be taken to obtain judgment against other tortfeasors should be referred to the minister, whose decision will be final. These provisions reserve of a high degree of potential control by the state over the way the MIB

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501 Which applies to motor accidents that occurred between 1st October 1999 and 31 July 2015.
502 Which applies to motor accidents that occurred on or after 1 August 2015.
503 See clause 3 of the Principal Agreement.
504 Whose role is now exercised by the Secretary of State for Transport.
505 See clause 4(2) supra.
discharges its role. The Department of Transport have confirmed that the Principal Agreement is still in effect.

As indicated above, it is commonly perceived that the MIB’s classification as an emanation of the state is a pivotal requirement. The answer is said to determine whether private individuals can rely upon the legal rights conferred on them by Article 10 of the Directive in legal proceedings against the MIB. If they can then this would entitle them to invite the court to disregard much of the present non conformity with the Directive that peppers our national provision that is supposed to guarantee compensatory protection of motor accident victims but which all too often serves to obstruct them from accessing their basic legal rights conferred under European law.

Part of the difficulty in making a correct attribution is due to the imprecision associated with what is meant by an “emanation of state”. The term is not an autonomous European law term or principle. It is more of a means to an end – an empirically derived shorthand developed by the Court of Justice of the European Union (CJEU) to define a person or organisation that is not part of central government but which is nevertheless so closely connected with a state controlled public service as to justify extending the special rule that enables individuals to benefit from the rights conferred on them by the directive itself as though it been fully transposed into national law. This doctrine is intended to prevent member states from evading liability for failing to properly implement a directive by outsourcing or otherwise delegating its obligations under that directive to a third party and then washing its hands of all responsibility. In consequence, emanation of state status has something of an elusive “I know it when I see it” quality that is easy to miss if one adopts an overly formulaic approach. This is why it is necessary to open our enquiry with a review of first principles on state liability.

506 It is unclear on what basis precisely it could be enforced as many if not all of the original contracting parties have since changed. It was still mentioned in the recitals to every MIB Agreement prior to 2003 but not thereafter
507 See below under the heading “On the role entrusted to the Article 10 compensating body”
508 Including the relevant primary and secondary legislation as well as the minister’s private law agreements with the MIB itself
509 Per Mr Justice Potter Stewart, in his Supreme Court judgment in Jacobellis v Ohio 378 U.S. 184 (1964)
This paper challenges prevailing judicial orthodoxy that the MIB is not an emanation of state. Furthermore, it also challenges the assumption that it is necessary to demonstrate that the MIB itself is under the control of the state as a precondition of the Directive having direct effect. This paper offers a modified approach to deciding the latter issue. It argues that the proper focus of any enquiry into the direct effect of the Directive against the MIB should centre on the public service devolved, as opposed to the organisation charged with its performance. There is however an obvious overlap between the two, especially in view of the MIB’s origin as a body set up specifically to compensate victims of uninsured drivers, so it is important to have a basic understanding of what kind of its constitution and activities.

The MIB has a surprisingly diverse range of commercial and public service interests. Its extensive scope of operations has a chimera-like quality that makes it difficult to categorise simply. The MIB is a not for profit organisation, in keeping with its public service ethos. However its CEO is a highly innovative and the organisation is involved in a number of commercial undertakings.

The MIB’s annual reports indicate that it provides training, auditing, compliance and management services. Presumably the revenues generated by these enterprises are applied to offset its operating costs, serving ultimately to reduce the amount of the levy it imposes on its members to fund the two compensatory schemes it is tasked with managing.

Against this, according to the Chairman’s opening statement in its 2014 annual report, the MIB has a “strategic aim of achieving a reduction in the level and impact of uninsured driving in the UK coupled with ensuring that the victims of uninsured and ‘hit and run’ drivers receive fair and prompt compensation”. This openly articulated public service role is also borne out by the way it works in partnership with various government departments and agencies (primarily the Department for Transport and the Ministry of Justice). These activities include anti-fraud initiatives, managing the Claims Portal, playing a significant role in developing and managing the Medco Scheme510, managing the Employers’

510 That regulates the commissioning and disclosure of medical reports in soft tissue injury claims introduced under the Ministry of Justice’s Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents

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Liability Tracing Office, operating a helpline to assist the police identify whether vehicles are insured, developing and operating askCUE511, and it acts as the UK appointed body to maintain the Insurance Database512. From this it will be appreciated that the MIB has diversified its activities significantly since its inception nearly seventy years ago, in 1946.

The superior law governing the MIB’s compensatory role now derives from Europe and is set out in the Directive. This is considered later under “On the role entrusted to the Article 10 body”.

The MIB is a consortium owned and managed by the multi-billion pound motor insurance sector, where licence to operate is made conditional upon membership and where each member is obliged to pay a hefty contribution every year to its levy. Allied to this is the MIB’s close and extensive working relationship with the government in the fields of activity identified above which allows it to act akin to, if not in actuality, as a quasi motor insurers’ civil service and a very effective lobbyist of its members’ interests.

The MIB has extensive and exclusive links with central government in keeping with its important role; something not enjoyed by ordinary citizens. A recent Freedom of Information Act request that sought to ascertain the extent of this relationship was declined on the ground that it would be too expensive to provide statistics even of high level contact between the government and the MIB.

Account must also be taken of the MIB’s public law status conferred under: (i) under the Green Card Scheme, incepted in 1949, where the MIB acts as the UK’s handling bureau tasked with compensating victims of foreign drivers by the United Nations Economic Commission for Europe, and its membership of the Council De Bureau and (ii) the additional European law roles it has assumed under the Directive. As to the latter, see below under “On the role entrusted to the Article 10 compensating body”.

This paper argues that any properly informed court should recognise the MIB for what it is: a public body charged with an important public service that is under the control of the state and for which purpose it is conferred with special powers; and

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511 This is an online service that enables claimant representatives to check the number of previous personal injury claims made by their clients
512 Which member states are required to maintain under the Directive
that the current narrative that presents the MIB as no more than a private independent contractor is overly simplistic.

Yet another difficulty with classifying the MIB’s proper legal status has to do with the way previous forensic enquiry has placed far too great an emphasis on the nature of the MIB itself (the legal formalities associated with the way it operates, the degree of control exerted over it by the State in its day to day affairs, its special powers and so forth), all arguably at the expense of any sufficient analysis of its public service role as a state authorised compensating body discharging the role set out in Article 10 of the Directive. The debate as to whether the MIB is an emanation of state risks obscuring a proper European consistent analysis that depends on superior European law principles being applied independently of this ambiguous labelling.

Accordingly, the author’s analysis will open by identifying the relevant European law governing state liability for infringements of directives and how this has been extended to embrace certain organisations so closely connected to the state to warrant, at least for these purposes, being identified with it for the purposes of direct effect. It will review the European and national jurisprudence on the conditions necessary for direct vertical effect to apply before moving on to address the legal position of the MIB itself, both on Flaux J’s own terms513 and independently thereof.

**First principles on state liability**

It is a commonplace and fundamental principle of European law that directives are addressed to the member states and that it is the responsibility of each member state to implement a directive’s objectives into its national law514. Member states have a treaty obligation “to achieve the result envisaged by a directive and their duty ....is to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation...”515

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513 Whose primary focus was on the nature of the MIB as opposed to the public service devolved to it
514 Von Colson and Kamann v Land Nordrhein-Westfalen [1984] CJEU Case 14/83
515 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] CJEU Case 222/84, para 6

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The directive requires every member state to implement into its own law the rights it confers on individuals but it does not automatically entitle the intended beneficiaries to rely on those provisions in their home court. Consequently, a claimant’s first recourse is to look to the national law implementation of the directive for his or her legal remedy. Unfortunately, the UK’s transposition of the Directive is riddled with defects that detract from the minimum standard of compensatory protection prescribed by its provisions. It is also well known that where a directive’s objectives have not been properly implemented a claimant may be able to argue for a European law consistent interpretation of the defective national law, in so far as this is possible. Failing that, an individual may in certain prescribed circumstances claim damages against the member state under the principles for the loss caused by its failure to fully implement the directive’s objective.

Unfortunately, as intimated above, our national courts have an inconsistent track record in delivering a purposive construction of the UK’s implementation of the Directive and action can be fraught with difficulty.

The principle of state liability for loss and damage caused to individuals by a breach of EU law is inherent to EU Treaty law. This is a fundamental doctrine of which the principles of state liability under and direct effect of directives under Foster v British Gas are subordinate manifestations. The following extract from the CJEU ruling in Becker v Finanzamt Münster-Innenstadt explains this:

516 See the author’s earlier article, Mind The Gap!, British Insurance Law Association Journal February 2016
517 See Aikens LJ’s helpful analysis of the principles applied by the UK courts to the consistent construction in Churchill Insurance Company Limited v Benjamin Wilkinson and Tracy Evans v Equity and Secretary of State for Transport [2012] EWCA Civ 1166, see Part VI of the judgment: Principles of interpretation of national laws which are based on EU Directives
518 Francovich and Others [1991] CJEU Joined Cases C-6/90 and C-9/90; See the footnote to this case above in the Preface alluding to these difficulties.
519 See Francovich para 35
520 Foster and others v British Gas plc [1990] CJEU Case C-188/89
521 Ursula Becker v Finanzamt Münster-Innenstadt [1982] CJEU (Case 8/81), followed in Francovich paras 11 and 12
“21 .....that whilst under Article 189 regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of measures covered by that article can never produce similar effects.

22 It would be incompatible with the binding effect which Article 189 ascribes to directives to exclude in principle the possibility of the obligations imposed by them being relied on by persons concerned.

23 Particularly in cases in which the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into consideration as an element of Community law.

24 Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails. Thus, 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 in so far as the provisions define rights which individuals are able to assert against the State.”

A modified principle

Accordingly, the principle by which a directive can be said to have direct effect against a state is an exception to the basic rule. To be exercised, the nature

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522 Referring to Article 189 of the EEC Treaty, Article 198 Maastricht consolidated version

523 See also Francovich para 32 which requires national courts, where they have jurisdiction, to give full effect to EU law and to protect the rights it confers on individuals

524 Mustill LJ provides a clear explanation for the basic rule in Doughty v Rolls Royce Plc [1991] EWCA Civ 15. In para 10 he states: “It is axiomatic that an individual cannot rely on the Directive merely by asserting rights against another individual which would

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of the right conferred under that directive must satisfy the following threshold criteria: first it must be a right conferred on individuals; second, it must be unconditional and sufficiently precise to enable a court to determine what rights have been conferred, and finally there must be a direct causal link between the state’s failure to implement the directive and the loss sustained\(^{525}\).

The way such state liability works is analogous to the common law principle of estoppel. However in this instance, individuals gain a positive right to rely on the rights conferred on them by a directive, against the State, on the basis that a State is prevented from relying on incompatible national provisions perpetuated by its own failure to fully implement the directive conferring those rights\(^ {526}\).

There can be little, if any, doubt that Articles 3 and 10 of the Directive satisfy these threshold conditions. Article 3 requires every member state “to take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance”\(^ {527}\).

The comprehensive nature of this obligation was self-evident from the language of the wording of the Directive’s predecessors in 1990\(^ {528}\), if not earlier. Any scintilla of doubt both as to its meaning and the high importance placed on the legislative objective of protecting individuals was removed following the CJEU’s ruling in *Bernaldez*\(^ {529}\) in 1996. A raft of CJEU rulings have since endorsed *Bernaldez*, culminating in the most recent judgment in *Vnuk v Triglav*\(^ {530}\) in 2014. Indeed it is hard to envisage how any serious challenge could now be raised in this regard.

In 2006 the CJUE ruled in *Farrell*\(^ {531}\) that Article 1 of the Third Directive on motor insurance (90/232/EEC) satisfied the threshold criteria for direct effect\(^ {532}\). That

\(^{525}\) *Francovich* para 11  
\(^{526}\) *Becker* para 25  
\(^{527}\) *Article 10 is considered below*  
\(^{528}\) The year in which the third European directive on motor insurance (90/232/EEC) was approved  
\(^{529}\) *Ruiz Bernaldez* [1996] CJEU (Case C-129/94)  
\(^{530}\) *Damijan Vnuk v Zavarovalnica Triglav d.d.*, [Case C-162/13]  
\(^{531}\) *Farrell v Whitty & MIB* [Case C-356/05]  
\(^{532}\) *Farrell*, para 37
provision, now consolidated in Article 12.1 of the Directive, extends the benefit of the Article 3 insurance obligation to “passengers other than the driver, arising out of the use of a vehicle”. Article 10 defines the role of the compensating body which every member state must adopt or incept with the object of compensating victims of uninsured and unidentified vehicles at least up to the limits of the Article 3 insurance obligation.  

**An extended exception**

Where many commentators and members of the judiciary are less certain is whether the MIB is subject to the doctrine of direct effect; the broad consensus is that it isn’t. Before this question can be answered, it is necessary to review the way state liability for failing to properly implement a directive has been extended, so as to embrace organisations that are not part of central government.  

The principle in *Becker* has been applied in a number of important CJEU judgments including, most notably, *Marshall v Southampton and South-West Hampshire Area Health Authority* and *Johnston v Chief Constable of the Royal Ulster Constabulary* and *Foster and others v British Gas plc*. All three of these cases were referred for preliminary rulings from the UK and featured claims by individuals affected by the defective implementation of the Equal Treatment Directive.

In *Marshall*, The CJEU applied the doctrine to a local health authority and ruled that once this doctrine was triggered the concept of direct effect was indivisible, so that:

“.... where a person involved in legal proceedings is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either

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533 This equally unconditional and precise provision is considered in more detail below.
534 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] CJEU Case C-271/91
535 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] CJEU Case 222/84
536 *Foster and others v British Gas plc*. [1990] CJEU Case C-188/89
537 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

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case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law"\(^{538}\).

Accordingly the CJEU ruled in *Marshall* that no distinction was to be drawn in this respect between the actions of a public authority in the discharge of its public service role, in this case acting as an area health authority, and its private arrangements with its employees.

In the *Johnston* case the Equal Treatment Directive was adjudged capable of having direct effect against the chief constable of the Royal Ulster Constabulary, notwithstanding the fact that his office was constitutionally independent of state control. The court ruled:

“....an official responsible for the direction of the police service. Whatever its relations may be with other organs of the state, such a public authority, charged by the state with the maintenance of public order and safety, does not act as a private individual. It may not take advantage of the failure of the state, of which it is an emanation, to comply with Community law”.

The significance of *Marshall* and *Johnston* lies in the way they extended the application of this doctrine beyond what many would consider to be central government or state authorities. This development is explained by Advocate-General van Gerven in his opinion of 8 May 1990 in *Foster*. Although the court did not apply the test he recommended\(^{539}\) for determining the direct effect of a directive, his legal analysis on state liability is so eloquent as to warrant repetition in full:

“...the point of departure must be the reasoning lying behind the *Marshall* and *Johnston* cases: a Member State, but also *any other public body charged with a particular duty* by the Member State from which it derives its authority, should not be allowed to benefit from the failure of the Member State to implement the relevant provision of a directive in national law. That, however, raises the question how far the expressions "public body", "charged with a particular duty" and "from which it derives its authority" precisely extend. Moreover, it is not entirely possible to give

\(^{538}\) *Marshall*, para 46

\(^{539}\) One that focused on the degree of State control influenced over the organisation
those expressions a precise Community meaning: whether someone forms part of the government, whether a particular duty is a public duty and whether someone derives his authority from the State (whether or not in the sense that he exercises authority delegated by the State) are difficult matters to define, and their meaning differs significantly not just from one Member State to another and within each Member State from one period to another but also in Community law, in so far as they are used there, according to the matter in issue.

In the cases I have referred to, the Court did not attempt to define those concepts in the abstract, and I think it was right not to do so. Nevertheless it appears from those cases that the concept of a public body must be understood very broadly and that all bodies which pursuant to the constitutional structure of a Member State can exercise any authority over individuals fall within the concept of "the State". In that respect it is immaterial how that authority (which I shall call public authority) is organized and how the various bodies which exercise that authority are related. In the light of the Marshall, Johnston and Costanzo judgments (and the judgment in Auer (43) which preceded them) there can be no doubt that they all fall under the concept of "the State", and there is no need for any criterion of delegation or control by other public authorities. That much is certain.540 [emphasis added]

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540 See para 21 of Advocate General van Gerven’s opinion in Foster
Emanations of the state or public bodies by another name

This then begs the question: what other organisations are caught by the Becker principle? As this is primarily a question of fact it is left to the national courts of each member state to make a determination. It is, as we shall see, a concept that is capable of extending beyond the conventional state apparatus such as the legislature, the executive and the judiciary. It has the potential to include all the organs of state including public bodies, local authorities and agencies employed by the state.

Even so, this only takes us so far. Epithets such as “public body”, “public authority”, “state agency” and “emanation of the state” tend to be used interchangeably in this context as convenient pegs on which to hang the concept of a public entity fixed with the extended application of the Becker exception that confers direct effect of a directive. Furthermore, they are not free-standing precisely defined concepts. For example, whilst “public authority” is given a highly prescriptive definition in the context of the Freedom Of Access To Information Directive the same term is used in a different and more colloquial sense in other contexts.

In Doughty v Rolls-Royce Plc Mustill LJ noted the ambiguity associated with the concept of “emanation of state”. He said that it has one meaning in public international law and he thought quite possibly another in the context of a body potentially fixed with direct effect in this context. That led him to question whether this term was helpful at all. He recommended the simple expedient of sticking to the test laid down by the CJEU in Foster, which incidentally makes no reference to emanations of the state. However, it should be noted that an overly rigid adherence to the Foster test goes against the grain of European jurisprudence.

541 Supra
542 Foster and others v British Gas plc. [1990] CJEU Case C-188/89, para 15
543 Used interchangeably with public authority in the Opinion of Mr Advocate General Van Gerven’s in Foster, para 21
544 Foster v British Gas [1991] 2 A.C. 306, per Templeman LJ para 1
545 See Griffin v South West Water Services Ltd [1995] IRLR 15, para 82
546 Byrne v MIB & Secretary of State for Transport [2007] EWHC 1268 (QB), paras 48 and 57
547 See Article 2(2) of the Freedom Of Access To Information Directive (2003/4/EC)
548 Doughty v Rolls-Royce Plc [1992] IRLR 126 CA
549 Doughty, para 29
and in particular the way the CJEU has consistently striven to avoid a formulaic approach to this issue\textsuperscript{550}.

The European law approach is governed by principle not form. Whilst the principle of subsidiary means that the European Union will not interfere in the way member states organise themselves\textsuperscript{551}, this must not be at the expense of undermining the effectiveness of its legislation and the state’s Treaty obligations. Thus in \textit{Evans v Secretary of State for Transport and the MIB} the CJEU described the MIB as a “public authority” and held that it did not matter that the Secretary of State had chosen to implement what is now the Article 10 obligation to compensate victims of uninsured and unidentified vehicles by means of a private law agreement. What mattered was that the compensatory guarantees conferred under Article 10’s predecessor\textsuperscript{552} could be accessed by victims from that body directly\textsuperscript{553}. The court went on to declare that “...it is for each Member State to ensure that individuals obtain reparation for loss and damage caused to them by non-compliance with Community law, whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation”.

In this the CJEU relied on an earlier ruling, in \textit{Klaus Konle v Republik Österreich}\textsuperscript{554}, to the effect that member states must ensure that individuals are able to obtain compensation caused by a failure to comply with EU law, whichever public authority is responsible\textsuperscript{555}. That same court also declared that a “member state cannot, therefore, plead the distribution of powers and responsibilities between the bodies which exist in its national legal order in order to free itself from liability on that basis”.\textsuperscript{556}

It will be recalled that the \textit{Becker} exception is capable of applying to a body that is constitutionally independent of the State, as in \textit{Johnston}.

\textit{The Foster guidance on direct effect}

\textsuperscript{550} See the extract from Advocate-General van Gerven’s opinion in \textit{Foster}, cited above
\textsuperscript{551} Evans v SoS for Transport and MIB [2003] CJEU Case C-63/01
\textsuperscript{552} Article 1(4) of Directive 84/5/EEC
\textsuperscript{553} Evans, para 34, see also the CJEU’s comments in \textit{Francovich} at para 17
\textsuperscript{554} \textit{Klaus Konle v Republik Österreich} [1999] CJEU Case C-302/97
\textsuperscript{555} \textit{Konle}, para 62
\textsuperscript{556} \textit{Konle}, para 63; applied in \textit{Haim v. Kassenzahnärztliche Vereinigung Nordrhein} [2000] CJEU (Case 424/97) [2002] 1 CMLR 247, para 28

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Notwithstanding the CJEU’s reluctance to devise a definitive test for determining whether a defectively implemented directive has direct effect against a given organisation, it has been asked for guidance on at least three occasions.

The chief authority is the CJEU’s judgment in *Foster and others v British Gas* in which it sets out the factors to be considered when deciding whether a body was capable of being subject to the direct effect exception. The leading UK authority is also conveniently to be found in the same case where Templeman LJ elaborated on the CJEU approach to the fact-finding exercise when it returned to the House of Lords from the CJEU in 1991.

In *Foster*, the CJEU was asked by the House of Lords to provide a preliminary ruling on whether Council Directive 76/207/EEC on equal treatment was directly applicable against a publicly owned utility company like the British Gas Corporation. Although the Court left it to the national courts to make its finding of fact it provided guidance on the approach to be taken when determining the kind of public body subject to the direct effect of a directive.

Although the CJEU adopted a different test to that recommended by the Advocate General it was clearly influenced by his analysis of the relevant European jurisprudence, beginning with *Becker*. The key passages in *Foster* are important enough to be recited in full:

“18 On the basis of those considerations, the Court has held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organizations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals.

19 The Court has accordingly held that provisions of a directive could be relied on against tax authorities (the judgments in Case 8/81 Becker, cited above, and in Case C-221/88 ECSC v Acciaierie e Ferriere Busseni (in

557 *Foster and others v British Gas plc.* [1990] CJEU Case C-188/89
558 *Foster v British Gas* [1991] 2 A.C. 306
559 We have already had cause to note the opinion of Mr Advocate General Van Gerven in this case, see above
560 i.e. of the need to prevent member states from taking advantage of their own failure to comply with Community law

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20 It follows from the foregoing that 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 those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.”

....

22 The answer to the question referred by the House of Lords must therefore be that Article 5(1) of Council Directive 76/207 of 9 February 1976 may be relied upon in a claim for damages against 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 those which result from the normal rules applicable in relations between individuals.”

[Emphasis added]

It will be observed that there is an apparent discrepancy here. On the one hand, at paragraph 18 the Court summarises the earlier authorities as propounding that the Becker principle is capable of applying to organisations which are either (i) subject to the authority or control of the State or (ii) have special powers. The criteria are clearly presented as alternatives and there is no mention of the organisation needing to fulfil a public service. On the other hand, at paragraphs 20 and 22, the criteria feature the provision of a public service and more to the point, in what is the operative part of the judgment, we are given three seemingly cumulative components. The body subject to direct effect must: (i) perform a
public service, (ii) which service is under the control of the state and (iii) for which the body possesses special powers.

These textual inconsistencies have caused a certain amount of controversy about whether this guideline criteria is to be read as offering alternative qualifying scenarios or whether they are to be applied as a composite check list. Further doubt was caused by the CJEU’s judgment in *Kampelmann v Landschaftsverband Westfalen-Lippe*[^561^] where it applied the criteria as alternatives rather than as a composite. However, *Kamplemann* does not appear to have been followed by the CJEU elsewhere.

Schiemann LJ provides an illuminating analysis of the rationale underscoring the Foster criteria, one that also uses the term “emanation of the state”, in *National Union of Teachers v The Governing Body of St Mary*. At paragraph 15 he explains:

“The ECJ has not promulgated a formula which can be applied to all situations. It has preferred to adopt the approach of the common law and of the French Conseil d’Etat of moving from case to case to establish principles and refine them as it goes along. Most of the case law has been developed on references to the ECJ under Article 177 of the EEC Treaty. The only ineluctable task of the ECJ on such a reference is to provide a ruling in sufficiently wide terms to enable the national court to reach a decision in the case in which the reference was made. There is a perpetual tension between the desirability of legal certainty which militates towards the laying down of broadly framed rules and the desire to move cautiously and to take stock of the effect of rulings. It is also important to remember that while the decision whether or not a particular body is properly regarded as an emanation of the state is a matter for the national court, the proper development of the Community requires that all national courts should proceed upon the same principles when applying Community law”.

The issue as to whether all three of the Foster criteria must each be established as essential preconditions to direct effect is the subject of an ongoing referral to

the CJEU made on 27 July 2015 by the Irish Supreme Court in Farrell v Whitty\textsuperscript{562}. The Supreme Court also asked whether there is “a fundamental principle underlying the separate factors identified in that decision which a court should apply in reasoning an assessment as to whether a specified body is an emanation of the State?” This case is proving to be something of a saga\textsuperscript{563}. It is the second referral to the CJEU in a case that has rumbled on for over a decade.

The facts of Farrell justify a digression from our consideration of Foster because of its particular relevance to the MIB.

**An Irish digression**

This first reference to the CJEU in Farrell\textsuperscript{564} occurred back in 2006. It concerned Article 1 of the Third Directive on motor insurance\textsuperscript{565} which provides that the compulsory insurance required by Article 3(1) of the First Directive\textsuperscript{566} must cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle.

The Farrell case facts are worth recounting. They featured a passenger who was seriously injured whilst travelling as a passenger in the loading bay of a small van that was only fitted with seating in the front. The driver was uninsured and furthermore, the national law provision in the Republic did not require compulsory third party cover for those parts of a vehicle not designed or equipped with seating. She presented a claim for compensation to the Irish Republic’s Article 10 compensating body, the Motor Insurers Bureau of Ireland (MIBI), who rejected her claim. They relied on the fact that the MIBI’s agreement with the Irish Republic only required it to compensate victims in circumstances where the statutory compulsory third party insurance requirement applied. As this appeared to conflict with the Article 3 insurance requirement the case was ultimately referred by the Irish High Court to the CJEU for a preliminary ruling on two

\textsuperscript{562} Elaine Farrell v Alan Whitty & MIB [2015] CJEU Case C-413/15
\textsuperscript{563} One of the three questions raised in Elaine Farrell v Alan Whitty, The Minister for the Environment, Ireland and the Attorney General, Motor Insurers Bureau of Ireland Case C-413/15 is whether the different elements listed in Foster are to be read conjunctively or disjunctively
\textsuperscript{564} Elaine Farrell v Alan Whitty & MIB [1996] CJEU Case C-356/05
\textsuperscript{566} Nor Article 3(1) of the Directive

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questions in order to determine the extent of the insurance requirement imposed by the Directive.

The Court answered the first question by ruling that a national law that restricted compulsory third party cover to those parts of a vehicle that had been designed and constructed with seating accommodation for passengers did not comply with Article 1 of the Third Directive. This was because member states did not have any legislative discretion to exclude persons from the protection afforded to passengers by the Directive. On the second question it ruled that the obligation in Article 1 was capable of having direct effect against the Irish State.

However, on the thorny issue as to whether this European law provision could also be relied on directly by an individual in the national courts against the MIBI, the court referred the case back to the Irish court to make the finding of fact, after restating the Foster formula as a cumulative test:

“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 those which result from the normal rules applicable in relations between individuals.”

When this issue was tried by Birmingham J in Elaine Farrell v Alan Whitty, he applied the guidance in Foster and found that Article 1 of the Third Directive was directly effective against the MIBI as an emanation of state. The trial judge’s comprehensive review of the CJEU, Irish and UK jurisprudence on direct effect deserves careful reading. Ms Farrell duly recovered her compensation without further ado.

The ongoing dispute is something of a battle of Titans over who is ultimately liable. Is the Irish Republic responsible for failing to properly implement the Directive? Alternatively, is it the MIBI, on the basis that its role is prescribed by directly effective European law, regardless of whatever private law agreements subsist between it and the Irish State? The outcome has major implications.

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567 Which expressly includes passengers within the concept of third parties intended to be protected by Article 3 cover, this is now consolidated within Article 12 of the Directive
568 Elaine Farrell v Alan Whitty, the Minister for the Environment, Ireland and the Attorney General and the Motor Insurance Bureau of Ireland [2008] IEHC 124
especially following the CJEU’s landmark ruling in *Damijan Vnuk v Zavarovalnica Triglav d.d.*\(^{569}\) which has exposed both the Irish and UK governments’ transposition of the geographic and mechanical scope\(^{570}\) of the Directive’s insurance requirement as being defective\(^{571}\). Not only is the remit of the Article 10 compensating bodies in each state inadequate, but millions of motor policies in both jurisdictions fail to comply with the unqualified and holistic scope of the Directive in this respect.

**The Foster guidance continued**

Returning now to *Foster*, when that case was referred back to the House of Lords in 1991\(^{572}\), Templeman LJ provided the only reasoned opinion. It is notable that he tested the role of the respondent gas company by all three of the *Foster* criteria, namely: (i) public service, (ii) control by the state and (iii) special powers.

The first characteristic was fairly self-evidently present as the defendant was a publicly owned utility company, so no determination was required there.

As to the second and third criteria, he warned against a narrow or strained interpretation of either of these terms. He explained: “I decline to apply the ruling of the European Court of Justice, couched in terms of broad principle and purposive language characteristic of Community law in a manner which is, for better or worse, sometimes applied to enactments of the United Kingdom Parliament”.

On the issue of control, he ruled that although the defendant had day to day control over its own affairs that did not render it independent, it was under the control of the state because not only was the minister able to give the company general and even specific directions but the company was accountable to him in

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\(^{569}\) *Damijan Vnuk v Zavarovalnica Triglav d.d.* [2014] CJEU Case C-162/13

\(^{570}\) In both jurisdictions the primary legislation confines the scope of compulsory third party cover to public property and to vehicles intended or adapted for use on roads, which is inconsistent with the *Vnuk*

\(^{571}\) Both the Irish (Road Traffic Act 1961) and UK statutory provisions permit motor insurers to qualify the cover provided for third party motor claims, save where expressly nullified. This conflicts with the unqualified free standing nature of the insurance requirement, see section 62(c) RTA 1961 and Ward LJ’s judgment in *EUI v Bristol Alliance Partnership Ltd* [2012] EWCA Civ 1267 on the necessary implication of sections, 148, 151(2)(b) and 151(3) of the Road Traffic Act 1988, which this author critiqued in “Marking The Boundary” JPIL issue 3 of 2013

\(^{572}\) *Foster v British Gas plc* [1991] 2 A.C. 306

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those respects. This approach suggests that it is important not to be misled by form but to take into account the substance of the relationship. Obscured soft power and influence can be just as potent a lever as other forms of documented control, although there could be some difficulty in establishing that in court.

On the third criteria he described the corporation’s monopoly as “a special power which could not have resulted from transactions between individuals”. In this he took account of the CJEU ruling in Johnston v. Chief Constable of the Royal Ulster Constabulary\(^{573}\) which also concerned the Equal Treatment Directive\(^{574}\) and whether it had direct effect against a chief constable in Northern Ireland. The court had ruled that regardless of the way in which the police service interacted with other organs of the state, “as a public authority, charged by the state with the maintenance of public order and safety, [it] does not act as a private individual”. As such, it could not be allowed “to take advantage of the failure of the state, of which it is an emanation, to comply with Community law.” This reveals the CJEU’s consistent concern with substance over form\(^{575}\) when it comes to applying the Becker principle.

In Foster the House of Lords reached the unanimous decision that the directive was directly effective against the British Gas Corporation.

Incidentally it is important to note that neither the CJEU nor the House of Lords felt it necessary to categorise the defendant as an “emanation of state”. This suggests that the term is no more than a convenient label that has become associated with Foster’s non-exhaustive list of criteria (one that is itself intended merely to serve as a yardstick) when approaching the task of identifying which organisations are so closely connected with the State as to confer direct effect of a directive under the Becker principle.

Templeman LJ’s analysis, excellent as it is, has a potentially misleading characteristic in common with the CJEU judgment in that case. It has to do with the unusually homogeneous nature of British Gas. Not only was it a state owned monopoly but to all intents and purposes it supplied one product: gas. Whilst it

\(^{573}\) Johnston v. Chief Constable of the Royal Ulster Constabulary [1987] CJEU Case 222/84


\(^{575}\) See the first sentence in para 20 of the CJEU’s judgment in Foster, quoted above.

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can be presumed that this entailed numerous individual components, such as the supply, delivery, installation, maintenance and servicing of boilers and burners, these were all subsidiary to its core business of supplying gas. Unfortunately, this led this learned judge to refer to the organisation and its public service in almost synonymous terms:

“... I can see no justification for a narrow or strained construction of the ruling of the European Court of Justice which applies to a body “under the control of the State” ... Similarly, I can see no justification for a narrow or strained construction of the ruling of the European Court of Justice which applies to a body which has “special powers beyond those which result from the normal rules applicable in relations between individuals.”

The problem with this passage is twofold. First, there are very few organisations possessing the monolithic monoculture of the kind to be found in pre-privatised British Gas, which arguably militates against the unqualified application of this House of Lords’ ruling in today’s less centralised economy. This is particularly relevant if we are to apply the criteria to a diverse and multifaceted entity such as the MIB. Secondly, as we have seen above the CJEU’s emphasis in paragraphs 20 and 22 is on the public service role as opposed to the organisation delivering it.

**Other UK authorities**

The next UK authority is a Court of Appeal decision which featured, yet again, the Equal Treatment Directive but this time the defendant was Rolls Royce, a privately owned commercial enterprise, which was accused of running a discriminatory pension policy that infringed the directive. In *Doughty v Rolls-Royce Plc*[^576] the only reasoned judgment is provided by Mustill LJ which provides further helpful insight into the approach to be taken when applying the *Foster* criteria. All three criteria were considered. He was prepared to accept a prima facie case for the company being subject to a degree of state control. However, he was unable to accept that this commercial enterprise discharged a public service or had special powers. Consequently, although the directive satisfied the threshold criteria for direct effect against the State, that doctrine did not apply to

[^576]: *Doughty v Rolls-Royce Plc* [1992] IRLR 126 CA

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a commercial entity like Rolls Royce. He rejected the appellant’s assertion that the control test alone was sufficient to trigger the doctrine.

Mustill LJ’s judgment is also of interest because he also expressed doubts as to the reliability of terms such as “emanation of the state”. Furthermore, in applying the Foster criteria it was clearly the function discharged by the company that was the focus of his attention, as the following excerpt reveals:

“... it must follow that the doctrine can be relied upon in a case such as the present only if the acts of the entity against which the individual proceeds are in some sense to be regarded as the acts of the Member State”.

Even more significant are Mustill LJ’s observations about the status of the criteria laid down by the CJEU in Foster. His view (one endorsed by his fellow Lord Justices) was that the Foster test was not intended to provide the answer to every category of case. He cited the phrase “...is included among...” in paragraph 20 its judgment to denote that other factors may be relevant. He then ruled that although the Foster criteria must always be a starting point and it will often be a finishing point of any analysis, the absence of one of the three factors is not automatically fatal to a positive diagnosis. However, where one of the factors is missing, then it will be necessary to identify some other suitable characteristic not contemplated by the formula before the Marshall principle can be brought into play.

Two further UK authorities provide a useful gloss on our national law approach to applying the Foster criteria, extending the Becker doctrine of direct effect.

In Griffin v South West Water Services Ltd Blackburne J found that the Collective Redundancies Directive 75/129 had direct effect against a privatised public utility company despite his finding that it was not subject to the direct control by the state. It was nevertheless responsible for providing a public service under the supervision of the state where it had special powers not enjoyed by ordinary individuals, such as to impose hosepipe bans. On the control condition,
he applied a teleological approach that focused on the function discharged by the organisation as opposed to the legal formalities involved. In doing so he made the following helpful observations:

“1. The question is not whether the body in question is under the control of the State but whether the public service in question is under the control of the State.

2. The legal form of the body is irrelevant.

3. The fact that the body is a commercial concern is also irrelevant.

4. It is also irrelevant that the body does not carry out any of the traditional functions of the State and is not an agent of the State.

5. It is irrelevant too that the State does not possess day-to-day control over the activities of the body.”

In this author's view this analysis is faultless, based as it is on the primary doctrine to be found in Becker and Marshall and from a proper, policy driven, appreciation of the CJEU’s judgment in Foster.

NUT v St Mary’s58¹ casts additional light on the approach to be taken when applying what was described as a tri-partite test. It turns on two of the criteria: state control and special powers. The case arose out of the dismissal of three teachers where the employer’s board of governors had failed to consult, contrary to The Business Transfers Directive58². The claimant appealed against the Employment Appeals Tribunal (EAT)'s decision dismissing the claim. The tribunal took the view that the Becker doctrine of direct effect did not extend to a board of governors as: (i) they were too remotely connected with the State to be deemed to be under its control, notwithstanding that the supervising local education authority could properly be regarded as an emanation of the state and (ii) it possessed no special powers. In doing so, the tribunal made the error of applying the kind of literal or checklist approach to the three criteria in Foster that the CJEU has been at pains to avoid.

58¹ National Union of Teachers & Ors v The Governing Body of St Mary’s Church of England School [1997] IRLR 242
58² The Business Transfers Directive 77/187
Schiemann LJ delivered the leading judgment in the Court of Appeal which overturned the EAT decision. He held that the tribunal had been wrong to apply the triple test in *Foster* as though it were a statutory definition\(^{583}\). The school was part of the State system, the governors were a public body charged by the State with running the school in keeping with the national curriculum and it was subject to the voluntary funding scheme. The governors derived their powers from the authority of an executive order issued by the minister in the exercise of his statutory powers. It was not necessary for the governors to be under the control of central government for them to satisfy *Foster’s* control criterion.

Even more noteworthy is the Court of Appeal’s unanimous disregard of the absence of any special powers. It ruled that it was wrong to apply the tripartite *Foster* test as though it were a statutory definition.

The *NUT* case confirms that when it comes to applying “the *Foster* criteria” it is important not to treat them as though they are inflexible statutory preconditions of direct effect, to be rigidly conformed to without regard to the underlying EU law principles in *Becker* from which they derive. It should be borne in mind that the *Foster* criteria were formulated in the context of case featuring a state owned public utility company. The core operating principle remains one of preventing the injustice caused to individuals by member states taking advantage of their own failure to comply with EU law as a defence\(^{584}\).

The law in this area is fluid and probably still evolving. As indicated above, a second reference has been made to the CJEU in *Farrell*\(^{585}\) by the Irish Supreme Court which asked the following questions: First, are the three factors in the *Foster* test to be applied conjunctively or disjunctively? Second, is there a fundamental principle underscoring the *Foster* test which courts should also take into account? Finally, is it sufficient that a broad measure of responsibility has been transferred to a body by a member state for the ostensible purpose of meeting obligations under European law for that body to be an emanation of the

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\(^{583}\) NUT v St Mary’s, para 41


\(^{585}\) Elaine Farrell v Alan Whitty, *The Minister for the Environment, Ireland and the Attorney General, Motor Insurers Bureau of Ireland* Case C-413/15

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member state or is it necessary, that such a body additionally have (a) special powers or (b) operate under direct control or supervision of the member state? In this author's view the CJEU ruling is likely to continue to resist devising a rigid formula. It is hoped and expected that the CJEU will refer to the Becker, Marshall and Johnston cases which refined the overlying principle and that it will emphasise the overriding importance of analysing the public service role as distinct from the organisation responsible for its discharge. It seems unlikely to concur with the final proposition as a broad statement of principle as that would appear to go against the grain of its ruling in Foster.

**Conclusions on the correct principles**

Before we move on to consider the available evidence, it might be helpful to summarise these European law principles.

The approach to determining whether an organisation is caught by the Becker exception, so as to make a directive directly effective against it, is a two stage enquiry.

Stage one looks to the nature of the directive under consideration. It examines whether the obligation imposed by the directive is sufficiently clear, precise and unconditional to trigger the Becker principle of direct effect against the state. Only if that test is satisfied is it appropriate to move on.

Stage two is to determine whether a particular organisation (not obviously part of central government) is subject to the direct effect of the directive, because either (i) the body is itself subject to the control or the state or has special powers or, (ii) where (as in the case of the MIB) it has been made responsible by the state for discharging a public service that is under the control of the state and for which it has special powers. In the latter scenario, the nature of that entity itself is not actually the fulcrum of the enquiry. In Foster, both the Advocate General and the CJEU were in agreement in saying that it is the public service discharged by the organisation that was the primary consideration.

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586 Professor Robert Merkin QC recently commented to the author that in his view it might have been better to have asked the CJEU to rule on whether emanation of the state status is a necessary characteristic of any authorised body discharging the role of compensating victims under Article 10 of the Directive.
As to the second stage, Mustill LJ’s instruction in *Doughty* that it is always necessary to commence any analysis by considering the *Foster* criteria arguably places too much emphasis on guidance that is subordinate to the governing principles set out in the Advocate General Van Gerven’s helpful summary repeated above\(^587\). Furthermore, whilst the CJEU in *Foster* is very authoritative, we are instructed by the Court of Appeal\(^588\) that *Foster* offers guidance that should not be applied strictly as though it were a statutory precondition.

*Foster* is merely an indicator as to how to apply a superior principle in practice and it is one devised in response to the special facts of a case featuring a state owned public utility. It is certainly true that if all three factors listed in *Foster* apply, then it is highly likely that the direct effect exception in *Becker* will extend to the body under consideration. If one of the factors does not apply then it will be necessary to look to some other characteristic or circumstance that justifies extending *Becker*.

It is important to avoid being distracted by formalities as this might jeopardise the teleological approach that is integral to the *Becker* exception. Any construction which places too much emphasis on factors such as the constitutional set up of an organisation, its contractual arrangements and the degree of state control over the organisation (as opposed to the public service it performs) risks obscuring the true purpose of the exercise which is to prevent the state, including its emanations, from taking advantage of its failure to properly implement a directive. Such considerations may well be relevant but they are not determinative. The *Becker* exception, as extended by *Konle, Marshall* and *Foster*, is partly about ensuring administrative probity by discouraging executive malfeasance\(^589\) and partly about ensuring that individual citizens receive fair treatment and redress under European law.

It is also important not to attach too great a significance to legal jargon. Terms such as “emanation of state”, “public body” or “public authority” can be elusively

\(^{587}\) See under The *Foster* guidance continued

\(^{588}\) In the NUT case, supra

\(^{589}\) In the sense that it is intended to deny member states the ability to divest themselves of responsibility for complying with European law by devising ever more complicated circumlocutory devices to obstruct or otherwise frustrate access to rights conferred under European law on individuals. See *Haim*, para 28
amorphous when employed as a generally applicable term. It is noteworthy the CJEU avoided this kind of restrictive labelling in *Foster*.

The focus of the enquiry prescribed by *Foster* is on the public role or function entrusted to the organ, body or individual by the state; not the body itself. The court should enquire: (i) whether the role or function devolved amounts to a public service; (ii) whether the state has the ability to control or influence the discharge of that service in any significant respect and (iii) whether the discharge of that function necessitates or otherwise involves the exercise of special powers beyond those ordinarily enjoyed by individuals.

Where some of the *Foster* criteria are not present (as in the *Griffin* and the *NUT* cases) this is not fatal to direct effect but it will be necessary to consider whether any other factors make it expedient to apply the *Becker* exception. One such factor could be the importance attached to the Directive’s protective purpose (as shown by the CJEU in its ruling in *Damijan Vnuk* in 2014. In any event, the enquiry should be undertaken in a purposive or teleological manner, reflecting the underlying principle applied in *Becker, Marshall and Johnston*.

The MIB’s public service role has already been considered at under “On the nature of the Motor Insurers Bureau”. It has also been observed that it is not necessary to establish that the MIB itself or that its activities as a whole conform strictly to the thumb rule criteria devised in *Foster*. Even so, it is instructive to test the MIB’s role under article 10 against the *Foster* criteria.

**On the role entrusted to the Article 10 compensating body**

Article 10 provides, inter alia:

> “3.1. Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied.

…..”

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590 *Damijan Vnuk v Zavarovalnica Triglav d.d.*, [Case C-162/13]

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Unlike the Equal Treatment Directive, this provision is very specific in the way it imposes an obligation on every member state first to adopt or incept an institution to serve as the authorised compensating body and second in the prescriptive terms defining its role. This puts this particular Directive in a distinctly different category to the directive featured in *Foster, Doughty, Johnston* and others, which (i) feature provisions in a directive that had general effect\(^ {591}\) and (ii) concerned the potential liability of organisations not directly anticipated by that legislation. There seems to be at least an arguable case to put Article 10 is in a distinctly different class to these other directives, because of the precision and specificity of the legislative objective. In which case, this factor alone ought to be a highly significant and persuasive indicator of direct effect, independently of the *Foster* criteria. *Becker’s* imperative of preventing member states from relying on their own failure to implement European law is made that much more compelling in the context of Article 10.

Even so, the *Foster* criteria are not to be discounted and so each of its components need to be addressed in turn. As the Article 10 role involves a public body providing a compensatory guarantee to motor accident victims, it is self evident that it properly categorized as a public service.\(^ {592}\) Accordingly the public service nature of the Article 10 compensating body will not be considered further here.

\(^ {591}\) E.G. The Equal Treatment Directives 76/207/EEC & 2000/78/EC

\(^ {592}\) However it should be noted that the MIB has disputed this in the past, see “*Byrne a case in point*” below
A public service under the control of the state

The UK has a treaty obligation “to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising under Community law” \(^{593}\). As such, it is clear that in order to fully implement Article 10, the UK must retain the ability to supervise, control and influence the way the MIB fulfils its contractual obligations under the two schemes it has devised to discharge the Article 10 role.

State control is applied through the terms of the MIB agreements themselves. Furthermore, there is abundant evidence that the UK government regularly exercises its prerogative to impose changes to both MIB agreements in its (inconsistently applied\(^{594}\)) attempt to keep them in line with European law developments.

A couple of examples will suffice. In 2001 the House of Lords ruled in *White v White & MIB*\(^{595}\) that the MIB’s exclusion of passenger liability in clause 6 of the Uninsured Drivers’ Agreement 1988 was unlawful. The MIB were then persuaded to amend its notes for guidance that accompanied the agreement to correct this illegality, despite having trenchantly defended the legal challenge that precipitated this revision.

Again, when on 22 May 2008 the Court of Appeal upheld Flaux J’s first instance finding in *Byrne*\(^{596}\) that the MIB’s inflexible three year limitation period for bringing a claim under the Untraced Drivers’ Agreement was unlawful (because it did not take proper account of the dispensation allowed in a equivalent civil action for

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\(^{593}\) see *Francovich and Others* [1991] CJEU Joined Cases C-6/90 and C-9/90, para 35
\(^{594}\) One example of many instances will suffice: when the Department for Transport found it necessary to amend the inflexible three year time limit for victims of untraced drivers to apply for compensation (see *Byrne a case in point*, below), it achieved this by making the necessary revision to clause 4 (3) of the Untraced Drivers Agreement 2003 to its provision into line with the Limitation Act 1980 in a supplemental agreement in 2008 and once more in a differently phrased revision in 2013. However it failed then or later to remove its unlawful exclusion in clause 4(3)(c) of any liability where the victim fails to report the incident to the police within 14 days or as soon as reasonably convenient, when such term makes no allowances for minors or mentally incapacitated victims and operates as an alternative limitation period by proxy
\(^{595}\) *White v White & MIB* [2001] 1 WLR 481
\(^{596}\) *Byrne v MIB & Secretary of State for Transport* [2007] EWHC 1268 (QB), considered at greater length below
minors and protected parties\textsuperscript{597} the agreement was duly amended by a supplemental agreement (dated 30 December 2008). As the commentary below indicates, the MIB had mounted a vigorous, if misguided, defence and so was clearly opposed to this revision.

In both cases, these amendments work against the mutualised interests of the motor insurers who comprise the MIB’s management and membership. It is therefore a reasonable assumption that these revisions were imposed on an unwilling MIB, in the same way as we are likely to see significant alterations to the Untraced Drivers’ Agreement 2003 and the Uninsured Drivers’ Agreement 2015 as a result of an ongoing judicial review.

Against this the Department for Transport has informed this author that it neither controls nor supervises the way the MIB implements these agreements.

However, as has already been noted above, control over the MIB’s day to day activities is not required by the Foster test; it is control over the relevant public service that matters and it is hard to see how it could be argued that this is not achieved through the through the Principal Agreement with the MIB’s membership and the MIB Agreements themselves. Furthermore, the minister also exerts a peripheral degree of operational control over the MIB in its appointment of arbitrators\textsuperscript{598} to hear appeals against certain decisions and in determining disputes as to the reasonableness of any request for information by the MIB under clause 19 of the Uninsured Drivers’ Agreement 1999.

There is also clause 4(2) of the Principal Agreement of 1945 which provides:

\begin{quote} 
"IN the event of any dispute as to the reasonableness of a requirement by the M.I.A\textsuperscript{599} that any particular step should be taken to obtain judgment against other torfeasors it shall be referred to the Minister whose decision shall be final."
\end{quote}

The Department also exercises extensive indirect influence over the MIB by virtue of its executive power to regulate all the motor insurers whom it authorises to

\textsuperscript{597} See the reference to Section 28 Limitation Act 1980 and the comments under Byrne, a case in point below

\textsuperscript{598} See for example clauses 20 and 21 of the Untraced Drivers’ Agreement 2003

\textsuperscript{599} The reference to M.I.A. in this agreement refers to the nominal title of the company intended to manage the mutualised compensatory fund that ultimately was constituted as the MIB in 1946
conduct business in this jurisdiction. An interesting insight into the holistic way the CJEU is likely to view this discrete ability to control and influence the MIB can be found in its recent judgment in *Fish Legal v Information Commissioner and ors*\(^{600}\).

*Fish Legal* featured a reference to the CJEU arising out of a legal challenge by environmental activists who sought to rely *inter alia*, on the Aarhus Convention\(^{601}\) and Article 2(2) of the 2003 Directive on access to environmental information\(^{602}\) to obtain data on pollution levels from various water utility companies. In particular the CJEU was asked to determine what was meant by a person being “under the control of a body or person falling within Article 2(2)(a) or (b)” of that Directive and whether a body that satisfies the CJEU’s criteria in *Foster* for “emanation of the state” status is caught by the duty it imposes to provide environmental information.

Article 2(2) of Directive 2003/4 defines a ‘public authority’ as follows:

“...

(a) government or other public administration, including public advisory bodies, at national, regional or local level;

(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and

(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b)”.

The reader will readily appreciate the close affinity between Article (2)(2)(c) and the *Foster* tripartite test. In *Fish Legal* the court ruled that Article 2(2) was intended to cover “a set of entities, whatever their legal form, that must be regarded as constituting public authority, be it the State itself, an entity

\(^{600}\) *Fish Legal v Information Commissioner, United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd* [2013] Case C-279/12


empowered by the State to act on its behalf or an entity controlled by the State”. It went on to elucidate:

“The manner in which such a public authority may exert decisive influence ... is irrelevant in this regard. It may take the form of, inter alia, a power to issue directions to the entities concerned, whether or not by exercising rights as a shareholder, the power to suspend, annul after the event or require prior authorisation for decisions taken by those entities, the power to appoint or remove from office the members of their management bodies or the majority of them, or the power wholly or partly to deny the entities financing to an extent that jeopardises their existence”603.

Accordingly we can deduce from Fish Legal that the concept of State control over the MIB includes the ability, now or at some time in the future, to vary, terminate or annul the MIB Agreements604 and the potential power to act or omit to take action to enforce the levy that the MIB depends on to discharge its roles under Articles 10 and 25.

In short, this evidence indicates that in the discharge of its compensatory role under the Directive, the MIB lacks any genuine autonomy to act in its own exclusive interests free from state control. It is bound by the terms of its various agreements with the state (which are themselves subject to variation at the behest of the state) as much as it is bound by the strictly circumscribed role imposed on it by European law. Whist the MIB agreements are to a certain extent consensual arrangements, it is also just as clear that the state has a strong hand in any negotiations.

The European jurisprudence is clear - all that is required is the potential for control or influence, not evidence of their manifestation605.

**Special powers**

It is perhaps convenient to repeat here the CJEU’s thumb rule criteria set out in Foster (considered above) for determining whether an organisation is potentially

603 Fish Legal, para 68
604 Expressly provided for in the notice provisions that apply to all the MIB agreements
605 “I have already said, the possibility of exercising influence must exist inter alia (or in particular) in connection with the matter to which the provision of a directive which has not yet been implemented relates or can relate.” per Advocate General Van Gerven’s opinion in Foster, para 21
subject to the direct vertical effect of a directive. We have seen that this applies to:

“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 those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon”\textsuperscript{606} [Emphasis added]

\textit{Special powers conferred under European law}

Where many jurists and commentators appear to have encountered difficulty is in seeking to establish whether the MIB has special powers connected with the discharge of its role as the Article 10 compensating body.

The MIB does in fact enjoy extensive special powers that can be said to derive independently of the UK State and which result from its supranational legal status as the authorised compensating body under Article 10 of the Directive. It should be emphasised that these European devolved powers are not peculiar to the MIB as a corporation, indeed they are not intended to be conferred on any organisation in its own right. They are instead integral to whichever organisation is charged with fulfilling the role of the Article 10 compensating body\textsuperscript{607}.

When the MIB acts as the Article 10 body it acts as a public law body whose role is defined by European law. It also discharges additional roles under the Directive, for example, where it acts as a compensating body of last resort for victims of accidents occurring in a foreign member state under Articles 20 to 26 of the Directive. Article 25 confers on the compensating body the right to recoup its outlay from foreign insurers and the foreign compensating body. The latter roles featuring foreign third parties are also inextricably connected with its role as the Article 23 Information Centre. All of this requires funding.

\textsuperscript{606} \textit{Foster}, para 22

\textsuperscript{607} And by the same token, whichever organisation discharging the role of compensator of foreign EEA accidents under Articles 24.1 and 25 and the custodian of the motor insurance database under Articles 23 and 26 of the Directive
Additional special powers are conferred on the MIB under Article 24 of the Directive. This entitles the compensating body to recoup its outlay incurred as an Article 20 body when compensating a victim of an uninsured or untraced driver in a foreign member state\(^608\).

As the UK national law is supposed to fully transpose the Directive, this means that both the Directive and the CJEU’s interpretation of that law have precedence over any inconsistent national law provision. Because Articles 10 and 20 through to 26 are so comprehensively prescriptive, they furnish the superior law defining this aspect of the MIB’s role, lending it a truly supranational or international status in the discharge of these specific European law derived obligations.

It is also worth noting that where a UK insurer provides cover specifically intended for use in a foreign member state’s territory\(^609\), then the UK is obliged by the Solvency II Directive of 2009 to ensure that every foreign motor insurer providing such cover in this jurisdiction becomes a member of its guarantee fund, to wit the MIB, and that they contribute to its levy\(^610\). This highly prescriptive requirement effectively confers a special power under European law on the MIB as it is the MIB and not the UK State that is the direct beneficiary of those funds. These foreign accident provisions, although distinct from the MIB’s domestic Article 10 role, remain a relevant factor due to the indivisible nature of Becker principle\(^611\).

It stands to reason that any individual or organisation set up or authorised by the Secretary of State to discharge the Article 10 role must be provided with the wherewithal with which to fund its compensatory role. Although Article 10 confers a wide discretion on individual states as to how this is to be achieved, the inescapable corollary of its provisions is that a body discharging the Article 10 role must have some recourse at law by which to ensure that it has sufficient means to undertake its responsibilities. Such a right must necessarily transcend any limitations that might be imposed under domestic law.

\(^{608}\) See Article 24(2) of the Directive
\(^{609}\) As distinct from the provision in Article 14 that requires a domestic policy to cover use abroad in the European Union

\(^{611}\) Per Marshall, supra
In 2005 in *Candolin*\(^{612}\) the CJEU delivered the following broad statement of principle concerning the basic Article 3 insurance requirement:

\[
27 \quad \text{The Member States must exercise their powers in compliance with Community law ……}
\]

\[
28 \quad \text{The national provisions which govern compensation for road accidents cannot, therefore, deprive those provisions of their effectiveness.}
\]

This statement of law applied a well established European law precept - the principle of effectiveness\(^{613}\) - to the motor insurance directives. Accordingly, were the UK to take action to prevent or otherwise, through inaction, obstruct the MIB’s ability to enforce an appropriate levy on its members, thereby undermining its ability to fund the compensation of victims of uninsured and untraced drivers, then the UK would be acting unlawfully.

Given that the UK is treaty bound to fully implement the Directive and that the wording used in Article 10\(^{614}\) is unconditional and precise in what it is required to do, it would appear that any action or omission by the state which jeopardises the MIB’s ability to discharge that role is something that the MIB could challenge. The MIB presumably has the ability to take the following steps: an action for specific performance of one or other of its contractual arrangements (either with the Secretary of State for Transport or its own members), judicial review of the minister’s act or omission or an infringement action or complaint to the European Commission. This European derived status is peculiar to the authorised body discharging the role of the Article 10 compensating body; not one capable of being exercised by ordinary private individuals.

\(^{612}\) *Katja Candolin and Others. v Vahinkovakuutusosakeyhtiö Pohjola and Others Case C-537/03*

\(^{613}\) *Upjohn* [1999] E Case C-120/97, paragraph 32

\(^{614}\) An extract from Article 10 is set out above under “On the role entrusted to the Article 10 compensating body”
Special powers conferred by the executive

As it happens, the MIB does not need to resort exclusively to public international law for its special powers because its entitlement to enforce a levy from its members is guaranteed through a combination of statutory provision and private contract law. Section 143(6) Road Traffic Act 1988 imposes a precondition to authorised insurer status that every motor insurer be a member of the MIB. The MIB’s Articles of Association require its members to contribute to its levy. Even if the MIB’s Articles of Association, properly construed, do not confer on it an express power to initiate formal proceedings to enforce its levy or to expel a member for failing to contribute does nothing to detract from, or diminish the potency of, its ability to call on the Secretary of State to enforce this special power on its behalf.

The fact remains that the MIB, to remain operationally effective, needs to know that, one way or another, it has the power to call upon the Secretary of State to ensure it continues to receive the levy.

Looked at another way, the UK national provision, obscurely devised as it may be, nevertheless effectively confers on the MIB a licence to impose an indirect form of taxation on all law abiding motor insurance premium paying members of the public. A constant refrain of the MIB in recent years has been that the cost of uninsured driving results in an average surcharge on each policy of £30. The ability to impose and enforce such a levy on the public, indirectly through its members, is a special power beyond that exercised by ordinary individuals.\footnote{Whether realised through an action for specific performance, judicial review or on an alternative basis applying the tri-partite test in Caparo Industries plc v Dickman [1990] UKHL 2}

The MIB also enjoys considerable power to influence government policy though its close and preferential relationship with the Secretary of State. The MIB’s influence is so strong that it sometimes seems as though it is in the driving seat (metaphorically speaking), not the minister. Take for example the Department for Transport’s apology in July 2013 for failing to address the serious issues raised in its February 2013 consultation on the MIB agreements. The announcement stated: “We must ensure we balance reducing the Department’s exposure to risk with agreements that are workable for the MIB to implement.
...The agreements cannot be changed unless both parties agree”. It should be noted that the UK’s obligation to fully implement the Directive is not conditional on its administrative convenience\(^{616}\). These difficulties are largely of the minister’s own making. He was advised, in response this consultation on the MIB Agreements, to abandon their anachronistic private agreement format by substituting them with a properly drafted codified scheme, he chose to ignore that advice. Instead it looks very much as though it is the MIB who draft the agreements, which are then signed off by the ministers.

The latest version of the Uninsured Drivers’ Agreement 2015 is replete with exclusions and limitation of liability, and reductions of the proper compensatory entitlement that blatantly conflict with the minimum standard of compensation required by the Directive\(^{617}\) and the original social policy aim of the Road Traffic Act 1930 that initiated the concept of mutualising the risk posed by motor vehicle risk. It is difficult to conceive of a properly qualified statutory draftsman blithely ignoring the European law it is supposed to implement in the same way and to the same degree as exists here.

**Special powers conferred under the MIB agreements**

**The Uninsured Drivers’ Agreements 1999 and 2015**

The following are some of the special powers that can be said to have been conferred on the MIB by the UK Government which are clearly intended to enable it to discharge its role as the Article 10 compensating body. These observations are restricted to the Uninsured Drivers’ Agreement 1999\(^{618}\) and they are not listed in order of importance, nor are they intended to be a comprehensive account.

First there are the curious provisions that bind the applicant to anything said and done by their solicitor or agent\(^{619}\) that have no parallel under the Civil Procedure Rules and which appear to be intended to replicate the common law. However, this is then augmented in the way it purports to bind minors and persons acting

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\(^{616}\) The Secretary of State was advised by this author in his response to the Department for Transport’s 2013 consultation in the MIB Agreements to abandon the anachronistic MIB Agreement in favour of a properly drafted codified system

\(^{617}\) Currently the subject of a judicial review

\(^{618}\) Which remains in force, notwithstanding its numerous illegalities, for all claims featuring accidents that predate 1 August 2015; which in all probability still accounts for the majority of uninsured driver claims at the time this paper was prepared

\(^{619}\) Clause 2.3
under a mental incapacity to things said or done on their behalf. This conflicts with Part 21 of the Civil Procedure Rules and the common law position considered recently by the Supreme Court in *Dunhill v Burgin*\(^{620}\). Ordinary defendants have no right to take advantage of a party’s incapacity in this way.

There is also the special evidential presumption that clause 6.3 purports to impose on the applicant\(^{621}\), whom it will be remembered is a non contracting party. Once again this has no parallel under the Civil Procedure Rules and sets a worrying precedent by seeming to confer a special preferential legal status on the MIB not enjoyed by any other litigant under our national law.

There is the power conferred on the MIB to recoup its outlay incurred in settling an uninsured driver claim from a responsible driver, notwithstanding the fact that in most cases the MIB does not receive any co-operation from the defendant driver let alone a signed authority to act on his behalf.

The exclusions of liability in clauses 6(1)(c)(ii)\(^{622}\), 6(1)(e)\(^{623}\) and 17\(^624\) in the 1999 Agreement purport to confer on the MIB the ability to impose exclusions or to make deductions from the victims’ compensatory entitlement that are not permitted under the normal common law rules for assessing damages. Whilst these provisions appear to breach the European law equivalence principle, they can also be viewed as constituting special powers not enjoyed by other defendants.

Clauses 7 to 12 confer extraordinary powers on the MIB to reject genuine claims in their entirety for seemingly the most trivial of procedural infractions\(^625\). No such draconian powers exist under the Civil Procedure Rules. The disproportionately unjust nature of these provisions are well illustrated by the requirement that applicants must complete the MIB claim form which contains a disclosure

\(^{620}\) *Dunhill v Burgin* [2014] UKSC 18

\(^{621}\) As to the passenger’s state of mind when entering an uninsured vehicle

\(^{622}\) Relating to subrogated claims

\(^{623}\) Guilty passenger knowledge

\(^{624}\) Relating to sums received as a result of the accident

\(^{625}\) After years of campaigning by this author, since 2007, the procedural preconditions to any liability have been removed from the Uninsured Drivers’ Agreement 2015

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mandate so offensively intrusive and excessively extensive as to conflict with the victim’s Human Right Convention to privacy.626

Clause 13 purports to entitle the MIB to reject any claim, however genuine or extensive, simply because the victim has failed to report a defendant’s failure to provide their insurance details as soon as reasonably practical (which term is not defined). No such defence extends to insured defendants or indeed to any other party, and rightly so.

These provisions transcend the procedural and substantive law rights of individual citizens.

The Untraced Drivers’ Agreement 2003

The MIB enjoys extensive quasi-inquisitorial and judicial powers to investigate claims and to require the co-operation of the applicant which go far beyond anything that an ordinary insurer would be entitled to impose in a comparable action issued under the direct right conferred by Article 18 of the Directive and Articles 9 and 11 of the Brussels I Regulation.627

The Untraced Drivers’ Agreement 2003 is an unsatisfactory, unjust scheme that places innocent victims at a considerable disadvantage in comparison to a normal civil action. Take for example the complete absence of any safeguards for children and the mentally handicapped. Every other litigant must conform with the triple protection imposed under Part 21 of the Civil Procedure Rules.628

Byrne, a case in point

Byrne v MIB & Secretary of State for Transport629 provides a useful and vivid illustration of the reluctance by some judges to cure a defective provision through a European law consistent construction. It is also important as it is the only

626 See section 12 of the obligatory MIB application form and clause 7 of the Agreement, which breaches Article 8 of the HRC
628 Namely the appointment of personal representatives, the commission of a barrister’s written opinion on the suitability of the proposed settlement and the court’s formal approval of the settlement. See Dunhill v Burgin,
629 Byrne v MIB & Secretary of State for Transport [2007] EWHC 1268 (QB)
English authority on whether the Directive is capable of direct effect against the MIB.

The case featured a 3 year old child injured by an untraced driver whose claim was submitted to the MIB during his minority. Liability was not disputed. However the MIB rejected the claim, relying on the 1972 version of the Untraced Drivers’ Agreement that imposed an inflexible 3 year time limit for submitting applications. Section 28 of the Limitation Act 1980 suspends the limitation period in a civil personal injury action where, at the time the cause of action arose, the claimant was under a disability: a term that embraces both minors and the mentally handicapped.

However the claimant’s lawyers were alive to the fact that this strict three year time limit was unlawful because it breached the European equivalency principle. The Secretary of State took the MIB’s side.

The MIB argued that, as a private contractor who had negotiated its agreement with the Secretary of State in good faith, it was only obliged to adhere to the terms of its contract. In reality it is very likely that this provision was insisted upon by the MIB when it submitted its draft proposals to the minister for approval. Both the minister and the MIB contended that the Untraced Drivers’ Agreement was no more than a private law agreement and as such that any European law inconsistency in the agreement could not be cured by a Marleasing style purposive interpretation.

Flaux J was required to determine four issues. First, whether the MIB’s 3 year time limit was permitted under the European law that the Untraced Drivers’ Agreement was supposed to implement. Secondly, if not, whether the agreement could be given a purposive construction that was capable of rectifying the defect identified. Thirdly, if the term was defective but incapable of being rectified through a European law consistent interpretation, whether the terms of the Directive could be relied on by the claimant directly against the MIB so as to

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630 That requires any national law implementation of rights conferred under European law to be equivalent to and as effective as those conferred under comparable proceedings

631 However, without proper public scrutiny or proper disclosure of the Department’s records, we shall never know for certain

632 This is now often referred to as a European law consistent interpretation
allow the court to reach a determination that was in conformity with the Directive. Finally, if neither the second nor third remedies were available, whether the UK State was liable to compensate the claimant for its failure to implement the Directive properly under *Francovich/Factortame* principles.

The first and fourth issues were determined in the claimant’s favour. The judge found that the imposition of a strict three year time limit against a child was inconsistent with the rights conferred under European law and in particular by the Directive. On the fourth issue he also held that the breach of European law was sufficiently serious to warrant damages because it was clear from the little correspondence disclosed that “…in December 1988, that the Department did appreciate that a three year time limit which was less than the corresponding limitation period for a claim against an insured driver in court would be precluded by art 1(4)”.

So the Department of Transport was aware of the gap in protection for children and the mentally handicapped, that this was unlawful but chose to support the MIB in its unjustified defence.

The claimant received his compensation and the MIB was later obliged to concede a revision to the Untraced Drivers’ Agreement that conferred a limitation period no less favourable than conferred in other tort actions against identified defendants.

**Where Byrne v MIB went wrong**

However learned and experienced a judge might be, no judge is omnipotent. Just outcomes depend on a degree of collaboration between professional representatives and the court; our adversarial civil justice system notwithstanding. Our civil courts depend on the legal representatives identifying the issues in dispute, and then presenting these along with the relevant law and evidence to the court for the judge to arrive at a just outcome. This in turn depends on the protagonists themselves providing full and proper instructions to their legal representatives just as much as on the legal professionals identifying the correct law.

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634 Referring here to to Article 1(4) of the Second Directive on motor insurance which is now consolidated in the Directive as Article 10 and which defines the role of the MIB

635 See the MIB’s Supplemental Agreement dated 2008

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It is regrettable the learned judge’s findings on the second and third issues were based on misconceived law and inadequate disclosure of evidence and as such they are erroneous. Their unfortunate legacy has remained unchallenged as a misleading precedent for nearly nine years.

Whilst it is not the author’s intention to wag an admonishing finger from an ivory tower or to attempt an exhaustive autopsy of a long interred trial, it is necessary to point out where the judgment is unsafe and why.

**On the European consistent interpretation of the MIB agreements**

On the second issue, the judge ruled that the Uninsured Drivers’ Agreement 1972 was not capable of being “construed so as to give effect to Article 1(4) of Directive 84/5/EEC and/or the European Community principle of equivalence”.

Unfortunately, although the judge’s attention was drawn to the CJEU judgments in *Evans* and *Commission v Greece* that same court’s seminal judgment in *Pfeiffer* is conspicuous by its absence. After all this time it is impossible to say what law was laid before the judge but it seems almost inconceivable that Flaux J would have ignored such an important authority had he been made aware of it. Instead, the court seems to have been referred to a number of old chestnuts, largely rendered obtiose by *Pfeiffer*, such as Schiemann and Hobhouse LLJ’s observations in *Mighell v Reading* to the effect that the MIB’s agreements are no more than a private law contracts and as such are not subject to a *Marleasing* style purposive construction.

Although this jurisprudence faithfully applies Nicholls LJ dicta in the House of Lords in *White v White & MIB*, one suspects that no one appears to have actually read the judgment. Had they done so, they would have appreciated that the *Marleasing* or no, the House of Lords was still able to apply a purposive construction of the agreement by applying conventional rules of construction, to

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636 Now Article 10 of the Directive 637 Supra, under “Emanations of the state or public bodies by another name” 638 Supra, under Special powers conferred under the MIB Uninsured Drivers’ Agreements. 639 Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV: [2—4] CJEU Case C-397/01 to C-403/01, see in particular paras 114 to 119. 640 Mighell v Reading and Another; Evans v Motor Insurers’ Bureau; White v White and Another (1998) Times, 12 [1999] 1 LLR 30 641 White v White & MIB [2001] UKHL 9, see paras 21 & 22.
give effect to the presumed intention of the contracting parties\textsuperscript{642}. It is notable that there is no mention in \textit{Byrne} of the fact that the House of Lords had, six years previously, cured a defect in an MIB agreement in this way by striking out an offending exclusion of liability that conflicted with European law, on the sound basis that it was presumed that the minister had not intended to flout European law.

\textit{Pfeiffer} has extended the compass of purposive or European law consistent interpretation into every aspect of a member state’s transposition and it has transformed the process of consistent construction in the process. Paragraphs 110 to 119 of the \textit{Pfeiffer} judgment should be compulsory reading for every judge and practitioner in this field. What Nicholls LJ’s common sense and intelligence inferred in \textit{White v White & MIIB} in 2001, \textit{Pfeiffer} made explicit three years later by ruling that national courts, when undertaking this exercise, must presume that the state intended to fulfil entirely the obligations arising from the directive concerned when implementing it\textsuperscript{643}. Furthermore, it ruled that the national courts must, when applying national laws and rules intended to give effect to a directive, “ensure that the legal protection which individuals derive from the rules of Community law … are fully effective”\textsuperscript{644}. Paragraphs 116 to 118 are particularly instructive from the view point of the MIB Agreements and so they are quoted in full here:

“116 In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, \textit{a provision of domestic law} to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive. “

117 In such circumstances, the national court, when hearing cases which…. derive from facts postdating expiry of the period for implementing the directive, must, when applying the provisions of national law

\textsuperscript{642} See White v White at paras 23 to 27.

\textsuperscript{643} \textit{Pfeiffer}, para 114, referring to even earlier European jurisprudene in \textit{Wagner Miret} [1993] Case C 334/92 paragraph 20.

\textsuperscript{644} \textit{Pfeiffer}, para 111.
specifically intended to implement the directive, interpret those provisions so far as possible in such a way that they are applied in conformity with the objectives of the directive (see, to that effect, the judgment in Case C-456/98 Centrosteel [2000] ECR I 6007, paragraphs 16 and 17).

118 In this instance, the principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that Directive 93/104 is fully effective, in order to prevent the maximum weekly working time laid down in Article 6(2) of the directive from being exceeded (see, to that effect, Marleasing, paragraphs 7 and 13).

[Emphasis added]

It is clear from this passage that Pfeiffer does not restrict these principles to legislation, in contrast to what was commonly inferred from Marleasing.

The MIB Agreements are part of our national law. We have already seen above\textsuperscript{645} that unless the UK is prepared to risk wholesale liability for failing to implement article 10 at all, the present MIB Agreements must be viewed as part and parcel of the UK’s national law implementation of the directive, and as such capable of conferring justifiable rights\textsuperscript{646}. Common sense also dictates as much.

Accordingly, every MIB agreement, being part of the UK law implementation of the Directive, must be construed in a European consistent manner\textsuperscript{647}. Any lingering doubts in the mind of the reader as to the wide ranging and cogent nature of the duty to apply a European consistent interpretation of national provisions implementing a directive, or indeed legislation, will be promptly dispelled by reading the Aikens LJ’s analysis of the UK authorities on consistent construction techniques in his Court of Appeal judgment in Churchill v Wilkinson\textsuperscript{648} in conjunction with Waller LJ’s Court of Appeal appraisal of Pfeiffer’s

\textsuperscript{645} Supra, under Special powers conferred under the MIB Uninsured Drivers Agreements

\textsuperscript{646} Non contracting third parties were given a statutory right to sue under a contract made for their benefit under the Contracts (Rights of Third Parties) Act 1999, although section 1(3) and 1(4) conflict with the free standing nature of the European protective principle and so require a European law consistent interpretation

\textsuperscript{647} I.e. and so be construed in a manner that gives effect to the Directive’s legislative aim, in so far as possible

\textsuperscript{648} Churchill Insurance Company Limited v Benjamin Wilkinson and Tracy Evans v Equity and Secretary of State for Transport [2012] EWCA Civ 1166, see Part VI of the
significance in *McCall v Pouton*649 EWCA Civ 1263. Given the crucial importance of *Pfeiffer*, the court’s finding in *Byrne* is not only wrong in law but can safely be disregarded as one made *per incuriam*.

HHJ Waksman QC’s judgment in *UK Insurance Ltd v Holden and R&S Pilling*650 EWHC 264 (QB) provides a timely reminder that Flaux J is not alone. The judgment exhibits the same reluctance to amend a national law provision through a European law constructive interpretation where this would appear to go against the clear wording and ‘presumed intention’651 of the domestic provision. Although there was no need to determine the implications of the *Vnuk* judgment on the statutory geographic scope of the UK’s transposition within the Road Traffic Act 1988 of the Article 3 third party insurance requirement, the judge nevertheless offered his *obiter* view that it would not be possible to construe Section 145 (3) of the Road Traffic Act 1988 consistently with the Article 3(1) insurance requirement as this would be going against the grain of the Act. Neither *Pfeiffer* nor the legal presumption he is supposed to apply (in effect that Parliament intended by the wording in Section 145 of the 1988 Act to fully implement Article 3) receives a mention. It is also unfortunate that the judge does not appear to have been referred to Waller LJ’s excellent analysis of *Pfeiffer’s* impact on the way a European law consistent interpretation applies in the context of the Directive, in *McCall v Poulton* EWCA Civ 1263 652.

Although HHJ Waksman’s views in the *UK insurance* case on this point are clearly open to criticism653 they nevertheless reflect a widespread reluctance in the judiciary to intervene in this way to correct non-compliant national law provision. Furthermore, if the UK referendum results in the UK ceding from the

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649 *McCall v Pouton* [2008] EWCA Civ 1263, paras 35 to 40
650 *UK Insurance Ltd v Holden and R&S Pilling* [2016] EWHC 264 (QB)
651 Meaning the intention to be gleaned from the natural meaning of the words used and without reference to *Pfeiffer’s* presumptive injunction
652 *McCall v Poulton* [2008] EWCA Civ 1263, see paras 35 to 40
653 If only for the simple but compelling reason that the gravamen of Part VI Road Traffic Act 1988 is to prevent accident victims from being unable to recover their compensatory entitlement by providing a compensatory guarantee scheme that is different in kind to the rights of the contracting parties. In which case, any *lacunae* in protection, being an exception to that basic principle, should be subject to considerable circumspection.
European Union, the judiciary are likely to exhibit an even greater reticence to cure non-compliant national provisions in this way, even where the accident circumstances pre date the legal date effect of the UK’s exit. These difficulties make the case for arguing the direct effect of the Directive against the MIB even more relevant, urgent and necessary.

**On direct vertical effect of the Directive against the MIB**

On the third issue in *Byrne*, Flaux J ruled that the MIB was not subject to the direct vertical effect of the Directive. This erroneous finding can be readily dispatched in the light of the European law considered under the preceding headings: “First principles on state liability” and “A modified principle”. Once again, it would seem that the court appears to have been misinformed on the correct law and there also seems to have been a serious failure to provide full and proper disclosure of the facts relevant to Department’s close working relationship with the MIB and its members.

As to the threshold criteria, Flaux J deftly dismissed the defendant’s arguments to the effect that as the Directive left a wide discretion to member states to determine the identity of the compensating body, the directive lacked sufficient precision. He found that Schiemann LJ’s *obiter* views to this effect in the Court of Appeal hearing of the *Evans* case, which views were supported by Swinton Thomas LJ and Hobhouse LJ, were made obsolete following the CJEU ruling in *Gharehveran*. According to *Gharehveran*, once a member state exercises its discretion to appoint such a body, any uncertainty or imprecision relating to its identity is thereby removed. The judge was clearly right to rule that the Directive itself was capable of direct effect; so far so good.

Where the judgment comes unstuck is in second limb of the analysis: in establishing whether the Directive has direct effect against the MIB as opposed to central government. Nowhere does the judgment even acknowledge the first principles of state liability and the European case law that lays the foundation for *Foster*. One lesson we can take from *Byrne* is that the CJEU’s judgment in *Foster*

654 *Mighell v Reading, Evans v Motor Insurers’ Bureau, White v White* [1999] 1 CMLR 1251
655 Although less stridently so by Hobhouse LJ
656 *Gharehveran* [2001] CJEU (Case C-441/99) [2001] ECR I-7687

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cannot be properly understood in isolation. *Foster* was never intended to stand on its own, it is incremental to and not independent of the principle of state liability formulated in *Becker*\(^{657}\) and *Marshall*\(^{658}\) as augmented by *Konle* \(^{659}\). None of these cases are mentioned in *Byrne*.

Instead the judgment offers a misleading analysis of the *Foster* criteria that led the judge to erroneously apply the tripartite test on the MIB, as opposed to the public service devolved to it. Arguably, the judgment is also overly reliant on the *Foster*, *Doughty*\(^{660}\) and *Griffin*\(^{661}\) cases, all of which feature large monolithic entities, not well suited to the facts of *Byrne*. It makes no reference to the CJEU ruling in *Johnston*\(^{662}\) nor, even more to the point, Schiemann LJ’s influential Court of Appeal’s judgment in the *NUT case*.

Of the three criteria in *Foster*, Flaux J rightly dismissed the defendant’s contention that the MIB’s role did not fulfil a public service. Where he errs is in the application of the second and third criteria. He concluded that the MIB was neither under the control of the state nor vested with special powers. Quite apart from being arguably the wrong questions\(^{663}\), any properly informed court would have found an embarrassing wealth of evidence\(^{664}\) to the contrary, sufficient to establish the case even on those terms.

On the second criterion, although the judgment makes a passing reference to Blackburne J’s judgment in *Griffin*, it appears that this may only have been given superficial consideration; what else could explain this learned judge’s failure to address Blackburne J’s succinct and helpful analysis at paragraph 94? It is so pertinent to this particular case as to merit its repetition in full:

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\(^{657}\) *Ursula Becker v Finanzamt Münster-Innenstadt* [1982] CJEU (Case 8/81)

\(^{658}\) *Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] CJEU Case C-271/91

\(^{659}\) See also *Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [2000] CJEU (Case 424/97)

\(^{660}\) *Doughty v Rolls-Royce Plc* [1992] IRLR 126 CA

\(^{661}\) *Griffin v South West Water Services Ltd* [1995] IRLR 15

\(^{662}\) *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1987] CJEU Case 222/84

\(^{663}\) As to the correct enquiry, see the concluding paragraphs under the *Conclusions* subheading beneath *A modified principle*

\(^{664}\) Considered above under the heading *On the role entrusted to the Article 10 compensating body*
“The plaintiffs contend, and SWW disputes, that the second of the three conditions, the so-called ‘control condition’, is fulfilled. In considering that condition it is necessary, in my view, to appreciate several points:

1. The question is not whether the body in question is under the control of the State but whether the public service in question is under the control of the State.
2. The legal form of the body is irrelevant.
3. The fact that the body is a commercial concern is also irrelevant.
4. It is also irrelevant that the body does not carry out any of the traditional functions of the State and is not an agent of the State.
5. It is irrelevant too that the State does not possess day-to-day control over the activities of the body.

See paragraph 20 of the European Court’s judgment in Foster [1990] IRLR 353 (set out above) and Lord Templeman in Foster [1991] IRLR 268 at pp.270–271.”

More unfortunate yet, the judgment fails to make any mention of the CJEU ruling in Farrell v Whitty\(^665\), which was delivered the preceding year, whose case facts are to all intents and purposes on all fours with Byrne. As indicted above, Farrell featured a near identical candidate for direct effect, namely the Irish Republic’s compensating body and it involved almost exactly the same civil law and social policy imperatives.

The CJEU was constrained to rule in Farrell that it was the prerogative of the national court, not the CJEU, to make the factual determination as to whether an institution in its jurisdiction was an emanation of the state; applying the relevant European jurisprudence. The fact that it did not dismiss outright the notion that the MIBI might be an emanation of state was surely something that should have been noted and considered. A fortiori the view of Advocate General Stix-Hackl at paragraph 72 of his 5\(^{th}\) October 2006 opinion in that case:

“In conclusion, it seems to me that the MIBI may, as a body authorised for the purposes of Article 1(4) of the Second Directive\(^666\) responsible for the

\(^{665}\) Elaine Farrell v Alan Whitty and Others [2006] CJEU Case C-356/05
\(^{666}\) Now Article 10 of the Directive, body responsible for compensation

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function entrusted to those bodies by that directive, be put on the same footing as the State, with the result that Article 1 of the Third Directive may be directly relied upon by individuals before the national courts.”

Any properly informed court should have been aware of the relevance of the Farrell case, the fact that it had been referred back to the national court and the fact that Birmingham J’s judgment, on this very issue the year before, had just been published. What is interesting about this Irish judgment is that it makes the same syntactical error as Byrne in the way it construes para 20 of the CJEU’s ruling in Foster as requiring an analysis of state control over the body in whom the public service is vested as opposed to control over the service per se. Properly construed in the light of the superior European law principle set out in Becker and other European jurisprudence, whether or not a state happens to exerts control over the body is incidental to, not determinative of, the test. It is the public service that must be subject to state control and the public service that must involve collateral special powers beyond those enjoyed by ordinary individuals. Notwithstanding this semantic confusion, Birmingham J still ruled that the MIBI was an emanation of the state. He was able to make this finding because he was not only aware of the guiding principle in Becker but had also been provided with sufficient evidence to come to a just conclusion, all in sharp contrast to Byrne.

One of Byrne’s more astonishing characteristics is the dearth of evidence disclosed to the court when, as with any government department, one would have anticipated an abundance of material. After all, the laying of ‘paper’ trails is what some consider to be a bureaucracy’s chief product. What seems particularly inexplicable is the absence of any reference to the 1945 Agreement which proves beyond doubt that the authorised motor insurers who comprise and

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667 Now Article 12 of the Directive, special categories of victim
668 Elaine Farrell v Alan Whitty, the Minister for the Environment, Ireland and the Attorney General and the Motor Insurance Bureau of Ireland [2008] IEHC 124
669 According to Waller LJ, in McCall v Poulton & MIB [2008] EWCA Civ 1263, Birmingham J’s judgment was posted on the internet a matter of days before the trial in Byrne, see para 47.
670 Supra
671 Supra, under the heading: The Foster guidance on direct effect
672 Increasingly superseded by emails and electronic documents
673 See above under On the nature of the Motor Insurers Bureau
manage the MIB are subject to state control, a control that includes ultimate sanction of divesting any non-compliant member of its authorised status.

It is apparent from Flaux J’s judgment and from comments made in the Court of Appeal in Byrne that the Department for Transport claimed that it had very little documentary evidence that was capable of casting light on the way it regulates the motor insurance sector and its relations with the MIB in particular. In this author’s view it is likely that a properly conducted search would reveal an abundance of internal memoranda, correspondence, diary entries and minutes retained at the ministry.

As to the final Foster criterion (that requires the body tasked with the public duty to possess special powers beyond those which result from the normal rules applicable to relations between individuals), Flaux J concluded that the MIB had none.

This finding strikes the author as being counter-intuitive, given what we have already noted above.

The judgment does at least consider section 145(6) Road Traffic Act 1988 which imposes membership of the MIB as a condition precedent to authorised status but it concluded that this did not confer any special power on the MIB. This strikes the reader as surprisingly naive, especially in view of the matters considered above under the heading On the role entrusted to the Article 10 compensating body. In the writer’s view it stands to reason that the MIB must have the power to require the Government to ensure that it is properly funded.

The judgment does not consider the MIB’s ability to call on the Government to compel insurers to provide it with their insurance information to enable it to

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674 See Carnwarth LJ’s comment in Byrne v MIB & Secretary of State for Transport [2008] EWCA Civ 574 at para 41
675 This is a phenomenon repeated in another more recent Francovich action against the Secretary of State for Transport, which Jay J commented on in the Delaney case, supra, at para 89 and 95 – 101
676 The author’s recent Freedom of Information Act request for data on the relationship between the MIB and the Department has been declined on the ground that it would be too expensive to provide statistics as to senior management level meetings; this is hardly consistent with the almost complete absence of records disclosed to the court in Byrne
677 See above under, “A public service under the control of the state” and the reference to the CJEU ruling in Fish Legal v Information Commissioner, United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd [2013] Case C-279/12

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discharge its role under Article 23, nor to consider the implications of this data being interrupted. Neither does it make any reference to the right of the compensating body to claim a reimbursement from a foreign compensating body under Article 24.2 of the Directive, nor its rights under Article 25. Neither was any consideration given to the extensive substantive and procedural powers conferred on the MIB within the MIB Agreements themselves.

**Conclusions on Byrne**

It seems highly unlikely that had Flaux J been appraised of key authorities such as *Peiffer, Becker* and *NUT*; the reference to the CJEU in *Farrell*, the detailed workings of the MIB Agreements; the European law rights conferred on the MIB by virtue of its role in discharging its responsibilities under Articles 10 and elsewhere in the Directive that he would not at least have taken them into account in his otherwise meticulous judgment. One is forced to conclude, applying the Occam’s razor principle⁶⁷⁸ that these matters were not raised. As indicated above, this author considers the judge’s finding on the second and third issues were both made *per incuriam*.

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⁶⁷⁸ Namely that where there are several competing hypotheses, the one with the fewest assumptions should be preferred.
Main Conclusions

The central theme of this paper is that Article 10 of the Directive has direct effect against the MIB. Furthermore, that this issue is not decided by establishing whether or not the MIB is an emanation of state in its own right. The proposition is governed by the principle of state liability in Becker as elucidated by the judgment in Foster but in the knowledge that the case facts are distinguishable. Even so, applying the Foster criteria to the MIB it is necessary to decide (i) whether the various responsibilities the MIB discharges constitute a public service and in particular whether its role as the Article 10 compensating body is a public service, (ii) whether those roles have been devolved to it by the state, (iii) whether the State has the ability to control or influence those public services and (iv) whether these roles, in particular its Article 10 role, involve the conferral of special powers not enjoyed by ordinary individuals.

The fact that an outsourced service provider, such as the MIB, when discharging those functions happens also to be acting as an emanation of state is a consequence of its role in discharging that public service; no more.

The overwhelming preponderance of the evidence considered above leads to the conclusion that the public service discharged by the MIB, as the appointed Article 10 compensating body, satisfies to the criteria formulated by the CJEU in Foster that tests the applicability of direct effect where certain European law derived responsibilities are devolved to third party organisations. It has also been argued on an a priori basis that the MIB is necessarily, by implication of its Article 10 role, subject to the direct effect of the Directive, independently of the test in Foster. The MIB is clearly an emanation of the motor insurance sector but when it acting in its capacity as an Article 10 compensator, it is discharging a public service imposed on the State defined by European law and as such it is acting as an emanation of the state, and accountable as such.

However it should be remembered that the CJEU is the final arbiter on the Becker principle and Foster’s test and on the jurisprudence as to the correct attribution

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679 Although this is certainly a relevant factor and one that is capable of triggering direct effect, see Foster para 18 above

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of emanation of state status. Its latest judgment in Farrell (no 2)\textsuperscript{680} is awaited with interest. Subject to this important caveat, if one assumes for a moment that the Directive does have direct effect against the MIB, then that begs the question: with what result?

\textit{Wider Implications}

The MIB’s potential liability under the \textit{Becker} principle is a large and controversial theme, one whose boundaries have not begun to be explored. It is also one complicated first, by emerging pressure from some member states, including the UK, for the Directive to be modified, and secondly, by the current uncertainty associated with the UK’s continued membership of the European Union and the way this is likely to affect the way courts construe non-compliant national provision.

It follows that if the direct effect exception in \textit{Becker} applies to organisations like the MIBI and the MIB, then it also applies to each and every Article 10 authorised body across the European Union. This will have beneficial consequences for United Kingdom residents injured in foreign EU member states where the foreign applicable law fails to fully implement Articles 3 and 10 of the Directive. In the United Kingdom there are two main areas where direct effect will be felt most.

\textbf{The MIB Agreements as a subordinate source of law}

The first of these concerns the way direct effect will alter individual victims’ rights under the two compensatory schemes set out within the Uninsured and Untraced Drivers’ Agreements. Although this author has argued that they are to be construed purposefully so at to give effect, in so far as is possible, to the legislative aims of the Directive, the extent to which this is capable of curing flaws that seem to go against the grain of these schemes has yet to be fully tested. Take for example the way both agreements dovetail their geographic and mechanical scope to the Road Traffic Act 1988 definitions imposing the duty to insure. In \textit{Mind The Gap!} the author argued that those provisions are incompatible with the wider scoped geographic and mechanical scope of the

\textsuperscript{680} As indicated above, this is the second reference to the CJEU on this issue in this case
Article 3 insurance requirement. Yet it is conceivable, even in a post *Pfiiffer* world, that a court might still take the view that to impose a European law consistent interpretation that complies with the much wider ambit indicated by *Vnuk*, would conflict with the *contra legem*681 principle and thus lie beyond the power of the court to confer. Alternatively, it is possible that a court might be persuaded to the view that to apply a wider geographic and mechanical scope to the MIB Agreements than has been contemplated by the statute682 would effectively be imposing an unacceptable degree of retrospection.

Putting such fundamental incompatibilities to one side, a European law consistent interpretation is still capable of proving very effective in excising the various unlawful exclusions and qualifications to liability within the MIB Agreements. This is because *Pfiiffer* requires every court to take a proactive stance. The conventional passivity rule683 is displaced in this context. The court’s mandatory constitutional duty, as an organ of the State, is to “... interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive”684. Furthermore, when undertaking this task it must “...presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive...”685.

However, the *Byrne* and *UK Insurance* cases still confront us, *per incuriam* though they may be. Notwithstanding Lord Aikens helpful guidance in *Churchill*, this is still a relatively grey area where the judicial discretion makes it difficult to predict outcomes. This is precisely where the ability to rely on the direct effect of the Directive against the MIB comes into its own.

Direct effect does not render the MIB Agreements obsolescent. Clearly, to the extent that they conform with EU law, they will remain the primary source of law,

681 See for example the way the House of Lords felt constrained in what they could do to cure the unamended version of section 143 Road Traffic Act 1988 in *Clarke v Kato and Cutter v Eagle Star Insurance Ltd* [1998] All ER (D) 481
682 Which the scheme is designed to augment; not surplant
683 By which the court leaves it to the parties to define the issues it is required to consider. The Civil Procedure Rules 1989 have made considerable inroads into this convention, see Part 3 The Court’s Case Management Powers
684 *Pfiiffer*, para 113
685 *Pfiiffer*, para 112
under the well established European subsidiarity principle\textsuperscript{686}. Even where that domestic provision is defective\textsuperscript{687}, a court’s first recourse is likely to be to attempt a European law consistent interpretation. However, it will no longer be confined to the constraints imposed by that artificial exercise: of second-guessing what a properly informed legislature or minister ought to have intended by words whose natural meaning fails to conform to the European law they are supposed to implement. Instead, once a non-conformity is established the court will be able to determine an individual claimant’s rights by resorting directly to the wording of the Directive itself, as though it were part of the national law, relegating the relevance of the actual national law implementation to a subordinate level of significance. Direct effect confers a much greater ability on judges to uphold rights on individuals conferred under superior European law, even where they go against the grain of the national law.

**MIB liability for non compliant statutory provision**

The second area in which the direct effect of the Directive will be most felt is in the way it impacts on the UK’s statutory provision, where that law fails to comply with the minimum standard of compensatory protection required under the Directive. In *Mind The Gap!*\textsuperscript{688} the following, non exhaustive, list of legislation was identified as conflicting with the more generous, wider scoped and free-standing compensatory guarantee imposed under European law: Part VI of the Road Traffic Act 1988, the Third Party Rights Acts 1930 and 2010 and the (European Community) Rights Against Insurers Regulations 2002\textsuperscript{689}.

Although the UK Parliament is primarily responsible for statutes and statutory instruments that infringe the Directive, and through it the UK government, the doctrine of direct effect will also have a profound impact on the MIB’s ultimate liability and through it, the motor insurers who contribute to its levy. As indicated above, the geographic and mechanical scope of the MIB’s contractual obligation to compensate victims under its two schemes is defined by Part VI of the Road

\textsuperscript{686} By way of example, see the CJEU ruling in *Evans*, para 34
\textsuperscript{687} In the sense that it is incompatible with the Directive
\textsuperscript{688} *Mind The Gap!,* Nicholas Bevan, British Insurance Law Association Journal, January 2016
\textsuperscript{689} To which one might add the Contracts (Rights of Third Parties) Act 1999, see earlier footnote and Section 1(5) thereof

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Traffic Act 1988 to which both sets of MIB agreements specifically refer\textsuperscript{690}. Unfortunately these statutory provisions do not extend to use of motor vehicles on private property nor to vehicles other than those intended or adapted for general road use, even where they are actually used on roads. The CJEU ruling in \textit{Vnuk} has made explicit what was previously clear and obvious, namely that the European law obligation imposed under Article 3 of the Directive permits no such restrictions to its geographic and mechanical scope.

The significance of direct effect against the MIB in this context is that it is capable of pinning the MIB with liability for the UK government’s legislative failings.

The MIB, as the Article 10 compensating body, is charged with compensating victims of “uninsured vehicles”. The proper scope of that role is ultimately determined by the wording of the Directive; not the UK’s statutory provisions nor the minister’s contractual arrangements with the MIB. Accordingly, regardless of whatever redress the MIB may have from the state, it is liable to compensate victims of motor vehicles not caught by the Road Traffic Act definitions and of motor accidents on private property, notwithstanding that these events clearly fall outside the natural meaning of the words used to define the scope of the MIB’s contractual arrangements with the State. Put another way the European principle of direct effect pins the MIB with liability for the State’s incompetence, for which it is not responsible.

As Advocate General Gereven explained at para 5 of his opinion in \textit{Foster}:

“5. In \textit{Marshall}\textsuperscript{691} the possibility of relying on an unconditional and sufficiently precise provision of a directive against a Member State was thus clearly linked to the failure of the Member State to implement the directive in national law correctly and at the proper time. (14) Accordingly, the principle "the State cannot plead its own wrong" (15) or the principle \textit{nemo auditur propriam turpitudinem allegans}\textsuperscript{692} were held to constitute the basis for vertical direct effect. At the same time, however, the principle

\textsuperscript{690} These confine the two compensatory schemes to events that require comprehensive third party motor insurance, as defined by sections 143, 145, 195 and 192 of the Road Traffic Act 1988

\textsuperscript{691} \textit{Marshall v Southampton and South-West Hampshire Area Health Authority} [1993] CJEU Case C-271/91.

\textsuperscript{692} i.e. no one shall be heard, who invokes his own guilt
was interpreted broadly: the failure to act can be relied on by individuals against the Member State regardless of the capacity in which the State acts - as "employer or public authority"; moreover, as also appears from later judgments which will be discussed below, the failure to act can be relied on by individuals against independent and/or local authorities which are not themselves responsible for the failure to implement the directive in national law.

[emphasis added]

Applying this principle to the MIB, as opposed to the MIB agreements per se, it is axiomatic that any vehicle which under European law ought to be covered by the Article 3 insurance requirement but is not due to the UK’s failure to fully transpose that obligation into the Road Traffic Act 1988 falls within the Article 10 definition of “a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied”.

The European jurisprudence is clear that there should be no gaps in cover. Recital 14 of the Directive explains this imperative: “It is necessary to make provision for a body to guarantee that the victim will not remain without compensation where the vehicle which caused the accident is uninsured or unidentified”.

It follows therefore that if Article 10 has direct effect then the MIB will also be liable not just for its contractual obligations agreed with the minister but also for any situation in which a vehicle requiring civil liability cover under Article 3 is in fact uninsured.

As indicated in Mind The Gap! this makes the MIB liable, and through it every authorised levy paying motor insurer, to compensate a plethora of exotic off road motor vehicles that do not fall within the highly specific definition within Section 185 of the 1988 Act. The MIB is also liable to compensate victims of motor accidents on private property, which under our national law does not require third party motor cover as it is not a public place. Furthermore many of difficulties encountered by accident victims due to the numerous other substantive law defects in the statutory and extra-statutory implementation of the Directive, effectively fall away.
The scale of the problem

The scale and nature of the UK’s non conformity is a shambles of near epic proportions: our national law provision in this area is so profoundly flawed that it cannot be taken at face value. Millions of motor policies contain exclusions and restrictions in cover that are not permitted by the Directive. The UK Insurance case reveals that some motor policies do not even conform with Section 145 Road Traffic Act 1988 which sets out the minimum third party cover requirements.

The widespread nature of the infringements by the UK in its statutory and extra-statutory transposition of the Directive have already been mentioned above. All these conflicts of law undermine the principle of legal certainty which is a pre requisite of a state’s full and proper implementation of the Directive. No well educated and reasonably informed citizen could be expected to identify the true extent of their entitlement to the compensatory guaranteed required under European law from even a close and careful study of our national law provision; especially if some of our judiciary appear to be unequal to the same task.

Legal certainty is vital, not just for the victims who depend on the UK’s proper implementation of their legal entitlement under European law but it arguably even more acute for the motor insurers operating in this market, as the pricing of premiums depends on accurate predictions of the financial risks they underwrite. It almost goes without saying that the MIB must now prepare itself for much greater scrutiny of the regimes they operate and for a tide of new claims for incidents that fall outside the scope of their contractual arrangements with the state.

Years of ministerial inaction are responsible. The Department for Transport were an intervening party in Bernaldez and so should have known, back in 1996, that the European insurance requirement was highly prescriptive, leaving no room for individual member states to permit their own idiosyncratic exclusions or restrictions in cover – but they did nothing. The Vnuk ruling has been with us since September 2014. The implications of that judgment could not have been

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693 See for example the unanimous but nevertheless erroneous decisions in EUI v Bristol Alliance Partnership Ltd [2012] EWCA Civ 1267 and Delaney v Pickett and Tradewise [2011] EWCA Civ 1532

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clearer. The amendments necessary to bring the geographic and mechanical scope of the compulsory third party motor insurance requirement provided for under the Road Traffic Act 1988 could hardly be simpler or more obvious. Yet the Department for Transport’s only response, so far, is to indicate in vague terms that the minister is contemplating yet another round of consultation; sometime soon. Consultation is no answer to decades of inaction and illegality. Meanwhile, lawyers, judges, insurers and the public must cope as best they can in the entirely avoidable hiatus caused by this ministry’s longstanding failure to properly discharge its legal responsibility to fully transpose the Directive.

Further uncertainty results from the impending referendum on the United Kingdom’s membership of the European Union but that at least is not the Department for Transport’s fault.
C. The New law journal

9. On the right road?

Published: 01 February 2013

In the first of a special NLJ series, Nicholas Bevan takes the government to task over failures to compensate RTA victims

Last year leave to appeal was sought from the Court of Appeal in three cases featuring our national law provision for guaranteeing that victims of motor vehicle incidents recover their full compensatory entitlement. It is to be hoped that at least one will be heard by the Supreme Court in 2013. If these appeals proceed, the Supreme Court will have to grapple with what appears to be a growing divergence between our domestic law in this area and the more generous provision required by the European Motor Vehicle Insurance Directives. This issue has important implications for insurer and victim alike.

The purpose of this series is to provide timely practical guidance for practitioners on how they should interpret our national law provision in this field of practice correctly. The need for clarification in this area is urgent as our national courts have been approaching the interpretive task from the wrong direction.

Where to start

The proper approach to interpreting our domestic law in this area should always begin with the relevant Community law. This may seem counterintuitive to many tort law practitioners but the purpose of this series is to substantiate a proposition that has become common place in the fields of health and safety, employment law and human rights.

It is well known that the UK has ceded a portion of its sovereignty to the European Community under a number of consolidated treaties. This is particularly relevant to the primacy of Community law principle. Most of us are familiar with Lord Denning’s dictum in *H.P. Bulmer Ltd v J. Bollinger SA*[1974] Ch 401 at 418, to

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694 Owners, Lexis Nexis Group

695 N.L.J. 2013, 163(7547), 130-132.
the effect that whenever an area of UK law is covered by Community law, it becomes part of our national law and “is equal in force to any statute”.

**Community law basics**

The Community has two main legislative processes. Regulations that are binding in their entirety and have direct effect in each member state, pursuant to Art 249 of the Treaty of Rome 1957 (as amended and consolidated). A directive, which usually sets out high level policy objectives and confers a wide discretion as to how individual member states implement them. They are teleological in nature, as Art 249(3) makes clear: “A directive shall be binding, as to the result to be achieved, upon each member state to which it is directed but shall leave to the national authorities the choice of form and methods.”

All directives are prefaced by a series of recitals; these state the Community policy underscoring the objectives. The operative parts of a directive are set out within the articles that follow.

**Interpreting Community law**

When it comes to interpreting a directive, the European Court of Justice (ECJ) is the ultimate authority (Art 220 of the Treaty). This principle is confirmed by s 3 (1) of the European Communities Act 1972 (ECA 1972) which incorporates relevant ECJ rulings into UK law. Article 234 of the treaty confers the ECJ’s jurisdiction to deliver preliminary rulings on issues referred to it by a national court. When interpreting a directive, the ECJ will tend to consider its purpose as opposed to applying a literal construction to the words used. Although our national courts have jurisdiction when it comes to interpreting our domestic law and the impact on it of Community law, s 3 of ECA 1972 requires them to do so by applying the relevant rulings of ECJ.

Article 10 of the treaty imposes a duty on national courts to interpret domestic legislation in a way that is consistent with Community law. The purposive interpretation principle was enshrined in *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135. It is worth citing a more recent ECJ ruling from 2006, *Adeneler and Others v Ellinikos Organismos Galaktos* ECJ Case C-212/04.
“When national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third para of Art 249 EC (see *Joined Cases C-397/01 to C-403/01 Pfeiffer and Others* [2004] ECR I-8835, para 113, and the case-law cited). This obligation to interpret national law in conformity with Community law concerns all provisions of national law, whether adopted before or after the directive in question (see *Case C-106/89 Marleasing*[1990] ECR I 4135, para 8, and *Pfeiffer and Others*, para 115).

“The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of Community law when they determine the disputes before them (see *Pfeiffer and Others*, para 114).” [ paras 108 & 109]

**The EU Motor Vehicle Insurance Directives**

Between 1972 and 2005, the European Council enacted five different directives with the aim of delivering a consistent approach across the European Community by member states to ensure that civil liability for use of motor vehicles is covered by some form of insurance provision.

These directives are not intended to alter civil or criminal liability arising out of the use of vehicles. In this, member states retain their autonomy; subject only to the principle that their laws must not indirectly deprive the directives of their effectiveness. The original requirement in Art 3 (1) of the First Motor Insurance Directive: 24/04/1972 (72/166/EC) [now Art 3 of the Sixth Directive] was that member states should “ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance”. That left lots of discretion to individual member states as to the terms of scope of the insurance cover they provided. This latitude has been restricted by successive directives and ECJ rulings to ensure a consistent approach across the Community. These
refinements are provided for within: the Second Motor Insurance Directive 30/12/1983 (84/5/EC); the Third Motor Insurance Directive 14/05/1990 (90/232/EC); and the Fifth Motor Insurance Directive 2005/14/EC.

Most recently, these directives were consolidated in the Sixth Directive 2009/103 EC. The key provisions for these purposes are contained in the following articles: 1 (definitions); 3 (ensuring cover for civil liability); 9 (derogations from Art 3); 10 (uninsured and untraced driver claims); 12 (special categories of victim); and 13 (exclusion clauses).

Article 2 (1) of the Second Directive [now Art 13 of the Sixth Directive] provides a list of policy exclusions which are deemed to be void as against a third party. Ordinarily, one might infer from the presence of such a list that all other exclusions are prima facie valid. A similar line of reasoning has been advanced in the interpretation of s 148 of the Road Traffic Act 1988. However, in Rafael Ruiz Bernáldez [1996] Case C-129/94, the ECJ applied a construction that went beyond what one would expect of a literal interpretation: it ruled that the list of void exclusions (far from being a self-contained list of exceptions to a basic rule) merely served to illustrate the kind of exclusions that Art 3(1) prevented. It held that Art 3(1) of the First Directive precludes an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle [para 20].

By way of derogation from that obligation, the second sub-para of Art 2(1) provides that certain persons may be excluded from compensation by the insurer, having regard to the situation they have themselves brought about (persons entering a vehicle which they know to have been stolen) [para 21].

The ECJ’s restrictive interpretation of Art 2 (1) has been endorsed and approved in subsequent rulings, such as in Candolin [2005] ECR I-5745, Case C-537/03. In Pfeiffer v Deutsches Rotes Kreuz [2004] C-397/01, the ECJ ruled that the principle that national law must be interpreted in conformity with Community law requires a national court to consider national law as a whole to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive.
Most recently, in *Churchill v Wilkinson and Evans* [2011] Case C-442/10, the ECJ ruled that once insurance is in place, “the only situation in which a third party who has been a victim of an accident may be excluded from insurance cover is that specified in the second sub-para of Art 2(1) of the Second Directive” [para 38].

The seventh recital in the preamble to the Second Directive states that it is in the interest of victims that the effects of certain exclusion clauses should be limited to the relationship between the insurer and the person responsible for the accident. This was an important factor in influencing the ECJ’s ruling in Candolin.

Part VI of the Road Traffic Act 1988 (RTA 1988), the Uninsured Drivers Agreements and the Untraced Drivers Agreements all seek to implement the UK’s obligations under the Motor Insurance Directives. Whenever a UK court seeks to interpret Pt VI of RTA 1988, or one of the aforementioned agreements between the Secretary of State and the Motor Insurers Bureau, these must be construed, as far as possible, purposively; not only in the light of the relevant directives but also in accordance with any ECJ interpretation of those same directives.

Accordingly, there is a very strong case to argue that under Community law where a compulsory motor insurance policy is in place, it covers civil liability for any use of the motor vehicle within the territory of the UK, save for the single instance of the “stolen vehicle” exclusion mentioned above.
10. On the right road? (Pt II)

Date: 08 February 2013

Nicholas Bevan continues his series on compensating RTA victims & finds our national law provision wanting

The terms, scope and workings of the UK government’s compensation guarantee has preoccupied legislators, the judiciary and legal practitioners alike since the first Road Traffic Act introduced in 1930 (RTA 1930). In the UK this provision has evolved over the years to produce four distinct compensatory safety nets. The first two consist of statutory rights. Between them, they confer on a victim a direct right to recover compensation from the defendant’s insurer and they are to be found within Pt VI of the Road Traffic Act 1988 (RTA 1988). The third and fourth are delivered by a completely different route: through two extra-statutory compensation schemes devised specifically for victims of uninsured and unidentified drivers. The distinction between the two different types of scheme (statutory and extra-statutory) is relevant to the way one interprets them because different rules of construction are said to apply. This article concentrates on the first two statutory schemes.

The contractual insurer

Of the two statutory schemes, the first confers on a victim a direct right of action against the insurer: this is itself a two-limbed affair. It begins with the obligation to insure and scope of cover required. Thus, under s 143 of RTA 1988, any person who uses a motor vehicle on a road or other public place must have third party motor insurance cover for the use to which the vehicle is put. Section 145 stipulates that this policy must cover “any liability” for 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. There are a number of restrictions on the ability of an insurer to limit or restrict its contractual liability, such as can be found within ss 148 and 150.
The second limb comes into play when a third party victim secures a judgment for loss or damage arising out of such use. A direct right is then conferred by RTA 1988 against the insurer of the responsible party under s 151 (5). A contractual insurer is obliged to satisfy a judgment against its assured by paying the third party direct under s 151 (2) (a).

The vast majority of claims are compensated by motor insurers, acting under their contractual obligation. Most of these claims are relatively uncontroversial. However, in *Cutter v Eagle Star Insurance* [1998] UKHL 4 All ER 417 the House of Lords had to determine whether a proper construction of s 145 extended the scope of cover, beyond what was then confined to “use of a vehicle on a road”, to encompass a car park. In the only reasoned judgment, Lord Clyde compared the apparently wider scope of the insurance obligation imposed by Art 3(1) of the First Motor Insurance Directive (as augmented by the Second and Third Directives) with ss 143 and 145 and addressed the apparent disparity head on.

He concluded that while the Marleasing principle permitted a court to strain to give effect to the purpose behind the legislation, this had its limits and in this instance could not be stretched so as to permit a court to add the words “or in any public place” even if it concluded that this was required under Community law. However, he took the view that RTA 1988 did comply with the directives as:

- the directives permit differences in the precise level of cover that national laws can impose; and
- s 145(3)(b) extends the scope of the insurance cover for a claim involving a vehicle normally based in the territory of another member state where a wider scope applies.

However, that ruling ignored the ECJ’s judgment in *Bernaldez* and predated its ruling in *Pfeiffer*. The Motor Vehicle (Compulsory Insurance) Regulations 2000 were passed shortly afterwards to extend the scope of the duty to insure under s 143 and the geographic scope of cover under s 145 to a “road or other public place”. Accordingly, *Cutter* must be viewed as being of questionable authority. It is possible that even the amended geographic scope may not be sufficiently wide to fully implement Art 3 (1) of the First Directive.
The contractual third party insurance scheme is augmented by the European Communities (Rights against Insurers) Regulations 2002. Regulation 3 confers on a victim the right to pursue a claim against the defendant’s motor insurer direct. This was introduced from 19 January 2003 and is intended to implement Art 3 of the Fourth Motor Vehicle Insurance Directive 2000/26/EC. However, it imposes two qualifications to the direct right:

- it is limited to claims arising out of “accidents”; and
- the insurers’ liability is confined to extent of its contractual liability to indemnify its insured.

Although the term “accidents” is also employed in Art 3 of the Fourth Directive, there is a strong case to argue that this is consistent with the primary duty under Art 3 (1) of the First Directive (72/166/EC), which is to ensure that civil liability, as opposed to criminal liability, is covered by insurance. In Part I of this series we saw that in *Ruiz Bernáldez* [1996] ECR I-1829, Case C-129/94 the Court of Justice ruled that the Directives permit only one policy exclusion against a third-party victim, namely under Art 2 (1) of the Second Directive 84/5/EEC (now Article 13 of the Sixth Directive) which applies where a passenger knows the vehicle he is riding in is stolen. Furthermore that, as a derogation from the main principle imposed under Art 3 of the First Directive, that one exception should be construed strictly. The same court also ruled that Art 3 (1) 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 [see para 20]. This was approved in *Candolin* [2005] ECR I-5745; Case C-537/03 and since. Accordingly it is arguable that Regulation 3 fails to fully implement the Directive if its effect is to deny the direct right where a claim features a deliberate running down or trespass to the person; as opposed to purely accidental injury or damage. Where Regulation 3 qualifies the direct right, by restricting it to the assured’s contractual entitlement, this is clearly not permitted by the Directives, save for the single instance permitted under Art 2 (1) above.

**The statutory insurer**

Shortly after RTA 1930 was enacted, it was apparent that further provision was required to prevent the compensatory policy aim being undermined by authorised motor insurers, who were imposing unduly restrictive policy terms and exclusions.
of cover. It was deemed necessary to guarantee a victim’s right to compensatory cover even where an insured defendant was not contractually entitled to an indemnity due to a breach of the policy terms. Accordingly a second statutory scheme was devised to supplement the first.

Because of the empirical way in which this part of the scheme developed, it is confined by statute to a limited number of specific instances. It applies where an insurer has delivered a third party motor policy issued in accordance with s 145 but where, in certain prescribed instances, it is entitled to avoid its contractual liability to indemnity its assured. An insurer responding to such a claim is commonly known as a statutory insurer. A statutory insurer is obliged under s 151 (5) to satisfy the third party claim despite the insured’s breach of contract.

However, a literal interpretation of RTA 1988 would appear to confine the operation of this scheme to:

- breaches falling within the list of eight types of policy limitation set out in s 148(2) (such restrictions on cover as the age or physical or mental condition of persons driving the vehicle, plus technical limitations relating to the vehicle itself);
- where under s 151 (2) (b) the only breach of condition was that the driver of the insured vehicle was unauthorised; or
- where under s 151 (3) the vehicle has been used without a driving licence.

These nullifying provisions only apply to a statutory insurance claim under s 151 (5). There is no similar provision within the 2002 regulations.

Where a statutory insurer satisfies a judgment under s 151 (5), RTA 1988, it also confers a corresponding statutory right of recovery against a policyholder or against anyone that has caused or permitted the unauthorised use of an insured vehicle, under s 148 (4) and s 151 (8) respectively.

The obvious disparities between our national law in this area and the more generous level of third party cover required under Community law has been a long-running if unresolved issue since Bernaldez in 1996 9 (see Part 1 of this series). Then, in the space of one year, there have been three unanimous Court of Appeal rulings on s 151.
In *Delaney v Pickett* [2011] EWCA Civ 1532 the court interpreted s 152 at face value and ruled that because an insurer had successfully obtained a post-accident declaration under s 152 to the effect that the motor policy was void (presumably on the grounds of nondisclosure of the driver’s alleged drug addiction), the insurer was obviated from meeting the injured passengers claim under s151. This appears to conflict with the ECJ rulings considered above. It then decided to treat the claim as one under the Uninsured Drivers Agreement 1999 and then compounded its error by misconstruing cl 6 where it is clearly in breach of the relevant Community law.

Next came *Churchill v Wilkinson* [2012] Civ 1166 where a previous and differently constituted Court of Appeal had properly referred to the ECJ for a preliminary determination the issue as to whether s 151(8) was compliant with Community law. The ECJ confirmed it was not. Accordingly, when the matter was restored to the Court of Appeal, the *Marleasing* principle was applied to s 151 (8) in a way which effectively introduced an extensive statutory amendment to this provision: one that removed an insurer’s automatic right to full recovery where the policyholder is also the claimant.

Finally, in *EUI v Bristol Alliance* [2012] EWCA Civ 1267 another set of experienced Court of Appeal judges sought to interpret s 151 by reviewing our domestic authorities before erroneously seeking to distinguish and marginalise the impact of *Bernaldez*. They ruled that while motorists are obliged under s 143, Pt VI of RTA 1988, to purchase third party insurance sufficient to cover “any use” they make of the insured vehicle in accordance with s 145, an authorised insurer is free to restrict the scope of the policies they sell. The problem is that most policies issued under s 145 do not extend to “any use”: *a fortiorari*, a driver’s suicide bid.

The EUI ruling exposes potential third party victims to the risk of failing to recover their compensatory entitlement where a defendant’s use falls outside the scope of the cover provided within the policy. Such an arbitrary outcome not only defeats the primary objective of Pt VI of RTA 1988 but is also at loggerheads with Art 3 (1) of the First Directive and the extensive body of superior ECJ jurisprudence.

Ward LJ’s view was that even though a third party victim’s compensatory entitlement was not guaranteed under s 151, the effect of RTA 1988 and the MIB
agreements were sufficient to comply with the directives. However, this is unsatisfactory because it appeared to deny the claimant in EUI any compensation as the property insurer’s subrogated claim was said to be excluded under cl 6 of the Uninsured Drivers Agreement 1999 (this view itself appears to conflict with the seventh recital and Art 1 of the Second Directive, now Art 10 of the Sixth Directive). It ignores the ECJ ruling in Churchill v Wilkinson [2011] Case C-442/10 that the MIB scheme should be a last resort, applicable only where there is no insurance or where the defendant is untraced.

The inconsistent approaches adopted by the Court of Appeal in these decisions only serves to demonstrate the unsatisfactory and shambolic nature of our national law provision in this area.

Reforming our national law provision

The significance of any Supreme Court ruling in these cases, quite apart from its intrinsic value for the proper construction of s 151, is that it is also likely to confirm that the UK’s provision for motor vehicle victims is deficient and contrary to Community law.

Other compensatory lacunae

There is a strong case to argue that the list of void exclusions within s 148 should be viewed, post Bernaldez, as merely illustrative of the kind of exclusion that is ineffective (see Part 1). This would prevent motor insurers from escaping their statutory duty to compensate third party victims by the employment of numerous restrictions in their policies. This would be more in keeping with the spirit of the Road Traffic Act 1930. It would also be consistent with the Community law, considered above, that upholds the right of a third party entitled to compensation under civil law to recover his or her compensation from the defendant’s insurer, free from the taint of any breach of contract or other such impediment (subject to the stolen vehicle exception).

There is an even stronger case to argue that the insurers right of recovery under s 148 (4) should also be subjected to the same kind of qualification as the Court of Appeal in Churchill imposed on its sibling in s 151 (8).

Furthermore, the prescriptive car-sharing provisions in s 150, the exceptions to an insurer’s liability to meet a judgment set out within ss 151 and 152 and the
way that the derogation from the duty to insure under s 144 exposes victims of unauthorised drivers—will all need to be reviewed; the same applies to reg 3 of the 2002 Regulations. It is also debatable whether the geographic scope of the duty to insure within s 143 and s 192 is compliant. In France, for example, compulsory third party insurance is imposed on or off road, on public or private land.

The disarray within our national law provision also extends to the case authorities. For example, it is questionable whether Fleming v Chief Constable of Avon and Somerset [1987] 1 All ER 318 still provides a valid test for determining whether a vehicle should be insured under s 143. Even under RTA 1988 definitions, a test which asks “would a reasonable person looking at the vehicle say its general use encompassed possible general road use” seems too restrictive. That would tend to exclude stripped down off-road scrambler motor bikes and other vehicles ill-equipped for road use. Whereas the Art 1 definition within the Sixth Directive is wider and covers “any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled”.

It is to be hoped the Secretary of State for Transport will instigate a wide-ranging review of our national law provision in this area, especially now these issues seem likely to be scrutinised by the Supreme Court.

Difficult as it may be to conceive, our extra-statutory national law provision for victims of uninsured and untraced drivers is even more dysfunctional. However, that is the subject of a separate article.

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11. On the right road? (Pt III)

Date: 15 February 2013

Nicholas Bevan explains why national law shouldn't be permitted to undermine the effectiveness of Community law

Uninsured drivers are an unpleasant hazard of modern life. Not only are they statistically more prone to accidents, but their inconsiderate approach to insurance puts their victims in jeopardy of being denied their compensatory entitlement.

We have seen from the first two articles in this series, highlighting how the government is failing to compensate RTA victims, that the primary source of law in this area of practice are the six Motor Vehicle Insurance Directives (MVID) and the European Court of Justice (ECJ) rulings that interpret and apply them (see NLJ, 1 February 2013, p 94 and NLJ, 8 February 2013, p 130).

The first MVID was adopted by the Community and became law in 1972. The last consolidating MVID was adopted in 2009. Both the MVIDs and the ECJ rulings have precedence over both our national legislature and judiciary. Between them, they serve as a blueprint to enable the UK to transpose the legislative intention of the Community into our national law. They represent the higher principle that should inform the UK's statutory and extra-statutory provision.

It makes sense, therefore, to review the Community law requirements first before considering our national provision for the compensatory guarantee afforded to victims of uninsured drivers.

Community law

The Sixth MVID consolidates, clarifies and replaced the first five MVIDs from 6 November 2009. The following provisions are of particular relevance to claims against uninsured drivers:

Art 3: Compulsory insurance of vehicles

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697 N.L.J. 2013, 163(7548), 160-162.
“Each member state shall...take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance... The insurance referred to in the first subparagraph shall cover compulsorily both damage to property and personal injuries.”

Part VI of the Road Traffic Act 1988 (RTA 1988) seeks to implement Art 3 of the Sixth MVID, as well the subordinate provisions within Arts 1 (definitions), 9 (minimum amounts), 12 (special categories of victim) and 13 (exclusion of cover). These Articles are also relevant to the compensatory provision for victims of uninsured drivers’ claims as the guarantee scheme is confined to circumstances that require compulsory third party insurance. It was not until the Second MVID of 1984 that victims of untraced vehicles were made the subject of Community law rules. This was re-enacted as Art 10 in the Sixth MVID which also provides a compensatory safety net for victims of identified but uninsured drivers.

**Art 10: Body responsible for compensation**

“1. Each member state shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Art 3 has not been satisfied.

“The first subparagraph shall be without prejudice to the right of the member states to regard compensation by the body as subsidiary or non-subsidiary and the right to make provision for the settlement of claims between the body and the person or persons responsible for the accident and other insurers or social security bodies required to compensate the victim in respect of the same accident. However, member states may not allow the body to make the payment of compensation conditional on the victim establishing in any way that the person liable is unable or refuses to pay...
“4. Each member state shall apply its laws, regulations and administrative provisions to the payment of compensation by the body, without prejudice to any other practice which is more favourable to the victim.”

The key provision within Art 10 is in the first subparagraph. This, and other provisions within the Sixth MVID, sets the minimum standard by which our national provision for victims of uninsured and untraced drivers is to be tested: they are to be compensated to the same extent as victims of identified and insured drivers under Art 3. The first subparagraph of Art 10 makes this explicit.

The line of ECJ rulings on the policy objectives and proper construction of the MVIDs that were considered in the preceding articles in this series apply with equal force to Art 10 of the Sixth MVID. Accordingly, the requirements imposed by Art 10 are to be interpreted purposively, to achieve its objectives. Any restriction or exclusion of the compensatory right conferred by Art 10 is to be construed restrictively.

Minimum levels of protection

In Evans v Secretary of state for Transport and the Motor Insurers Bureau: C-63/01, the ECJ ruled that the legislative intention, of what is now Art 10, is to entitle victims of “unidentified or insufficiently insured vehicles” to “protection equivalent to, and as effective as, that available to persons injured by identified and insured vehicles”. However, the ECJ went on to qualify this by observing that the twin Community law principles of equivalence and effectiveness do not confer identical provision. Instead they require member states when transposing a directive to ensure that the rules it devises to confer Community law rights are no less favourable than those governing similar domestic rights (the principle of equivalence) and that they do not render the exercise of those rights impossible or excessively difficult (the principle of effectiveness). The Evans case featured an untraced driver claim where the principle of equivalence was less relevant, due to the complete absence of any identifiable defendant that could be pursued through legal process. Even so, the court upheld Mr Evans’s entitlement to interest on his compensation, which at that time was excluded from the Motor Insurers Bureau’s (MIB) untraced driver compensation scheme.
Applying these principles to a claim against an identified but uninsured driver, then in order to conform with Community law, the Uninsured Drivers Agreement 1999 (1999 agreement) must confer a comparable level of compensatory cover to that which would apply to a normal claim against an insured driver under RTA 1988. Accordingly, as a rule of thumb, any material departure within the 1999 agreement from the insurance indemnity guaranteed to third party claimants under the RTA 1988, whether substantive or procedural, should be viewed as a potentially incorrect transposition of Art 10 MVID.

Art 10 of the Sixth MVID and its predecessor (Art 1(4) of the Second MVID (84/5/EEC)) have been implemented in the UK through successive agreements between the secretary of state and the MIB. The MIB administers two extra-statutory compensation schemes: currently the 1999 agreement and the Untraced Drivers Agreement 2003.

The MIB’s status

The MIB is a company limited by guarantee incepted in 1946. Its Articles of Association confirm that its primary purpose is to compensate victims of uninsured or untraced drivers where the loss or damage arose out of circumstances that require third party motor insurance, whether imposed under Pt VI of the RTA 1988 “or by any other statute...rule, regulation, order, directive...”. Every insurance company that underwrites motor vehicle insurance in this jurisdiction is required by s 95 of RTA 1988 to be a member and it must also contribute towards its compensatory fund.

In Evans the ECJ confirmed the MIB’s status as the UK’s authorised body under Art 10(1). It based this finding on the fact that the MIB is legally obliged to compensate victims under the compensatory guarantee conferred by the MVIDs through its contractual arrangements with the secretary of state. The fact that the source of its obligations are set out in a private law agreement between it and a public authority was held to be immaterial. This represents a significant development from Hobhouse LJ’s view in Mighell v Reading & MIB & Ors [1999] 1 CMLR 1251 that the MIB was no more than a private contractor through which the state happened to entrust the delivery of its Community law obligations under the MVIDs.
There has always been a strong case to argue that the MIB is an emanation of the state. The relevance of such a classification is that if the MIB is indeed an emanation of the state, then any departure from the level of protection afforded under Art 10 is enforceable by a court order directed against the MIB itself under the Community law doctrine of direct effect, without the need to join in the secretary of state as a party.

The ECJ has ruled in several instances that rights conferred on individuals under the MVIDs are capable of having direct effect under Community law principles—the only live issue being whether this principle applied to the MIB as an emanation of state. That issue was considered, but left unresolved by the House of Lords, in White v White & MIB [2001] UKHL 9. The only clear ruling, however, comes from Flaux J in Byrne (A Minor) v MIB and Secretary of State for Transport [2007] EWHC 1268 (QB) where he held that the was not an emanation of state. That decision, never very persuasive, was weakened further by Birmingham J’s well reasoned judgment in Farrell v Whitty & the MIB [2008] IEHC 124 (delivered by the High Court of Ireland). Farrell is the only instance where the ECJ has been asked to make a preliminary ruling on this issue (Farrell v Alan Whitty, Minister for the Environment and Others, Motor Insurers Bureau of Ireland (MIBI): C-356/05). It is worth noting that the EU Commission submitted an opinion that the Motor Insurers Bureau of Ireland (MIBI) was an emanation of state. Unfortunately, the ECJ was unable to decide the point either way due to the paucity of evidence before it, but it did not dismiss this as a possibility. Instead it referred the issue back to the Irish High Court for a determination, after setting out the relevant Community jurisprudence on this issue. Birmingham J ruled that the MIBI was an emanation of state. The MIBI was established on almost identical principles as the MIB in the UK. That ruling was never appealed. The judgment provides a helpful analysis of the relevant criteria within Foster v British Gas [1990] IRLR 353 as modified by NUT v St Mary’s Church of England (Aided) Junior School [1997] IRLR 242 as well as a review of judicial discussion on the nature the MIB.

It is also worth noting that in McCall v Poulton [2008] EWCA Civ 1263 the Court of Appeal referred the same issue, but this time featuring the MIB itself, to the ECJ for a preliminary ruling but it never reached Luxembourg as the claim was promptly compromised.
The status of the Uninsured Drivers Agreement 1999

The issue as to whether the Uninsured and Untraced Drivers Agreements are no more than private law contractual arrangements between the secretary of state and an outsourced agent, or whether they are part of our civil law, remains a matter of some controversy. The outcome is said to determine whether the courts have the power to interpret the 1999 and the 2003 agreements purposively by applying the principle in Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-4135 which is confined to the interpretation of national law or whether they are constrained by conventional private law construction rules. However, its importance was diminished when the House of Lords procured a similar outcome in White v White & MIB by applying conventional rules of construction for private law agreements in its interpretation of cl 6 of the 1999 agreement. It construed cl 6 in a way that was consistent with the fact that both contracting parties were presumed to have intended to comply with the MVIDs and, in doing so, it effectively struck out the offending words in much the same fashion as it would have done if applying the Marleasing principle.

The more recent ECJ ruling in Evans provides a strong inference that the MIB agreements form an integral part of the UK government’s national law. At para 35, it ruled that if a member state is to comply with the MVIDs ‘it is essential for national law to guarantee that the national authorities will effectively apply the directive in full, that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of all their rights and, where appropriate, may rely on them before the national courts’. This puts the UK in a tight place: since if it wishes to continue to argue that the 1999 and 2003 agreements are no more than private law arrangements, it risks being accused of failing to properly implement the MVIDs. Such a conclusion is certainly closer to the view expressed by Lord Denning MR in Hardy v Motor Insurers’ Bureau [1964] 2 QB 745 that the MIB’s Uninsured Drivers’ Agreement of 1946 was “as important as any statute”.

If the 1999 agreement is indeed part of our national law, as common sense suggests, then the Marleasing principle must apply to its construction with equal, if not greater, force than to any statute, as it is also arguable that the courts are not constrained in its exercise by the contra legem principle. If it is not, then the
conventional interpretative approach followed in White v White & MIB seems to deliver the same “purposive” outcome as Marleasing regardless.

What constitutes an uninsured vehicle?

One might suppose this to be a simple question of fact, one that is acte clair and capable of being determined by our national courts applying long established common law principles.

Until recently, it seemed the phrase “a vehicle for which the insurance obligation provided for in Art 3 has not been satisfied” in Art 10 (1) of the Sixth MVID—meant the compensating body’s role embraced a scenario where some insurance cover is in place but it is insufficient to cover the risk that has materialised. Such a view was certainly adopted by the ECJ in Evans.

However, the recent line of ECJ rulings from Ruiz Bernaldez [1996] ECR 1-1929 through to Churchill v Wilkinson and Evans [2011] C-442/10 suggest that Community law may have moved on. In our first article in this series we noted that the Churchill ruling applied an interpretation that extends the scope of the primary third party insurance indemnity imposed under Art 3 MVID as requiring contractual cover that is good for any use except for the single “stolen vehicle exclusion” permitted under Art 13.

It also opined 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 or unidentified or has not satisfied the insurance requirements referred to in Art 3(1) of the First Directive”. Quite what is meant by the final phrase remains unclear. However, if the ultimate effect of Art 3 is that motor insurance policies are to be construed as providing a third party indemnity that is good for any use to which the vehicle is actually put, then a necessary corollary of that would be that the 1999 agreement is confined to situations where either there is absolutely no insurance cover in place at the time of the incident giving rise to the claim or where the “stolen vehicle exclusion” applies.

From a motor insurance perspective, this could have a profound impact on the reserves of those who underwrite the riskier categories of driver as their statutorily
imposed liability to third party claimants under s 151 has in effect been demutualised. Yet in EUI Ltd v Bristol Alliance Ltd Partnership [2012] EWCA Civ 1267 the Court of Appeal took a diametrically opposed view, one that limited the remit of the statutory insurer to narrow confines permitted under s 151.

Even so, the ECJ has repeatedly ruled that while the MVIDs do not seek to harmonise the civil or criminal liability provision of its member states, national laws cannot be permitted to undermine the effectiveness of a Community law. This issue has yet to be resolved.

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12. On the right road (Pt IV)

Date: 22 February 2013

In his final article on compensation for motor victims, Nicholas Bevan compares & contrasts UK & EU provisions

There is a strong case to argue that the Uninsured Drivers Agreement 1999 (the 1999 agreement) is part and parcel of our national law and thus subject to the Marleasing interpretive principle (see Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-4135) and that the normal rules of construction that apply to private agreements produce the same purposive outcome anyway. Furthermore, as the Motor Insurers Bureau (MIB) is probably an emanation of state, any material departure from the minimum levels of compensatory protection prescribed by the Motor Vehicle Insurance Directives (MVIDs) is directly enforceable by the courts. Even if direct effect does not apply, the UK government is liable for losses sustained by claimants through its failure to properly implement the MVIDs under Francovich and others [1991] ECR 1-5357.

It is arguable, following the ECJ ruling in Churchill, that the 1999 agreement is now confined to the dwindling number of claims where there is no insurance in place; as opposed to the increasingly common phenomenon of “fronting” unauthorised drivers with superficially legitimate insurance. Accordingly, where some insurance is in place, but it is ineffective, then that claim should be dealt with by the motor insurer direct, as a statutory insurance claim under s151 (5) of the Road Traffic Act 1988 (RTA 1988) and not under the 1999 agreement. The only exception being a passenger claim where the right to compensation is nullified by the stolen vehicle exception.

It is now appropriate to compare the provision under 1999 agreement with the minimum standards that required under Community law. The equivalence principle requires that the compensatory protection extended under this scheme to victims of uninsured drivers should be comparable to the level of protection available to victims of insured drivers. As RTA 1988 is an incomplete transposition of the MVIDs in several important areas outlined in Part II of this

698 N.L.J. 2013, 163(7549), 193-195.
series it is necessary to look to the higher standards imposed by the MVIDs, considered in Part III of this series.

**Substantive issues**

Below are the key instances where the 1999 agreement breaches the minimum compensatory standard imposed by the Sixth MVID.

**Scope**

The right to compensation is restricted to a “relevant liability” which the interpretive clauses define as “a liability in respect of which a contract of insurance must be in force to comply with Pt VI of RTA 1988”. This is sensible but it necessarily inherits the geographic restrictions considered previously under ss 143 and 192 of RTA 1988. There is an argument that this also conflicts with the wider scope imposed under Art 3 of the Sixth MVID (the directive).

Exclusions and limitations of liability

The 1999 agreement is packed with exclusions of liability which conflict with the Community law minimum standard.

Under cl 6.1(a) and (b), claims involving a vehicle exempted from the requirement to take out motor insurance under s 144 of RTA 1988 are excluded. However, we saw in Part II that leaves the victims of unauthorised users exposed to recovering no compensation at all. Article 5.1 of the directive requires appropriate measures to be taken to ensure that compensation is paid in respect of any loss or injury caused by vehicles belonging to persons exempted from the insurance requirement.

Under cl 6.1(c), assignees of a claimant’s right of action and subrogated claimants (such as credit hire charges and sick pay) are excluded. Neither the directive, the RTA 1988 or our common law impose such exclusions. Any departure from the basic compensatory principle conferred by the directive must be construed restrictively. Subrogated claims should not be confused with the provision within the second subparagraph of Art 10.1 of the directive. There, the MIB’s right to deduct “subordinated” claims from a victim’s compensation is confined by the use of the phrase: “…other insurers or social security bodies to subrogated claims by insurance undertakings and state run social security bodies”. That permits the avoidance of double recovery through the deduction of
state benefits, such as under the Social Security Recovery of Benefits Act 1997 and it also takes into account any interim payments made under a victims comprehensive policy of insurance.

The directive does not confer a general right to deduct subrogated claims nor does it permit a departure from the basic full compensation principle. This was challenged in McCall v Poulton & MIB [2008] EWCA Civ 1263 Where the Court of Appeal referred this point to the ECJ for a preliminary ruling along with the question of whether Marleasing should be used to interpret the 1999 agreement and whether, following Farrell v Whitty, the MIB was an emanation of state. McCall was promptly settled before this issue could be determined by the ECJ.

The exclusion under cl 6.1(d)(i) for claimants other than passengers who knew, or ought to have known, that the vehicle was uninsured is unsustainable. There is no equivalent provision under the directive.

Clause 6.1(e) lists four instances where liability is excluded for passengers. Only two of these are permitted by the directive and even then, their validity is dependent on a purposive construction to repair its misleading draftsmanship.

Article 10(2) permits an exclusion of liability in only one circumstance, and this applies to “persons who voluntarily entered the vehicle which caused the damage or injury when the body [ie, the MIB] can prove that they knew it was uninsured”.

Whereas the cl 6.1(e) exclusion provides: “…a claim which is made in respect of a relevant liability described in para (2) by a claimant who, at the time of the use giving rise to the relevant liability was voluntarily allowing himself to be carried in the vehicle and, either before the commencement of his journey in the vehicle or after such commencement if he could reasonably be expected to have alighted from it, knew or ought to have known that—

1. the vehicle had been stolen or unlawfully taken,
2. the vehicle was being used without there being in force in relation to its use such a contract of insurance as would comply with Pt VI of RTA 1988,
3. the vehicle was being used in the course or furtherance of a crime,
4. the vehicle was being used as a means of escape from, or avoidance of, lawful apprehension.”.

In White v White & MIB [2001] UKHL 9, the House of Lords ruled that as the directive requires actual (not constructive) knowledge, the 1999 agreement had to be construed and applied in such a way as to disregard the references in cl 6.1(e)(ii) to “ought to have known”. In that case, as the MIB was unable to prove that the uninsured driver’s brother had actual knowledge that he was uninsured, it was unable to exclude that claim. The law lords ruled that actual knowledge includes turning a deliberate blind eye and not asking when one suspects something. Accordingly, excepting a passenger with actual knowledge that the driver is uninsured and the possible permitted exclusion of a passenger who knows that the vehicle has been stolen, all the other exclusions are unsustainable under the superior Community law as they conflict with the directive policy aim of ensuring a consistent compensatory guarantee scheme across the different member states.

While the second subparagraph of Art 13 permits an insurer to exclude liability to indemnify those “who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen” that is not the same as taking without consent under cl 6.1(e)(i) or proscribing any insurance indemnity for such persons. It may be a commonly employed term but if there is no insurance in place, the MIB must establish this is a normal insurance term before it can rely on cl 6.1(e)(i).

Deductions from compensation

Under cl 17, the MIB is allowed to deduct from the claimant’s compensatory entitlement sums received from any of these sources:

- the Policyholders Protection Board (which is now defunct);
- from an insurer under any agreement or arrangement;
- from any other source....where those sums were paid in respect of the injury loss or damage claimed in the proceedings.
This goes way beyond the limited deductions permitted by Art 10(1) of the directive and conflicts with our common law rules on the quantification of damages. Clause 17 constitutes a clear breach of the Community law equivalence principle.

**Procedural issues**

If one wished to illustrate the unequal struggle between the civil servants advising successive secretaries of state for transport on the one hand, and the motor insurance industry leaders who comprise the MIB board on the other, one need only look at the 1999 agreement. It’s arcane terminology and its structure (replete with abstruse definitions, exclusions of liability, unjustified conditions precedent to liability and excessive notice provisions) resembles an insurance policy a lot more than anything one might recognise as a compensatory scheme for victims. This suggests the Ministry of Transport conceded more or less to whatever demands were made of it by the insurance lobby. This exposes successive UK governments not just to the accusation that the rights of victims has been sacrificed to insurance industry’s commercial interests but the form and content of this scheme are so unjust to those it is supposed to protect as to risk infringement proceedings.

The 1999 agreement has a number of Draconian procedural conditions precedent that have no parallel under the Civil Procedure Rules 1998 (CPR) or RTA 1988. If these conditions are not met, then the MIB escapes any liability to compensate; however trivial the infraction or grave the injury. For example:

- **Under cl 7,** for failing to use the MIB’s own application form when applying for compensation or to provide such information as the MIB may reasonably require. This, even though the current version of the MIB’s extensive application form and questionnaire requires an applicant to consent to the release of a wide range of personal information that goes far beyond anything any litigant is entitled to under the CPR and which arguably breaches Art 8 of the European Convention on Human Rights.

- **Under cl 13,** for failing to request insurance information from the defendant driver or for failing to use all reasonable endeavours to obtain this information or to report the failure to provide that information to the police. This subverts the parliamentary objective behind s 154 of RTA
1988 which is to increase, not diminish, the prospects of a victim recovering their compensatory entitlement.

- Under cl 9, for failing to provide “proper notice” to the MIB of the commencement of proceedings in a time window that is subtly, but often fatally, different from that required under s 152(1) of RTA 1988: not prior to commencement but within 14 days after commencement. Furthermore, “proper notice” requires an extraordinary amount of disclosure of material under cl 9.2, some of which is clearly not material to the issues, and in a form that is not required under RTA 1988 or under the CPR. Fortunately the worst excesses of these particular provisions have been mitigated by the MIB’s revised notes for guidance which the MIB honours.

- Under cls 10 and 11, for failing to inform the MIB within seven days of various developments, once proceedings have commenced or, within the same period, such additional information as the MIB may reasonably require. The MIB’s amended notes for guidance waive some of these requirements where the MIB is added as a party to the proceedings. Even so, no equivalent to these extreme measures exists elsewhere in our civil justice system.

Claimants wanting to claim compensation from the MIB are referred to the MIB direct by the government information site. The prospects of lay claimant being able to successfully identify, navigate and interpret different and often conflicting sources that make up the UK’s extra-statutory provision for victims of uninsured drivers, is bleak. If our national courts are unable to apply a consistent approach to a purposive construction of what is in many respects a highly misleading scheme, what chance the lay client?

**Call for reform**

Before the UK’s accession to Europe in 1973, if the government of the day thought it just or expedient to either restrict access to or to limit the level compensation extended to uninsured drivers then it could do so, and with impunity.
However the government’s position following its accession is a different matter. In the words of Lord Denning: “The Treaty [of Rome, 1957] does not touch any of the matters which concern solely England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.”—H.P. Bulmer Ltd v J. Bollinger SA [1974] Ch 401 at 418.

After 1973, the government faced a choice: it could either revise its existing arrangements or legislate to ensure that our domestic provision complied with the MVID; doing nothing was not an option.

The ECJ has ruled that it is essential for national law to guarantee that the national authorities will effectively apply the directive in full, that the legal position under national law should be sufficiently precise and clear and that individuals are made aware of all their rights and, where appropriate, may rely on them before the national courts. Failure to deliver a compensatory regime that meets these requirements is also breach of Community law, Commission v Greece [1995] ECR I-499 (Case C-365/93).

The UK government’s provision for uninsured drivers is in dire need of reform. The Uninsured Drivers Agreement 1988 was clearly long past its shelf life by the time of the ECJ’s ruling in Bernáldez in 1996. What the secretary of state did in 1999 was to replace the 1988 agreement with something just as unfit for purpose and the ECJ’s development of the law in this area has only compounded the problem. He must act now to completely reform the UK’s statutory and extra statutory provision in this area, or face the consequences of his prevarication.

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Date: 2 September 2016

In Brief
- Important regulatory reform for automated vehicles
- RTA practitioners have until 9 September to respond to government proposals

Road traffic accident practitioners are no doubt monitoring closely the rapid advance of automated motor technology. These increasingly sophisticated systems have important implications not just for road safety but also for legal practice as well as the regulatory framework that governs motor liability and insurance.

Transport revolution

We have become inured to the stubbornly high casualty statistics associated with road transport. The Department for Transport (DfT) inform us that there were 1,732 fatalities on our roads last year and several hundred thousand other casualties. Yet, this could be set to change. We are about to witness a revolution in transport, which by first restricting and ultimately removing entirely the scope for human driver-error, offers the prospect of dramatically improved road safety and, in consequence, cheaper motor insurance.

Last month the DfT published its latest proposals for revising the regulatory framework for motorised transport of various ‘near to market technologies’. Pathway to Driverless Cars invites responses from interested parties on three broad aspects of this emerging technology: compulsory insurance; construction and use regulation and the Highway Code. It is a thought provoking paper that makes some sensible suggestions.

The DfT believes that we are likely to see the introduction on our roads of semi-automated vehicles (AKA ‘advanced driver assistance systems’) within the next two to four years. These systems will be able to replace direct human control of motor vehicles in certain highly prescriptive scenarios: such as in maintaining a course in motorway traffic, remote control parking and, for convoys of heavy
goods vehicles run in close formation and controlled by a single lead driver. Presumably there will be further innovations along these lines. These systems will still require constant vigilance by the vehicle users: who must at all times be ready and able to resume control: either at the completion of the semi-automated process or in response to an exigency that requires human intervention. Because a degree of human control is retained, primary responsibility for safe driving will continue to rest on the user.

The DfT also anticipates that self-driving vehicles (AKA ‘automated vehicle technology’) could be on our roads sometime in the 2020s. Clearly this will require a very different regulatory framework as their users will effectively be no more than passengers. Unless a user fails to maintain the vehicle, disobeys the manufacturer’s instructions, breaches the Highway Code, or resumes direct control, then under normal common law rules it is hard to see how they could be held responsible for an accident caused by such an automaton. This technology looks set to change vehicle ownership, at least in the inner-cities, as consumer expectations shift from a personal driving experience to a Uber-style auto-taxi service. However, despite the recent media hype, this futuristic concept may be some way off. Accordingly, the DfT paper plans a rolling programme of regulatory reform.

The DfT’s proposals concern the ‘near to market’ motorway assist and remote control parking systems of semi-automated vehicles. Its preference is making ‘the minimum changes required to ensure clarity, to give victims easy access to compensation, and to give the market certainty without influencing or preventing different models being developed in the future.’

**White paper inaccuracies**

One should not expect in a consultative white paper the technical precision of a draft bill however the government’s proposals appear to feature a number of inaccuracies. This is one reason why practitioners should invest the time to respond to this consultation.

One of these misconceptions is that our law on third party motor insurance needs to be extended to include product liability [para 1.3]. It is likely that Section 145 Road Traffic Act 1988 (the Act) when properly construed in the light of the Article 3 of European Directive 2009/103 on motor insurance, that it is intended to
implement, already effectively requires such cover. The Court of Justice ruling in *Damijan Vnuk* and the recent European Commission’s *Road Map* communique of 8 June are explicit on the European law requirement. This European law will continue to govern UK law on motor insurance for at least two more years and, most probably post Brexit, in a less direct but still tangible fashion.

The problem is our national law transposition of this European law is that it is systemically defective. The dictionary meaning of Section 145 (3) of the Act is that the cover is restricted to ‘any liability which may be incurred by him’ – in other words: driver liability. The European law concept of use is much wider and our courts are required to import this wider scope, in so far as is possible.

This inconsistency naturally extends to third party motor polices issued in compliance with section 145. These tend to cover individual users’ liability, as opposed to the continental practice that covers vehicles. Accordingly, if a hidden technical fault causes an accident (one undiscoverable through inspection or maintenance) so that the owner or user is blameless, some policies will not respond. Others purport to exclude liability where the vehicle is unroadworthy. Even so, the statutory liability of an insurer under section 151 (2) (b) of the Act is drawn in such wide terms that it is theoretically capable of covering product defects in conjunction with a European law consistent construction of section 145.

Another problem we can anticipate is that as various driving functions become increasingly automated so too will the tendency and opportunity for users to point an exculpatory finger at them. Furthermore, for every fool-proof device there always seems to be a fool greater than the device. So it is inevitable that some users will tamper with the systems or fail to maintain them and yet others will simply misapply them. User fault and product liability issues are likely to arise concurrently. These have the potential to result in expensive, technically complicated and lengthy multi-party actions that would at the very least delay compensation. Even where a mechanical or technical defect is held to be responsible, the manufacturer may be able to evade the strict liability conferred by the Consumer Protection Act 1987 by deploying a section 4 ‘state of the art’ defence, particularly where extensive research, road testing and regulatory compliance is established. Expensive expert evidence will be required and has already made an appearance in some cases, perhaps most recently in *Sparrow*.
v Andre [2016] EWHC 739 (QB). The unequal struggle between individual victims and powerful corporate manufacturers and suppliers could undermine public confidence in the safety and suitability of newly introduced automated systems. This leads us on to another possible misconception.

The DfT believe that there is no need to revise the common law or statutory provision governing primary liability in this area [para 2.20]. This author is not so sure. The product liability regime is fraught with complication, featuring as it does contract law, tort law and as well as consumer legislation. Arguably what is required is strict liability for producers accompanied by a statutory provision that imposes an absolute duty on all motor insurers to satisfy any claim caused or contributed to by a product defect associated with the vehicle’s use in terms analogous to but distinct from the strict liability that applies to an employer under the Employers’ Liability (Defective Equipment) Act 1969. The insurer will not be deemed to be negligent and the existing law on product liability need not be altered. Further statutory provision should be made to allow the insurer to recoup its outlay as a subrogated claim from a producer, supplier or other third party, wholly or partly responsible for the defect that caused or contributed to the accident. This would ensure that innocent victims recover their compensation relatively promptly from the insurer involved, or in default, from the Motor Insurers Bureau (MIB).

What at first blush seem to be an unprecedented imposition on motor insurers, may well be feasible, desirable even, in the light of the following:

- There is already precedent for direct insurer liability as sections 148 and 151 of the Act require insurers to satisfy judgments even for non-contractual liabilities, these measures were first introduced in 1934. Then in 1946 the industry agreed to meet claims arising out of uninsured driving;
- It has already been argued above that section 151 (2) of the Act already imposes insurer liability for mechanical defects;
- The DfT concede that insurers should meet third party claims where a defect results from user misuse or neglect [para 2.25];
- Motor insurers benefit from a highly artificial state-enforced multi-billion-pound captive market where its customer base is guaranteed and the
basic insurable risk already well established. They are best placed to cope;

- Given that the government’s first responsibility in this context is to ensure the safety of the general public through rigorous testing and regulation of these new technologies as well as the introduction of the necessary infrastructure, it seems reasonable to expect (if not anticipate) that the risk actually posed by this new technology should no greater than the existing risk posed by human error; insurers’ net outlay might even diminish;

- Insurers are free, within reason, to adjust their premiums to accommodate the as yet unknown risk posed by this new technology;

- The government could offer to underwrite any unforeseen catastrophic event caused by this nascent technology, perhaps triggered where the losses exceed a certain level. This might be particularly relevant to the deployment of HVG convoys;

- Motor insurers will retain greater control of claims and costs and they are better placed to take informed decisions on whether to pursue subrogated product liability claims. The MIB could assume a valuable role as a centre of expertise in investigating, assessing and handling such claims on its members’ behalf.

**Third party cover failings**

In the writer’s view it would be a mistake to introduce separate legislation in this area without also addressing the numerous failings in third party motor cover that pepper our entire national law transposition of directive 2009/103 on motor insurance. The DfT was warned about these infringements by various parties in its earlier flawed consultation on the MIB agreements in February 2013. This is now the subject of a wide ranging judicial review by RoadPeace because it ignored that advice. Our domestic law in this area is patchy, inconsistent, tediously long and unnecessarily complicated. This is in large measure the cumulative effect of decades of empirical development. Bolting on separate product liability cover will only compound the problem.

We need a fresh start: clearly articulated provisions that give effect to the Parliamentary objective of guaranteeing the prompt compensation of third party
victims through insurance. Part VI of the Act should be repealed and the MIB agreements rescinded. The entire corpus of third party provision should be incorporated within a new Modern Transport Bill.

Consultation

Practitioners have a rare opportunity to influence government policy by responding to this paper on or before 9 September.