

Validity and Effect of Exclusion Clauses Against Third Parties in Motor Insurance

Submitted by Matthew Raymond Channon to the University of Exeter as a thesis for the degree of *Doctor of Philosophy* in Law, September 2017.

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Abstract

Compulsory third party motor insurance was introduced in 1930 to ensure that compensation was paid to innocent third party victims of road traffic accidents, subject to certain limitations. Throughout the past century, the legislature has found difficulty in balancing the freedom of insurers to insert standard terms into policies, and the victims' right to receive compensation. The Motor Insurers' Bureau (henceforth '*MIB*') was introduced to mitigate this as a fund of last resort, to compensate when an accident was caused by an uninsured or untraced driver. The role of the MIB is disputed due to conflicting European Union (henceforth '*EU*') and United Kingdom (henceforth '*UK*') law.

This thesis examines the regulation behind exclusion clauses and their use in third party motor insurance policies. The thesis answers three key questions. First, to what extent are exclusion clauses valid in third party motor insurance policies against third parties? Second, what is the effect of the use of exclusion clauses on third party claims? Third how should the law in this area be reformed? It further examines the effect on exclusion clauses of general contractual and insurance contract regulation on third party victims. Finally, the thesis will examine the role of the MIB and whether it provides adequate protection as a '*fund of last resort*'.

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EU

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Table of Abbreviations

AA- Automobile Association

AG-Advocate General

BIA- British Insurance Association

CIDRA- Consumer Insurance (Disclosure and Representations Act) 2012

CJEU- Court of Justice of the European Union

CRA- Consumer Rights Act 2015

EFTAC- European Free Trade Association Court

ICOBS- Insurance Conduct of Business Sourcebook

ECJ- European Court of Justice

EFTA- European Free Trade Association

EFTAC- European Free Trade Association Court

EU- European Union

FCA- Financial Conduct Authority

FSA- Financial Services Authority

FSMA- Financial Services and Markets Act

HDE- Horizontal Direct Effect

LMA- Lloyds Market Association

MIB- Motor Insurers' Bureau

MIBI- Motor Insurers' Bureau Ireland

MoT- Ministry of Transport

MOU- Memorandum of Understanding

RTA- Road Traffic Act

RTCAB- Road Traffic (Compensation for Accidents) Bill 1932

SoSFT- Secretary of State for Transport

TFEU- Treaty on the Functioning of the European Union

TPRAI- Third Parties (Rights against Insurers) Act 1930

UDA- Uninsured Drivers' Agreement

UtDA- Untraced Drivers' Agreement

UK- United Kingdom

Chapter One: Introduction

Third party motor insurance policies are contractual in nature. They follow similar rules in the creation of the policy as contracts, including the requirement of an offer, acceptance, consideration, invitation to treat, and intention to create legal relations.¹ Likewise, most rules specific to insurance contracts are also followed, such as insurable interest,² and the duty of utmost good faith.³ What sets motor insurance aside from areas of both contract and many types of insurance contract, is their compulsory⁴ and protective nature. Motor insurance is the most substantial classification of insurance in terms of numbers involved, with over 36 million registered motor vehicles on the road in the United Kingdom (henceforth 'UK'), the majority insured against third party risks.⁵

Any person who uses (or causes or permits any other person to use⁶) a vehicle on a road or public place in the UK without requisite insurance is committing a criminal offence.⁷ This is necessary to ensure that the third party 'victim' of road traffic accidents will receive compensation. Compulsory insurance provides that where someone who is injured from an accident which was not their fault,⁸ instead of relying on the driver to compensate (which would be impossible if they are financially unable to pay), claims can be made against the insurer of the

¹ For further discussion on requirements of a contract see Hugh Beale et al, *Chitty on Contracts*, (32nd edition, Sweet and Maxwell, 2015, Volume 1 Part 2).

² Insurable interest is to prevent someone from insuring on something that they do not have a legal interest in, which effectively amounts to gambling.

³ The duty of utmost good faith is upon both the insured and the insurer originally found in the Marine Insurance Act 1906. The Insurance Act 2015 removed avoidance as a remedy for this duty, although it continues to exist today. This is limited slightly in relation to third parties in Motor Insurance through Section 152 RTA 1988 but does exist. For more information on Insurable Interest and the duty of utmost good faith, see Professor Robert Merkin, *Colinvaux and Merkin's Insurance Contract Law*, (11th edition, Sweet and Maxwell, 2016).

⁴ Note there are other areas of insurance law which are compulsory. For example, horse riding establishments must insure for hire and use of their horses. Recent regulations amending Nuclear Installations Act 1965, also shipping cases. For other areas of compulsory insurance. See British Insurance Law Association, "BILA Response to AIDA World Congress 2010 Questionnaire: 'Mandatory Insurance-Legal and Economic Myths and Realities'" www.aida.org.uk/docs/United%20Kingdom.docx [Accessed 2nd August 2017].

⁵ Department for Transport, "Vehicle Licensing Statistics: Quarter 1 January to March 2017" https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/619078/vehicle-licensing-january-to-march-2017.pdf [Accessed 15th June 2017].

⁶ Section 143 (b) Road Traffic Act 1988.

⁷ Section 143 Road Traffic Act 1988.

⁸ In the UK, there is a fault based system and therefore third party insurance is not designed to compensate for those who are at fault, although comprehensive policies can be bought for damage caused by drivers who are not at fault as an addition, these are not compulsory.

responsible driver.⁹ However, as with any type of contract, both parties (the insurer and the insured) have contractual autonomy, so long as the policy complies with the requirements of the **RTA 1988**.¹⁰

Due to being the stronger party to the contract, the policy will usually be on the insurers' standard terms, whilst allowing the insured some flexibility to cater the policy to their needs, and potentially pay less in their premiums. This freedom conflicts directly with the purpose of third party insurance, in attempting to provide protection to the third party when they are injured or have their property damaged. The law has attempted to manage this conflict through express legislation at both EU and UK level.¹¹ Moreover, legislation affects this area indirectly, for example in relation to exclusion clauses and insurance law generally.¹²

Safeguards are in place to protect the third party victim if claims fall outside of the legislation. An extra-statutory Agreement made between the MIB, a body consisting of every practising motor insurer in the UK, and the Secretary of State for Transport (henceforth 'SoSFT'), provides compensation to be paid to the third party as a measure of last resort. The MIB **Uninsured Drivers' Agreement** (henceforth 'UDA')¹³ and **Untraced Drivers' Agreement** (henceforth 'UtDA'),¹⁴ are arguably not failsafe, as they themselves are contracts, meaning, some gaps inevitably exist.

Due to the amount of obscure and outdated legislation, EU Directives, and Court of Justice of the European Union (henceforth 'CJEU') decisions, this area of law is confused. There is an absence of clarity as to whether exclusion clauses could potentially hinder compensation to third parties. This thesis will therefore examine

⁹ Professor Merkin notes that insurance 'underpins' tort. See Robert Merkin, "Tort and Insurance: Some Perspectives", (2010), *Journal of Professional Negligence*, 208.

¹⁰ See requirements of policies within Section 145 of the Road Traffic Act 1988.

¹¹ The Road Traffic Act 1988 and the Sixth Consolidated Motor Insurance Directive.

¹² Particularly, the Insurance Act 2015, Consumer Insurance (Disclosure and Representations) Act 2012, and Consumer Rights Act 2015.

¹³ The Uninsured Drivers' Agreement 2015 can be found here

<<https://www.mib.org.uk/media/166917/2015-uninsured-drivers-agreement-england-scotland-wales.pdf>> [Accessed 28th August 2017].

¹⁴ The Untraced Drivers' Agreement is beyond the scope of this thesis, as the thesis is concerned where a driver is made uninsured due to breach of an exclusion. By their nature, the policy of an untraced driver is not known. The Untraced Drivers' Agreement 2017 can be found here <https://www.mib.org.uk/media/355104/amended-2017-untraced-drivers-agreement-england-scotland-and-wales_v10.pdf> [Accessed 24th August 2017].

the validity¹⁵ and effect of exclusion clauses in third party motor insurance policies on third party claims.

Research Questions

This thesis seeks to answer three research questions to combine both theoretical and practical knowledge. First, to what extent are exclusion clauses valid in third party motor insurance policies against third parties? Second, what is the effect of the use of exclusion clauses on third party claims? Third, how should the law in this area be reformed?

Methodology

This thesis is largely doctrinal in nature. The question as to the validity of exclusion clauses will be answered by the examination of primary sources, including and legislation and case law. Moreover, secondary material will be utilised such as; consultations, reports, news articles, *travaux preparatoires*, along with parliamentary debates, and academic comment. This question is also answered in the use of comparative law, through occasional reference to other jurisdictions, including the Bahamas and Singapore. These jurisdictions have identical motor insurance legislation to the UK, meaning that although cases from these jurisdictions are not binding, they are highly instructive.

Moreover, there is significant comparative analysis with EU law, particularly in Chapters Four and Five. The EU remains supreme until the UK's official departure, and therefore continues to have a significant impact. The examination of EU Law will be through the six Motor Insurance Directives and interpreting ECJ and CJEU case law, and ways in which third parties could enforce their EU law rights through direct effect, indirect effect, and state liability, will also be examined.

¹⁵ This thesis will utilise the words 'invalid' or 'void' in relation to exclusion clauses interchangeably and will be taken to have the same meaning, that the exclusion cannot be used against a third party but it is still permissible against the first party. This is similar to the courts' and legislatures interchangeable approach. For example Ward LJ in *Bristol Alliance Partnership v Williams and another* [2012] EWCA Civ 1267 [51] uses the word 'void' and Jay J in *Delaney v Secretary of State for Transport* [2014] EWHC 1785 (QB) used the words 'valid' [36] and 'void' [17] (albeit this case was examining validity of clauses in the MIB Agreements). Moreover, Section 148 RTA 1988 is titled 'Avoidance of certain exceptions to policies or securities' but within the provision itself uses the term 'matters...be of no effect' (Section 148 (1)). This shows the clear interchangeable approach used by the courts and legislature which will therefore be followed in this thesis to avoid uncertainty.

The second question involving the effect of exclusion clauses on third party claims will be answered largely based on the same method as above. However, qualitative empirical research will also be undertaken in the form of a face-to-face recorded interview with two representatives of the MIB (at the MIB's headquarters), and then by sending follow-up questions via email to those representatives.

Empirical research will be undertaken to fill significant gaps in relation to the interpretation and policy behind the MIB Agreements. This is due to the absence of impartial literature surrounding the MIB.

Whilst there is literature in relation to the MIB in books¹⁶ and journal literature, these are not neutral. In personal injury law, there are two opposing lobbies which represent either the claimant or the insurer. Insurers are represented by the Association of British Insurers, a body formed of insurers which represents their views. These, alongside practitioners who represent the insurance industry, often present pro-MIB views in literature.¹⁷ Organisations often represent claimant's interests such as the Association of Personal Injury Lawyers, the Motor Accidents Solicitors Society, and claimant practitioners,¹⁸ these present negative views of the MIB in literature.¹⁹ Consequently, gaining views which are completely neutral of the MIB is problematic. Whilst some literature is critical but clearly unbiased,²⁰ this is aimed preliminarily at providing practical guidance to victims and practitioners, as to how to make a claim against the MIB. There is no known literature which

¹⁶ These, along with journal literature are cited below.

¹⁷ See for example the article by Andrew Baker "Uninsured Drivers' Agreement 2015" (2016) Personal Injury Law Brief Update Journal, available at <<http://www.pibriefupdate.com/content/law-journal-summaries/news-category-2/3560-uninsured-drivers-agreement-2015-andrew-baker-horwich-farrelly-solicitors>> [Accessed 16th August 2017]. Also, Association of British Insurers "Memorandum from the Association of British Insurers (ABI) (CMI 13)" House of Commons Committee Evidence 591 into the Cost of Motor Insurance.

¹⁸ Practitioners are often members of these organisations.

¹⁹ See for example the book by Andrew Ritchie QC, *Apil Guide to MIB Claims* (Jordan's Publishing Limited, 2016). Also, several pieces in the Journal of Personal Injury Law, which is the journal attached to APIL and consequently represents their views. Also see the works of Dr Nicholas Bevan who is very prevalent in this area, Nicholas publishes frequently on issues to do with the MIB and is heavily involved in a Judicial Review involving the MIB Agreements, this Judicial Review is discussed on pages 175-176 and 245-246. Works of Dr Bevan include Nick Bevan "Putting Wrongs to the Rights: Part 1" (2016) New Law Journal 166 (7700), 17-18 and Nick Bevan "Tinkering at the Edges" (2015) Journal of Personal Injury Law, 3, 138-148.

²⁰ See for example, Donald Williams and Malcolm Johnson, *Guide to Motor Insurers' Bureau Claims*, (The Law Society, 10th edition, 2012).

combines both critical but unbiased perspectives, alongside perspectives from the MIB.

The interviews therefore seek to gain policy perspectives from the MIB, which alongside the examination of the **UDA** and interpreting case law, will give a clear view as to how the MIB Agreements work in practice and the effect on third parties. The use of the MIB for interviews, rather than the insurance industry is important, as the MIB provides the fund of last resort and its' Agreements are relied upon by insurers where an exclusion clause is breached. Consequently, they will be in the best position to provide answers as to policy behind their Agreements which will aide in answering the second research question. Moreover, understanding the positions of every motor insurer in the country is unfeasible and the MIB can provide an overall outlook. Interest is in the numbers of claims which are received by the MIB and those that are denied, this will seek to inform the thesis as to whether protection is given to third party claims, as if a number of claims are denied for minor procedural infractions, it would connote that the MIB were seeking to avoid paying third parties.

The interview was undertaken March 2015, where several questions were asked to representatives of the MIB. However, this was before the introduction of the **UDA 2015**, and the UK public voted to leave the EU²¹ in June 2016, therefore, although the interview was deemed to be of some relevance, it was slightly outdated. Consequently, questions were sent to the MIB in July 2017 which were later answered via email. These questions, added to the previous questions by enquiring about changes to the MIB Agreements as well as Brexit. As mentioned above, the questions used were aimed at gaining policy perspectives from the MIB, asking for their opinions on exclusion clause use, their Agreements and protection offered to the third party.

The third question will be answered in the conclusion by bringing together the conclusions made as a result of the research undertaken to consider where the law could be reformed, particularly in light of Brexit.

²¹ This will be referred to as '*Brexit*'.

Originality

Motor insurance law, until recently, has received little attention, either through practise or academically. Several recent developments from both the UK and EU, along with alterations in the MIB Agreements, have increased attention significantly, with articles having been produced by a handful of authors,²² along with Professor Merkin's '*Law of Motor Insurance*' books.²³ Moreover, this author has published and presented works during the research and writing of this thesis, the work relates mainly to other areas of motor insurance law.²⁴

This thesis shows originality throughout. The UK's main legislation in relation to exclusion clauses (***Road Traffic Act 1988***²⁵) is identical to one of the earliest pieces of legislation in relation to motor insurance (***Road Traffic Act 1934***²⁶). Whilst the ***RTA 1988*** is often subject to scrutiny,²⁷ the ***RTA 1934***'s evaluation is sporadic, and there is no known literature amalgamating commentary and critique. The thesis will uncover and evaluate significant amounts of material, thereby evaluating the rationale behind the list of prohibited exclusion clauses in the ***RTAs 1934*** and ***1988***, and why other exclusion clauses are permitted. This includes a recently released cabinet document, news articles from the time, academic commentary (much of which has not been discussed previously), and judicial opinions.²⁸ Bringing this together, for the first time, the rationale behind prohibited

²² See for example the Articles produced by Dr Nick Bevan (n 19). Also see Margaret Hemsworth, "Insurance obligations, the Road Traffic Act 1988 and deliberately caused damage" (2013) J.B.L, 3, 354-361. Also, Jenny Papettas, "Insurers' liability under policies of compulsory third party motor insurance" (2013) P.N, 29(3), 200-204.

²³ Robert Merkin and Margaret Hemsworth, *The Law of Motor Insurance* (2nd Edition, Sweet and Maxwell, 2015).

²⁴ A piece was presented by the author to the Association Internationale De Droit Des Assurances (AIDA) Motor Insurance Working Party but was unpublished, the piece was awarded an AIDA academic prize. Matthew Channon, 'Does the EU and UK correctly balance the interests of the consumer and third party victim in Motor Insurance?' (Unpublished, Presented to the AIDA Motor Insurance Working Party, Vienna, November 2016). This was focussed on two core areas of motor insurance law, compensating 'blameworthy and criminal passengers' and on 'scope'. Also see Matthew Channon and Robert Merkin "Boris Johnson and EU Law" http://www.huffingtonpost.co.uk/matthew-channon/boris-johnson-and-eu-law_b_13977998.html [Accessed 29th March 2017] and Matthew Channon, 'Time to Motor on With Reform' Personal Injury Law Brief Update Journal <<http://www.pibriefupdate.com/content/law-journal-summaries/news-category-2/3418-time-to-motor-on-with-reform-matthew-channon>> [Accessed 04/09/2017].

²⁵ RTA 1988.

²⁶ RTA 1934.

²⁷ See sources as noted in (n 23 and n 19).

²⁸ These include opinions in cases which are not available on the usual case-law databases such as Westlaw. The author has found these decisions through newspaper archives, such as the Manchester Guardian, where some commentary was written on decisions.

exclusions in the **RTA 1988** will be clearer, alongside the historical interpretation of these exclusions.

Moreover, evidence to the Cassel Committee, established at the time, *inter alia*, to address the issue of exclusion clauses, will be uncovered for the first time.²⁹ There is no known literature which has examined the evidence submitted to the Committee, providing insight as to the rationale behind the **RTA 1934**'s inclusion of certain prohibited exclusion clauses, and the need to price them into risk. Further, the interpretation of the list of prohibited exclusions has only been examined briefly and sporadically. This thesis will bring together literature, current and historical, to interpret these exclusion clauses and further examine whether the list is exhaustive.

This thesis will add to literature from Dr Nicholas Bevan and more recently Marson et al,³⁰ which have previously focussed on the relationship between UK and EU law, but in a much more broad-brush way. By focussing specifically on the area of exclusion clauses, this thesis will provide an in-depth evaluation of the UK's relationship to the EU in relation to exclusion clauses.

Moreover, this thesis will go further than previous literature regarding the evaluation of Ward LJ's judgment ***Bristol Alliance v Williams***, (henceforth '*Bristol Alliance*')³¹ a case which overlooks the importance of EU law. By evaluating the rationale behind Ward LJ's judgment and unpicking the dictum of Ward LJ, the thesis intends to assess exactly where Ward LJ is incorrect.

The thesis, for the first time, will provide a detailed outlook of other legislation and instruments which have some, albeit indirect effect, on exclusion clauses. Professor Merkin's book on Motor Insurance discusses briefly the ***Consumer Insurance (Disclosure and Representation) Act 2012*** (henceforth '*CIDRA*'), ***Insurance Act 2015***, the ***Consumer Rights Act 2015*** (henceforth '*CRA 2015*'), and their relation to motor insurance. However, this is of limited depth and before

²⁹ This evidence was gained through the National Archives, the author visited the archives and searched through 1000's of pages of evidence to find relevant material.

³⁰ Nicholas Bevan (n 19) and James Marson et al, "Motor Vehicle Insurance Law: Ignoring the Lessons from King Rex", (2017) *Business Law Review* (in print) and James Marson et al 'Irreconcilable differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives' (2017) *J.B.L.*, 1, 51-70.

³¹ [2012] EWCA Civ 1267. A case that is very significant in exclusion clauses and will be discussed throughout this thesis.

much of the academic commentary was introduced on the **Insurance Act 2015**. This thesis brings together this commentary, and applies it to exclusion clauses, along with the primary sources.

Whilst these parts of the thesis are clearly original, the thesis altogether is also original through the introduction of analysis on the effect of all legislation from the EU and UK which would influence exclusion clauses. The question as to the validity of exclusion clauses in motor insurance policies has never been sufficiently answered, considering UK and EU law including the most recent legislation and case law.

As discussed in relation to methodology, the thesis will also utilise both doctrinal and empirical research to uncover the effect of exclusion clause use on a third party. This makes this chapter original as an examination of MIB Agreements, alongside information gained from the MIB on policy, has not been undertaken previously.

This thesis, in chapters and altogether, presents an original analysis of the validity and effect of exclusion clause use against third parties.

Limitations

The coverage of this thesis has some limitations. It will not examine exclusion clauses in relation to first party claims. First party (also known as ‘*comprehensive*³² or ‘*fire and theft*³³) policies are not compulsory and are for the insured to protect themselves or their property if they are at fault for an accident (the not at fault driver is already protected by the at fault driver’s policy). These policies are not regulated under the **RTA 1988** or EU law, but rather by the principles of contract and insurance law.³⁴ Consequently they do not confer the same controversy as third

³² Full coverage of the insured which would be the same as the third party, although this is subject to some limitations and first party protection falls outside of the RTA 1988.

³³ Where the insurer will cover the insured for fire and theft damage only, but will pay the third party the same as in any third party policy.

³⁴ Chapter Six will examine the Insurance Act 2015 and the Consumer Rights Act 2015 which are aimed primarily at first parties. However, these will be examined in relation to their effect on third party claims.

party insurance as it is the first party who breaches³⁵ the exclusion clause and whom are deemed responsible.

Whilst it is inevitable that some areas of tort will be discussed, due to the intertwined nature of tort and insurance law,³⁶ the thesis is primarily concerned with insurance law. When an accident occurs in the UK, liability is first determined. The UK has a 'fault' based system with regards to motor accidents, therefore an insurer is only required to pay a claim once liability is determined, and a judgment in relation to that liability has been given.³⁷ Of course, the insurer is involved from the beginning, despite claims being in the insured's name, meaning that there is some overlap.³⁸ However, this will be kept mainly to insurance law rules to provide a more focussed discussion.

Moreover, this thesis is not concerned with the differences between exclusion clauses such as whether a term is a warranty, condition precedent, or innominate term, and these will fall within the same definition of exclusion clause throughout the thesis (unless expressly stated). This is because the two core statutory instruments regulating motor insurance, the **RTA 1988**, and the **Sixth Consolidated Motor Insurance Directive**, (henceforth the '*Sixth Directive*')³⁹ do not distinguish between these.⁴⁰

³⁵ This thesis uses the word 'breach' throughout for consistency reasons. It is evident that not all exclusions can be 'breached' *per se*, they may be merely limitations on insurance coverage and not exclusions that can be in the technical sense 'breached'. For example, if a term describes the risk as being in relation to 'social, domestic, and pleasure purposes' then although there is no exclusion clause to breach here (as the policy may not expressly exclude other uses) the use of the vehicle still falls outside of the terms of the policy and is nevertheless equivalent to a 'breach'. The use of 'breach' in these scenarios ensures that a consistent approach is taken, as the result would still be the same even if a term is not technically 'breached'.

³⁶ For a greater examination of this, see the leading text, Robert Merkin and Jenny Steele, *Insurance and the Law of Obligations* (Oxford University Press, 2013). Moreover, see Robert Merkin, "Tort, Insurance, and Ideology: Further Thoughts", (2012), M.L.R., 75(3), 301-323. Also see James Davey, "A compulsory diet of chickens and eggs: the EU motor insurance directives as a shadow tort regime" in Paula Giliker, *Research Handbook on EU Tort Law* (Edward Elgar Publishing, October 2017).

³⁷ See Section 151 (1) which requires a "*judgment to be obtained*".

³⁸ See *Ibid.*

³⁹ 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.

⁴⁰ Also note that the term 'exclusion clause' is often referred to in different ways. For example, Ward LJ in the significant Bristol Alliance (n 15) case does not distinguish the terms '*exclusions*' and '*exclusion clauses*'. Professor Merkin in 'The Law of Motor Insurance' often uses the phrase 'policy terms' in relation to exclusion clauses.

Definition of 'Victim'

For clarity, this thesis will utilise a broad meaning of 'victim' throughout, and will include those who are not at fault for the accident, and have had damages reduced through contributory negligence. It will further include the driver who is not at-fault for the accident (if another driver is involved). This is because although the driver would have a potential claim under their own insurance (if they have 'comprehensive insurance'), and therefore would not remain uncompensated, they would usually claim against the at-fault driver's insurance. Furthermore, the definition of victim, also includes those who would not normally be a victim, such as a business, or where an insurer is claiming against another through subrogation.⁴¹ This follows the judgments in both the High Court⁴² and Court of Appeal⁴³ in the key exclusion clause case of **Bristol Alliance**. In the High Court, Tugendhat J stated:

"There is nothing to justify a definition of victim which excludes third parties who have suffered personal injury or damage to property, but who are also insured, and whose insurers exercise their rights of subrogation. On the contrary, such a limitation of the definition of victim appears to be inconsistent with the principle of subrogation".⁴⁴

Consequently, the term victim will connote a wide meaning.

Structure

The thesis contains six substantive chapters.

Part I of Chapter Two will examine the background and history behind exclusion clauses in motor insurance policies. It will critically examine the controversial **RTA's 1930** and **1934** and interpreting case law to understand the laws' origins and development along with policy approaches. Part II of Chapter Two will examine early reform discussion in relation to exclusion clauses. It will examine evidence to the Cassel Committee, a Committee which was introduced to reform motor

⁴¹ Subrogation occurs where the insurer will pay damages to their own insured, then recover the costs from the at fault party or their insurers.

⁴² [2011] EWHC 1657 (QB).

⁴³ Bristol Alliance (n 15).

⁴⁴ Ibid, [83].

insurance, as well as the Committee's recommendations. It will then examine academic commentary relating to this report.

Chapter Three will examine UK law relating to exclusion clauses with emphasis on **the RTA 1988** and its interpretive case law. The Chapter is divided into three. First to examine the lists of prohibited exclusion clauses within **Section 148** and **Section 151 RTA 1988**, and subsequent interpretation through case law and textbooks. Second to examine whether these are exhaustive of prohibited exclusion clauses. Finally, the Chapter will examine which other exclusion clauses are permitted.

Chapter Four will analyse EU law and its effect on the validity of exclusion clauses. It will examine the six Motor Insurance Directives and subsequent decisions from the then European Court of Justice (ECJ) and CJEU which have significantly shaped the law through wide interpretation of the Directives.

Chapter Five will examine the UK's interpretation of EU law through numerous conflicting cases. It will examine these conflicts between cases and decisions. Moreover, it will look at the potential effect of UK exiting the EU and the effect of this on the UK's implementation. Finally, the Chapter will examine whether the UK is open to state liability due to its non-compliance with EU law.

Chapter Six will look at the effect of other regulation in the UK on exclusion clauses, particularly general contract laws on unfair terms, as well as regulation of general insurance laws from **CIDRA** and the **Insurance Act 2015**.

Chapter Seven will examine the MIB and the impact on use of exclusion clauses for third parties. It will utilise both doctrinal and empirical research to determine whether the MIB provides an effective backup. Part I of this Chapter will examine the MIB and its role alongside the **UDA 2015** and restrictions within it. Part II will examine the defence of illegality and whether it can be used by the MIB deny claims. Finally, Part III will examine overall whether the MIB provides adequate protection, by utilising the previous material along with statistics from the MIB and will further examine the future of the MIB.

Chapter Two: Early Reform to Exclusion Clauses in Motor Insurance

Introduction

Current regulation of the validity of exclusion clauses against third party road accident victims (within the UK) is primarily contained in the **RTA 1988**, a descendent of the original controversial legislation enacted in 1930 and 1934.⁴⁵ Most of the changes which have followed between the **RTA 1988** and earlier Acts, were made primarily to comply with EU law harmonisation.⁴⁶ Nevertheless, the list of exclusion clauses in the **RTA 1988** is identical to that contained in the **RTA 1934**. It is therefore important to look behind the legislation to see how the current position was formed and the policy behind this.

This Chapter will provide a background to the thesis, understanding as to how the law has evolved, and the policy behind it. It will examine the exclusion clause provisions of the previous **RTA's 1930** and **1934** as well as the rationale behind them and the criticism that they have faced. The Chapter will moreover examine the Cassel Report which proposed reform to the law relating to exclusion clauses, and will examine the key debate surrounding the regulation of exclusion clauses.

Part I: Introduction of Compulsory Insurance

Pre-1930: Pressure to Legislate

After the First World War, between 1919 and 1930, the number of motor vehicles on the road increased significantly, along with a '*staggering*' rise in the number of road deaths.⁴⁷ It became the customary practice of vehicle owners to insure voluntarily against the risk of injuring other road users, including pedestrians. Risk of accidents, at this stage, were high, as licencing for road users was not in force and driving standards were low. There was only limited restriction on the use of vehicles. Although approximately 99 percent of vehicles on the road were

⁴⁵ The Road Traffic Acts 1930 and 1934.

⁴⁶ This will be discussed throughout Chapters Three and Four.

⁴⁷ From 4886 in the year 1926, to 7305 in the year 1930. See Peter Bartrip, "Pedestrians, Motorists and No-Fault Compensation for Road Accidents in 1930s Britain" (2010), *Journal of Legal History*, 31 (1), pp45-60, 46.

voluntarily insured,⁴⁸ uninsured drivers were often responsible for serious hardship caused to injured victims. This is because the drivers responsible for an accident were devoid of the means to pay (the so-called '*man of straw*'⁴⁹) for the hardship that they were responsible and liable for. Consequently, a victim would often spend significant sums in enforcing their tort law rights in gaining a judgment against the driver responsible, which could not be paid, because the driver responsible for the accident had limited means. Earl Russell in the House of Lord's stated:

*"The majority of us have enough common sense to insure our cars and ourselves against all eventualities, but some risk the chance in order to save their pockets, often knowing full well that they are but men of straw and perfectly incapable of being made to pay for any damage they may do...innumerable instances are already on record".*⁵⁰

Although Parliament was coming under increased pressure to introduce greater protection for accident victims, there was ambiguity as to the form that this would take. The insurance industry was sceptical of the introduction of compulsory motor insurance, due to concerns that the impression would be given that victims of road accidents would always be compensated regardless of liability or contract.⁵¹ They argued, therefore, that the introduction of compulsory insurance would erode the freedom of contract and insurers' ability to restrict liability, restricting insurers' limitation of risk and provision of cost-effective premiums.⁵² Arguments were made by the insurance industry in attempting to doubt the need for compulsory insurance in the first place. As stated by W F Todd (in the Chartered Insurance Institute):

⁴⁸ There was difficulty in finding an exact figure as statistics were not available. See Earl Russel's Bill, Motor Vehicles Compulsory Insurance Bill House of Lords Debate, 15 July 1925, Volume 62, CC76-88, 87.

⁴⁹ *Ibid*, 76.

⁵⁰ *Ibid*.

⁵¹ See some scepticism from the Insurance Industry from W.F. Todd '*Motor Insurance*' (1926) a paper read before the Insurance Institute of Yorkshire. Also in Royal Commission "*The Control of Traffic on the Roads*" Parliamentary Paper, 1929-1930 (Cmd 3365).

⁵² *Ibid*.

*“Because of these road casualties we have also heard of a demand for compulsory third party insurance... (you) may have smacked your lips, but I suggest to you that we do not need it”.*⁵³

Against the will of the insurance companies and much of the public,⁵⁴ a system of compulsory insurance was introduced through the **RTA 1930** and was later amended by the **RTA 1934**. These Acts have been fiercely criticised by many, especially in relation to loopholes which allowed insurance companies to insert exclusion clauses into their policies.

Road Traffic Act 1930

After a lengthy parliamentary debate,⁵⁵ a Royal Commission Report,⁵⁶ and numerous proposals,⁵⁷ compulsory third party motor insurance was introduced in Part Two of the **RTA 1930**, with the aim of removing ‘*the intolerable injustice*⁵⁸ often faced by third parties due to the absence of compensation. This would be achieved by ensuring that nobody other than certain exempted persons could drive a motor vehicle on a road, unless they were insured against certain liabilities which they may have incurred to a limited class of third parties.⁵⁹

The **Third Parties (Rights against Insurers) Act 1930** (henceforth ‘*TPRAI*’) was further introduced to protect third parties against the insured’s bankruptcy or insurance company’s liquidation. Several cases materialised before 1930 where the insolvency of the insured driver meant that there was no route to compensation for the victim, as the insurer could use the defence of privity against the third party. Consequently, due to the **TPRAI 1930**, victims were assigned the insured’s rights

⁵³ Ibid.

⁵⁴ There were some concerns particularly about the fact that those who have bad driving records may not be able to gain insurance, due to being ‘uninsurable’. See Earl Russel’s Bill (n 46).

⁵⁵ See for example questions from Morris MP in HC Debates 26 July 1926 volume 198 c1696.

⁵⁶ Royal Commission “The Control of Traffic on the Roads” Parliamentary Paper, 1929-1930 (Cmd 3365).

⁵⁷ Proposals were brought through the House of Lords through Earl Russel’s compulsory insurance bill see HL Deb 15 July 1925 volume 62 cc76-88.

⁵⁸ Minister of Transport (Mr. Herbert Morrison) in the debate during the second reading of the Road Traffic Bill on February 18, 1930. Hansard Parliamentary Debates (Commons) 5th Series, Volume 235, 1203.

⁵⁹ Christopher Shawcross, *The Law of Motor Insurance* (1st edition, Butterworth Publishing, 1935), 166.

against the insurer to allow them to claim directly. This, therefore, signalled the legislature's intention to protect the accident victim rather than the insured.⁶⁰

Road Traffic Act Provisions

In addition to the above, **Section 35 RTA 1930** made it compulsory for any user of a motor vehicle on a road⁶¹ to obtain insurance, issued by an authorised insurer, covering the use of the vehicle.⁶² This, *prima facie*, would mean that victims of road traffic accidents would be guaranteed compensation, because the insurer would compensate for damage and injury caused by the negligent or blameworthy insured driver, therefore removing potential hardship to third parties.

However, it became evident that hardship was not always prevented, as no provision was made for compensation in relation to victims of uninsured or untraced drivers. Moreover, insurers could continue to repudiate liability in cases of non-disclosure or misrepresentation by the insured.⁶³ Furthermore, and most importantly for this thesis, there was only partial limitation in the **RTA 1930**, regarding insurers' use of exclusion clauses against third parties.⁶⁴ The only limitation of exclusion clauses came in the form of **Section 38** of the Act, which stated:

*"Any condition in a policy or security issued or given for the purposes of this Part of this Act, providing that no liability shall arise under the policy or security or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done **after the happening of the event giving rise to a claim under the policy or security, shall be of no effect**".⁶⁵*

⁶⁰ Matthew Dyson, *Unravelling Tort and Crime* (Cambridge University Press, 2014), 31.

⁶¹ Road defined as any highway or other road to which the public has access, including bridges. Section 121 RTA 1930.

⁶² Definition under Section 36 (3) "*authorised insurer*" means an assurance company or an underwriter in whose case the requirements of the Assurance Companies Act, 1909, as amended by this Act, with respect to deposits by assurance companies and deposits and guarantees by underwriters are complied with".

⁶³ Non-Disclosure and Misrepresentation were not touched by the RTA 1930 and continued to be regulated under the Marine Insurance Act 1906 (Sections 17 and 18).

⁶⁴ See Section 36 (5) RTA "A policy shall be of no effect ...unless...there is...delivered by the insurer...a certificate...in the prescribed form and containing such particulars of any conditions subject to which the policy is issued".

⁶⁵ emphasis added.

This Section limited the insurers' reliance on exclusion clauses relating to third parties⁶⁶ where the insured did or omitted to do something after the accident had occurred. An example of a prevalent clause utilised consistently by insurers pre-1930, which was later prohibited by **Section 38**, is the '*notice clause*', requiring the insured to give notice to the insurer or guarantor, within a specified time limit. As stated by Greer J, *obiter*, in **Re McCormick**:⁶⁷

“Section 38 means this: If there are any provisions in the policy that there shall be no liability on the insurance company if notice is not given by the insured within, say, a week or ten days-whatever the period may be...that although it may be a good answer to a claim by the insured, it is not to be an answer to a claim made by a third party against an insurance company”.⁶⁸

Hence, **Section 38** did not prohibit the use of clauses by the insurer in relation to the insured, but stated that exclusion clauses shall be of no effect in relation to claims made by third parties, consequently retaining freedom of contract in relation to the insured.

It is notable that although **Section 38** was predominantly aimed at removing the reliance on notice clauses against third parties, it extended to instances with the insured admitting liability without the insurers' permission. An example of this can be seen in the pre-1930 case of **Tustin v Arnold**,⁶⁹ where the insured admitted liability for the accident despite a clause in the policy restricting the insured from doing this.

Further restrictions included where the insured refused to allow the insurer to have control of any court proceedings. Moreover, as stated by Dodson, other instances encompassed where the insured might have done something which prejudiced the interests of the insurers, or failed to secure evidence which might have helped a

⁶⁶ The provision does not affect claims by the insured and therefore these clauses can still be utilised in policies.

⁶⁷ [1934] 49 LI L Rep 361.

⁶⁸ *Ibid* emphasis added. Cases in which a clause requiring notice was utilised by an insurer pre-1930 include Verelst's Administratrix v Motor Union Insurance Co Ltd [1925] 2 K.B. 137 where the insurer repudiated liability because notice was not given '*as soon as possible*' after the accident. Also see Revel v London General Insurance Co (1934) 50 LI. L. Rep. 114 where Section 38 allowed the third party to avoid a clause because action was not taken 3 months after the accident.

⁶⁹ (1915) 31 T.L.R. 368.

jury or judge in the case of a trial.⁷⁰ **Section 38** therefore removed the unjust situation of third party non-compensation where risk was unaffected, and was more of a way of escaping the obligation to pay claims.

It is arguable that by not restricting the insured post-accident, it would potentially prejudice the insurer when making investigations and throughout the claims process, especially if liability was admitted or if the insured refused to give evidence. Unlike exclusion clauses relating to the accident itself or pre-accident disclosure, it is unlikely that insurers would have priced the risk of post-accident compliance failure into their premiums. Any pricing of these post-accident 'risks' would have minimal impact, and therefore their prohibition was an easy target for the legislature.

However, despite numerous instances caught by **Section 38**, profound limitations of the **RTA 1930** soon became apparent due to complaints from third parties. To protect themselves from unscrupulous drivers, insurers created a system of different types of policies depending on the material risks involved.⁷¹ This meant that there were substantially different rates of premium depending on the type of vehicle insured, the use to which it was put, the number of insured drivers, and drivers' previous records.⁷² This provided more affordable insurance, allowing drivers with limited means to obtain an insurance policy and cater it to their needs.

Insurers found it essential that if premiums were to be kept to a minimum, so as not to discourage the 'man of straw'⁷³ from driving uninsured, the risk insured against was required to be fully understood by the driver, and the vehicle should be utilised in a way which was stated in the proposal form.⁷⁴ Consequently, stringent conditions were imposed on the insured. Accordingly, it was inevitable that insurers would utilise exclusion clauses and conditions when breached, allowing the legal evasion of liability by insurers under the policy, leaving the injured

⁷⁰ Robert Pentland Mahaffy, *Mahaffy and Dodson's Road Traffic Acts and Orders* (2nd Edition, Butterworth & Co, 1936).

⁷¹ See the nine types of policy set out in Christopher Shawcross, *The Law of Motor Insurance* (2nd Edition Butterworth & Co, London, 1947), 271.at lxxxiv.

⁷² *Ibid.*

⁷³ See the discussion earlier in this Chapter relating to the 'man of straw' at page 34.

⁷⁴ Shawcross (n 74).

third party with nowhere to claim compensation. Law-makers evidently failed to appreciate this when introducing legislation as can be seen below.⁷⁵

In ***Bright v Ashfold*** (henceforth '*Bright*'),⁷⁶ the insurer repudiated liability against a third party because a condition in the policy was broken by the insured which excluded the use of a motorbike without a side-car being attached. The third party contended that this would fall within the **Section 38** prohibition, which, they argued, did not solely preclude exclusion clauses in relation to actions that occur after the event.⁷⁷ Lord Hewart C.J. stated that the case was '*too clear for argument*',⁷⁸ as the exclusion clause fell outside of **Section 38**. Likewise, in ***Gray v Blackmore*** (henceforth '*Gray*'),⁷⁹ an exclusion clause inserted into the policy excluding coverage for use other than for '*private purposes*', was deemed to fall outside of **Section 38**. This was despite claimant's contentions that **Section 38** should be reinterpreted to include all exclusion clauses. Branson J stated, having concluded the vehicle was not being used for the purpose that was permitted under the policy:

*"there is nothing in the Road Traffic Act which enables the insured, the plaintiff to say, 'Notwithstanding that I was using this car in the way in which the policy says, not that I was not to use it, but that I could not use it and retain my cover, you are still liable to pay me under the policy'".*⁸⁰

Although it was clear that the introduction of compulsory insurance in the **RTA 1930** was as a step forward in the protection of third parties,⁸¹ the gaps in protection made clear in both ***Bright***⁸² and ***Gray***⁸³ were criticised by authors and academics. Sebag Cohen stated in the Law Times (now the New Law Journal) that, '*there is*

⁷⁵ Ibid.

⁷⁶ [1932] 2 K.B. 153.

⁷⁷ A similar argument was made and dismissed in *Greenlees v Port of Manchester Co* 1933 S.C. 383, where Lord Moncrieff stated at 390 :*" I read that section, which excludes in a question with third parties injured a defence by the insurers founded on conditions in the policy limiting their liability in respect of what may shortly be described as "subsequent" acts or omissions, as by inference affirming the validity of such limiting conditions in so far as these are made dependent upon "antecedent" events. A false statement by the applicant for a policy before the policy is granted is of course an antecedent and not a subsequent event, and as such is not within the limiting operation of the subsection"*.

⁷⁸ *Bright* (n 79), 158.

⁷⁹ [1934] 1 K.B. 95.

⁸⁰ Ibid, 108.

⁸¹ *Shawcross* (n 74), 164.

⁸² *Bright* (n 79).

⁸³ *Gray* (n 82).

little doubt that Parliament cannot have appreciated the full effect of the limitations placed on Sect 38.⁸⁴ Cohen suggested that there were a variety of defences available to insurers, and even a seriously injured third party through the negligent actions of the driver, *'might well be unable to obtain any damages whatever'*.⁸⁵ Furthermore, Cohen noted that there was only limited consultation from Parliament on the use of exclusion clauses, therefore rushing legislation without prior thought to the consequences of permitting insurers to repudiate claims to third parties. Finally, Cohen was concerned that many claimants would continue to suffer hardship resulting from these exclusion clauses, clearly contrary to the intentions of the Act.

The courts were also very critical of the **RTA 1930**. For example, Goddard J in **Zurich General Accident & Liability Insurance Co Ltd v Morrison**⁸⁶ (henceforth '*Zurich v Morrison*') stated:

"The Road Traffic Act, 1934, was passed to remedy a state of affairs that became apparent soon after the principle of compulsory insurance against third party risks had been established. That Act and the Third Parties' (Rights against Insurers) Act, passed in the same year, would naturally have led the public, at least those who were neither lawyers nor connected with the business of insurance, to believe that if...through no fault of their own, injured or killed by a motor car they or their dependants would be certain of recovering damages, even though the wrong-doer was an impecunious person. How wrong they were quickly appeared. Insurance was left in the hands of companies and underwriters who could impose what terms and conditions they chose. Nor was there any standard form of policy, and any...insurer could hedge round the policies with so many warranties and conditions that no one advising an injured person could say with any certainty whether, if damages were

⁸⁴ Sebag Cohen, "Defects in the law relating to insurance against third party risks for motor vehicles" (1934) Paper Presented to The Law Society Annual Provincial Meeting, entered in the Law Times, Volume 231, 237.

⁸⁵ *Ibid.*

⁸⁶ *Zurich General Accident & Liability Insurance Co Ltd v Morrison* [1942] 2 K.B. 53.

*recovered against the driver of the car, there was a prospect of recovering against the insurers”.*⁸⁷

Goddard J was clearly frustrated that insurers were exploiting the limitations of **Section 38**. Furthermore, policies were complex due to different coverage, making it difficult for third parties to know their position. As mentioned previously on page 23, the insurance industry introduced different types of policy depending on the insured’s requirements, thereby essentially allowing the insured to cater the policy to their needs, whilst ensuring lower premiums. This, therefore, meant that there were no standard forms of policy and even similar types of policy contained different exclusion clauses to cater to the individual. It is submitted that this highlights the difficulty in balancing the interest of the consumer, to have lower premiums and being able to cater their policy to their needs, and the interest of the third party by providing clarity and compensation.

Goddard J further illustrates the difficulty of public perception with regards to compensation, and follows the warnings by Lloyds’ of London, in consultation for the **RTA 1930**, that the public, ‘*would get the idea*’ that they would always be able to recover from the driver.⁸⁸

Moreover, to expand the previous point relating to clauses in similar types of policy, it was clear that these exclusion clauses were going too far, and were often exploited by the insurance industry. For example, some insurers inserted discriminatory clauses randomly in policies restricting use by, ‘*Jews and foreigners*’,⁸⁹ increasing the potential for insurers to repudiate liability. This follows the dictum of Lord Moulton in **Joel v. Law Union & Crown Insurance Co**,⁹⁰ a pre-1930 case concerning non-disclosure in fire policies which was cited by Goddard J in **Zurich v Morrison**,⁹¹ as being relevant to policy terms:

⁸⁷ Ibid, [61].

⁸⁸ Lloyds of London evidence to Royal Commission on Transport for “Control of Traffic on the Roads” (1929) (Cmd 3365): Minutes of Evidence: 278.

⁸⁹ Richards v Port of Manchester(1934) 50 Ll. L. Rep. 132

⁹⁰ [1908] 2 K.B. 863.

⁹¹ Zurich (n 89).

“I am satisfied that few of those who insure have any idea how completely they leave themselves in the hands of the insurers should the latter wish to dispute the policy when it falls in”.⁹²

Hence, the failure of the **RTA 1930** to substantially restrict exclusion clauses sustained a very one-sided situation, whereby insurers could easily repudiate liability against third party claimants, despite the third party not being a party to the contract. Shawcross further argued that **Section 38** had little or no effect on the construction of policies, as they continued in the same form, and with exclusion clauses which had become customary.⁹³ Shawcross claimed, therefore, that policies had complied with the **RTA 1930** on one hand, but on the other it had manifestly defeated the object of it.⁹⁴

It is submitted that the Act sought to limit insurers' liability to appease any concerns within the insurance industry. It was clear in the Royal Commission's consultation that insurers were sceptical of the introduction of compulsory insurance despite the expanded and compulsory nature of the market that it gave them. There was a belief that it would begin to erode insurers' freedom of contract and would force them to insure less desirable drivers, with little protection if an exclusion clause was breached. Thus, the legislature allowed the industry almost complete contractual freedom,⁹⁵ allowing a means of escape from policies, although without proper comprehension of the effect that it would have on the third party victim.

It is evident overall that the aim of the **RTA 1930** to remove, '*the intolerable injustice*⁹⁶ towards third parties had failed.⁹⁷ Parliament was under pressure to reform this inadequate situation and consulted widely to find a solution through the introduction more legislation.

⁹² Joel (n 93), 884.

⁹³ Shawcross (n 74), 271

⁹⁴ Ibid.

⁹⁵ JS Steer, 'The Romance of Accident Insurance', (1939) Chartered Insurance Institute Journal, Volume 42, 277.

⁹⁶ Minister of Transport (Mr. Herbert Morrison) in the debate during the second reading of the Road Traffic Bill on February 18, 1930. Hansard, Parliamentary Debates (Commons) 5th Series, Volume 235, 1203.

⁹⁷ Hughes argued that there was no doubt that the 1930 Act had failed to achieve its object, see Hector Hughes, *Road Users Rights, Liabilities, and Insurance*, (Sweet and Maxwell, 1938), 143.

The Road Traffic Act 1934

The **RTA 1934** approached the issue of compulsory insurance from another angle, by not enlarging the statutory duty of compulsory insurance, but rather by endowing third parties with greater rights against insurance companies.⁹⁸ The Act attempted to enhance the rights of innocent victims in two ways. First by providing insurers with a duty to satisfy judgments against third parties under **Section 10**.⁹⁹ This duty allowed the third party to directly sue the insurer for any damages, even where the insured was solvent. Further, the insurer was obliged to satisfy the judgment if a certificate was delivered and the claim fell within the terms of the policy.¹⁰⁰ The second reform of third party rights was the direct prohibition of certain exclusion clauses, alongside post-accident clauses already prohibited under **Section 38**.¹⁰¹ **Section 12 RTA 1934** listed certain exclusion clauses which were prohibited against third parties, these were:

“

- (a) the age, physical or mental condition of the persons driving the vehicle; or*
- (b) the condition of the vehicle; or*
- (c) the number of persons that the vehicle carries; or*
- (d) the weight or physical characteristics of the goods that the vehicle carries; or*
- (e) the times at which or the areas within which the vehicle is used; or*
- (f) the horsepower or the value of the vehicle; or*
- (g) the carrying on the vehicle of any particular apparatus; or*

⁹⁸ Ibid, 136.

⁹⁹ Subject to Section 10 (3) RTA 1934 which permitted the insurer to seek a Court declaration that it could avoid the policy due to misrepresentation or non-disclosure.

¹⁰⁰ This is where some cases involving exclusion clauses have fallen down as the insurer argues that the claim was outside the terms of the policy. See later discussion in the next Chapter and the case of *Bristol Alliance Partnership v Williams* (n 15).

¹⁰¹ RTA 1930. Again, this was in relation to clauses being used against third parties, there was nothing in Section 38 to prevent the insurer from relying on exclusion against the driver.

(h) the carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by or under the Roads Act 1920”

To allow some recompense for the insurer if one of these terms was breached, the insurer could recover from the insured (under **Section 12**) any payment it made to the victim. This, however, was not always straightforward, as the insured was often financially unable to meet any claim. Some uncertainty exists surrounding why these specific clauses were prohibited, and other potentially more prohibitive exclusion clauses were omitted. Discussions prior to the Act shows great anxiety amongst senior politicians and ministers surrounding insurers’ continued reliance on certain exclusion clauses.

For example, a recently released Cabinet document emphasised concern from the Minister of Transport in 1934, in relation to clauses which allowed the insurer to repudiate liability in cases of unroadworthy or poorly maintained vehicles. The Minister in the Cabinet Document stated:

*“Most motor policies contain a condition to the effect that the company shall not be liable if the motor vehicle is driven in an unsafe or damaged condition i.e. if the vehicle has not been properly maintained and is not roadworthy. Cases of repudiation have been brought to my notice where defective maintenance has been put forward **as a reason of repudiation though the particular defect in maintenance may have no bearing on the accident**”.*¹⁰²

The Minister was predominantly concerned with cases whereby the insurer was attempting to escape the policy utilising the roadworthiness exclusion clause against third parties, despite roadworthiness not being the overall cause or even contributing to the accident.

An example of a roadworthiness exclusion clause being used in this instance can be seen in the pre-1930 case **Jones and James v Provincial Insurance Company**,¹⁰³ where the insurer repudiated liability for damages due to breach of

¹⁰² Cabinet Document “*Memorandum by the Minister of Transport*” The National Archives Catalogue Ref CAB/24/247 CP4.34, 1934, 2. emphasis added.

¹⁰³ (1929) 35 Ll. L. Rep. 135.

an ‘*efficient vehicle condition*’ exclusion. However, the cause of the accident was thought to be due to incompetence of the driver rather than an ineffective footbrake, as the vehicle’s handbrake was working effectively enough to stop the vehicle. The Court held that the insurers were not liable to compensate the third party because, ‘*the greatest possible disasters would follow if people should think they might driver motor cars without brakes and were protected...by insurers*’.¹⁰⁴ The Court therefore permitted the clause to be used as a deterrent against the use of unroadworthy vehicles. This, however, is controversial because unless the driver of the vehicle can afford to pay damages to the third party victim, the victim would be left without compensation, despite not being responsible for the unroadworthy state of the vehicle. There is little deterrence in allowing roadworthiness exclusion clauses against third parties, unless they are passengers. This therefore signifies that in cases where the breach of exclusion clause was not the cause of the accident, the Courts were willing to permit the clause to be used . As this was a situation clearly needing to be addressed, exclusion clauses relating to ‘*condition of the vehicle*’ were prohibited under **Section 12 (b) RTA 1934**.

In relation to the other clauses prohibited by **Section 12**, Shawcross stated that **Section 12** was drafted, ‘*with one eye continually looking at a motor policy...containing the terms and conditions commonly used by insurers in 1934*’.¹⁰⁵ This corresponds with the evidence to the Cassel Committee, which stated that these were conditions most successfully pleaded by insurers in practice.¹⁰⁶ It is further evident that **Section 12** was drafted by examining previous case law also. For example, in **Bright v Ashfold**,¹⁰⁷ involving breach of an exclusion clause because of an attached trailer. Similarly, cases involving roadworthiness,¹⁰⁸ and cases including **Farr v Mutual Motor Traders’ Mutual Insurance Society**,¹⁰⁹ involving times where the vehicle can be used.

¹⁰⁴ Ibid.

¹⁰⁵ Shawcross (n 74), 277.

¹⁰⁶ This will be discussed later in this Chapter. Moreover, see Board of Trade “Report of the Committee on Compulsory Insurance” (1937) Cmd. 5528, 51.

¹⁰⁷ Bright (n 79).

¹⁰⁸ Crossley v Road Transport and General Insurance Co (1925) LI.L.R.219.

¹⁰⁹ Farr v Mutual Motor Traders’ Mutual Insurance Society [1920] 3 K.B. 669.

The decision, however, to include only some prohibited exclusions, seemingly connotes that any other exclusion clauses are valid.¹¹⁰ This rather limited approach was immediately criticised by many. For example, Cohen argued that although the introduction of a partial prohibition of exclusion clauses: ‘*goes a considerable way towards remedying the main defects that existed under the 1930 Act as regards third parties*’,¹¹¹ it is a pity:

*“the legislature...did not decide on a policy of “all in” insurance (and)...having gone so far, Parliament should have had the courage to go further and give adequate protection to innocent third parties”.*¹¹²

Cohen noted that numerous restrictions continued which were utilised to defeat third party claims, and suggested that Parliament did not have the resolution to stand up to the insurance industry and powerful motoring lobbies. Comparably, O’Brien stated that the gaps in the **RTA 1930** will therefore not, ‘*guarantee whatever that a person who is seriously and permanently disabled owing to the negligence of a driver...will, in fact, receive any compensation whatsoever*’.¹¹³

Some appellate judges also decided to speak out about the failure of the **RTA 1934**. For example, Judge McCleary stated that insurers should not be permitted to repudiate liability against an innocent third party, when the breach of an exclusion clause was beyond the third parties’ control. Judge McCleary stated:

“It not infrequently happens that a third party who has been seriously injured as a result of an accident...is left the judgment of a...considerable sum which is not worth the cost of the paper it is written on, this is not a fanciful picture....It should be made impossible for any insurance company to repudiate liability by reason of any matter which is between them and their insured driver in which the third party has no control...There can be no doubt that as the law stands at present , it does not provide that

¹¹⁰ This will be examined in greater depth in the next Chapter.

¹¹¹ Sebag Cohen (n 87), 237.

¹¹² Ibid.

¹¹³ O’Brien B, “The Road Traffic Acts, 1930-1934” (1934) The Law Society Annual Provincial Meeting, The Law Times, Volume 178, 232.

*protection to injured third parties which was intended by the RTA...It should be settled by Parliamentary counsel that no company...should be allowed to plead any defence affecting a claim by an innocent third party".*¹¹⁴

The issue of control is important and will be examined in greater depth later in this Chapter.¹¹⁵ However, this is a theme with criticism of exclusion clause use, third parties were being penalised for something outside of their control. It is submitted that this is comparable to a lottery, not unlike the situation pre-1930, where it was down to chance as to whether the victim was hit by a person driving within their policy and would therefore gain compensation. This emphasises a clear absence of control for the victim.

Moreover, many cases were difficult for judges due to the lengths insurers were willing to go to avoid payment to third parties. For example, in **Richards**¹¹⁶ an exclusion clause was successfully utilised which prohibited the use of the vehicle by: 'Jews, Air Force Officers, actors, actresses, Turf commission agents, undergraduates or foreigners'. The High Court accepted that these exclusion clauses were valid under the Act, because they were not expressly prohibited under **Section 12**. Consequently, the insurer only needed to prove that the driver was in fact Jewish to avoid the claim against the third party, although failed to do so in this case. Another unreported case, albeit criminal prosecution case, went before the Manchester Magistrates Court due to the use of a vehicle without insurance as a result of exclusion clause breach. The clause excluded, 'Jews, foreigners, music-hall artists, theatrical agents, and bookmakers'.¹¹⁷ Like **Richards**, the user of the vehicle was purported to be Jewish and these terms were deemed to be outside the limits of **Section 12**. Finally, in **Carlton v R&J Park Ltd**,¹¹⁸ the insured failed to disclose that he was a Romanian subject. The case was decided on other

¹¹⁴ ___ "Insurance of Motorists: Third party claims that are not met, a judge's suggestions", Manchester Guardian, April 3, 1935. emphasis added

¹¹⁵ Page 52.

¹¹⁶ Richards (n 92).

¹¹⁷ "Car Insurance and Jews: "Hitlerism Comment", Manchester Guardian, September 14, 1934, 12.

¹¹⁸ (1922), 10, LL. L. R. 818. This was found in Shawcross (n 74), 431. Although this may well be a case concerning non-disclosure rather than an express exclusion, it highlights that insurers were willing to go to lengths to refuse claims based on nationality.

grounds, but Sankey J (as he then was) stated that this should have been disclosed.

Unusual and discriminatory terms aside, many terms which were more regularly used by insurers were also beyond the limits of **Section 12**. For example, the most commonly used exclusion clauses limiting driving to ‘*social domestic and pleasure purposes*’ or to ‘*business use*’ did not fall within **Section 12**. Cases continued to go through the Courts whereby a limitation was used involving ‘*social, domestic and pleasure*’ and were deemed valid against third parties.¹¹⁹ Of course, it was argued below, in the Cassel Committee’s consultation discussions,¹²⁰ that these exclusion clauses are vital for rating purposes.

Another major criticism of the **RTA 1934** and **Section 12** was the assumption that motor insurance policies and standard terms would not change over time. Consequently, these commonly used exclusion clauses listed in the Act would eventually become obsolete,¹²¹ as insurers update their policies and rely on different clauses and find different ways to repudiate liability. Consequently, to be effective against new commonly used policy terms, the Act would need to be regularly updated.

The above cases show that the **RTA 1934** permitted many forms of exclusion clause to be utilised against third parties, often leaving victims of road accidents without compensation. As stated by Shawcross, it is:

*“Impossible to avoid the feeling that the framers of the Act never intended to permit these gaping holes in the system of compulsory insurance. Nevertheless the language in the Act permitted them, and it was inevitable that insurers should take advantage of them”.*¹²²

It is difficult to understand the intention of the legislature when creating the **RTAs** without examining documents of meetings, and only one Cabinet Document is available (as noted above). However, it seems from the House of Commons

¹¹⁹ See *Bonham v Zurich General Accident & Liability Insurance Co Ltd* [1945] K.B. 292. It is also important to note that SDP purposes continue to cause confusion which will be examined in the next Chapter.

¹²⁰ Page 51.

¹²¹ Shawcross (n 74), 277.

¹²² *Ibid.*

statement made by Minister of Transport, that the **RTA 1934** was never going to fill all the gaps which were left from the **RTA 1930** that its aim was to enhance victims' protection to a certain extent by removing certain exclusion clauses.¹²³ Moreover, comparable to the **RTA 1930**, it is evident that the legislature was wary of controversy within the insurance industry about the potential infringement of their right to freedom of contract. Further, from policy holders and powerful motoring organisations who represented them,¹²⁴ due to the potential for vast premium increases (as seen in the BIA evidence on pages 51-55).

An example of the government's wariness of powerful motoring organisations can be found in their handling of the **Road Traffic (Compensation for Accidents) Bill 1932** (henceforth '**RTCAB**'). Lord Danesford introduced the Bill in the House of Lords, proposing the introduction of a system no-fault liability on UK roads, reverting from the system of fault based liability. This would have signified a guarantee of compensation for those involved in road traffic accidents, regardless of fault. The Government had originally '*shown sympathy*'¹²⁵ to the objectives of the Bill. Furthermore, a Select Committee, established to scrutinise this area, supported the Bill, finding that it would not have a substantial effect on motorists, as the cost would be shared amongst all drivers through their insurance premiums.¹²⁶ However, motoring organisations including the Automobile Association (henceforth '**AA**') were against the Bill, and stated that it was, '*very tired of legislation against the motorist; we have had our fill of it you know*'.¹²⁷ This statement from the AA clearly related to the introduction of the **RTA 1930**, forcing motorists to insure their vehicles. After significant critique from groups, the Government later backtracked and refused to support the Bill. Bartrip stated that the rationale behind this was that:

¹²³ Stanley stated: "there have been disclosed certain gaps which can be remedied within the framework of the existing schemes, and hon. Members will find in I **some** attempt to do so emphasis added" see House of Common's Debate, 10 April 1934, Volume I, 288 cc167-294 ,177.

¹²⁴ See Daily Mail article which stated that a new RTA would be enough to "stir them (motoring organisations) into cyclonic activity" Sir Malcolm Campbell "Motoring Organisations Must Defend Themselves Against the Traffic Act", Daily Mail Friday, September 14, 1934; page 4; Issue 11978.

¹²⁵ See PW Bartrip (n 48), 55.

¹²⁶ Ibid, 56.

¹²⁷ Select Committee on the Road Traffic (Compensation for Accidents) Bill: Minutes of Evidence, London, 1933, 35–45; Cited in Ibid, 56.

*“Most motorists were income tax and rate payers; many belonged either to the AA, whose membership passed half a million in August 1933, or RAC. On these grounds government needed to treat them with ‘great delicacy’ rather than brand them pariahs or subject them to excessive regulation”.*¹²⁸

It is evident, therefore, that a very cautious approach was taken by the Government in both the **RTCAB** and the **RTAs** due to lobbying from significantly populated motoring organisations concerned about premiums and excessive regulation. The Government attempted to balance competing pressures, between ensuring victims were compensated, whilst ensuring that premiums were kept low.

Furthermore, in addition to motoring organisations, motor insurance was still relatively new, and the requirement of compulsory insurance was unheard of, therefore undoubtedly increasing caution amongst the insurance industry. Overall, it was clear that more reform was needed and the Cassel Committee was established precisely to examine and propose reform of the area of compulsory insurance. With the protection of third parties at the core of this, part of this Committee’s consultation was focused on the balance between third party rights and lower premiums.

Part II: Proposed Reform to Exclusion Clauses

Cassel Committee Evidence

Part II of this Chapter will examine the Cassel Committee evidence and subsequent recommendations relating to exclusion clauses. The evidence is informative in respect of the rationale behind insurer’s use of exclusion clauses, and why certain clauses are permitted under the **RTA 1934**.¹²⁹ Moreover, the report was significant due to its recommendations, and is often cited in recent key case law.¹³⁰

On 6th February 1936 the Cassel Committee, under the leadership of Sir Felix Cassel K.C, and consisting of representatives from insurance companies and

¹²⁸ Ibid, 58-59.

¹²⁹ RTAs 1934 and 1988.

¹³⁰ See for example by Ward LJ in *Bristol Alliance* (n 15).

Lloyds' of London, was appointed by the Board of Trade, a Committee of the Privy Council, to:

*“consider and report whether any, and if so what, changes in the existing law relating to the carrying on of the business of insurance are desirable in the light of statutory provisions relating to compulsory insurance against third party risks”.*¹³¹

The Committee was formed to address significant hardship which had fallen upon many victims of road traffic accidents, arising from the failure of the previous Acts in ensuring that insurers were meeting their commitments to third parties. This was either because of insurer insolvency or the insertion of exclusion clauses within policies.

The Committee sought evidence from organisations including the Minister of Transport, the British Insurance Association (henceforth 'BIA'), and the Pedestrians' Association. In addition, the Committee heard oral evidence and questioned consultees. A sub-committee was set up, led by Sir Felix Cassel K.C to examine, *'defences by insurers and failure to insure'*.¹³²

The BIA submitted lengthy memoranda in which they examined the issue of exclusion clauses and further justified the use of certain exclusion clauses against innocent third parties.¹³³ The BIA were predominantly sceptical about the possibility of an overall prohibition of exclusion clauses, and feared that the whole insurance rating system would be undermined if these clauses could not be utilised. Furthermore, that it would be impossible to rate risks equitably in the interests of the public.¹³⁴ To reinforce this point, the BIA examined and justified the use of common exclusions. Their examination was divided into two. First, conditions and exclusion clauses referring to the person driving the vehicle, and second, in relation to the use to which the vehicle is put.

¹³¹ Board of Trade *“Report of the Committee on Compulsory Insurance”* (1937) Cmd. 5528, 5.

¹³² The sub-committee dealing with this will now be referred to as the “defences sub-committee”.

¹³³ Board of Trade Departmental Committee on Compulsory Insurance, *“Precis of Evidence to be Given on Behalf of the British Insurance Association”* (1936-1937) (Available from the National Archives).

¹³⁴ *Ibid*, 14.

Regarding the person driving the vehicle, the BIA found five clauses, if prohibited, would cause an overall negative effect on the insurance industry, the driver (usually limited to the policyholder), or the public.¹³⁵ First, they argued that clauses restricting driving to one named person (i.e. the insured, chauffeur, or other person) were crucial due to a substantial premium discount as a result of lowering risk.¹³⁶ Consequently, the BIA argued, that there would be, '*great dissatisfaction*'¹³⁷ amongst drivers if these were prohibited. Second, in relation to clauses restricting driving to individuals with permission of the insured, the BIA stated that although these have limited restrictive effect, they are nevertheless important due to providing a, '*real safeguard to the insurer*', particularly in cases in which the vehicle has been stolen.¹³⁸ Third, the BIA attached significant importance to clauses which restricted driving to the insured or their employee. The BIA stated that these exclusion clauses are customarily found in many Commercial Vehicle Policies especially when the vehicle may be hired. The BIA argued that if this clause was prohibited, then the policy holder would have no control over, and further that the insurer would have no knowledge of, the sort of person that may drive the vehicle. Thus, the BIA argued, that special terms including this are needed to prevent certain '*undesirable persons*' from driving.¹³⁹

The fourth exclusion clause was in relation to excluding an individual named person, the BIA argued that this prevents drivers whose accident or conviction record clearly shows them to be a bad driver. Consequently, they stated that this exclusion clause is more about ensuring road safety and protecting the public rather than providing the insurer with an escape route,¹⁴⁰ they further argued that there might be cases where the insurers would decline to grant insurance which could be dealt with better by permitting them to exclude a named person.¹⁴¹

Finally, the BIA examined clauses which limit the driving to licensed persons. They argued that although clauses of this type might not be deemed important to insurers, their prohibition would result in an increase in driving by unlicensed

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid,

¹⁴⁰ Ibid, 14-15.

¹⁴¹ Ibid,15.

persons, and even those prohibited from holding a licence by the Court due to intoxication or dangerous driving.¹⁴² Consequently, the BIA argued, the number of road accidents would almost certainly increase without the use of these exclusion clauses.¹⁴³

Accordingly, the above exclusion clauses seem to have two rationales. First, in the protection of the public by preventing and deterring certain undesirable or dangerous people from driving, whilst protecting the interests of the insurer by reducing the potential risk of an accident. Second, by permitting the driver of the vehicle to have a substantially lower premium by, substantially lowering the risk to the insurer and therefore the premium that they would charge. The first rationale is particularly difficult, as the third party (unless a passenger), will have little knowledge in terms of those driving the vehicle. Of course, in cases where the insured has the means to pay third parties independent of insurance, exclusions would provide a deterrent, as the insured would compensate instead of the insurer. However, where the insured has no means to pay, there would be little deterrence in excluding third parties.

In relation to exclusion clauses involving uses to which the vehicle is put, the BIA divided the issue depending on whether the vehicle was: a private car, a goods vehicle, a public service vehicle, or a motor trade vehicle. The BIA stated that policies involving private cars are commonly either restricted to use for, '*social domestic or pleasure purposes*' or for '*business use*' only, and¹⁴⁴ if these restrictions were to be removed then it would, on average, add 50 percent to premiums.¹⁴⁵ Moreover, if the use for hire was included then premiums would almost certainly double.¹⁴⁶ They therefore contended, from the wide variations in premiums, that those who insure their vehicle for limited purposes would feel prejudiced if they were grouped for rating purposes with drivers whose premiums are usually greater.¹⁴⁷

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid, 17.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid, 19.

The BIA therefore argued that clauses defining the use and potential users were clearly important to drivers as well as the insurance industry, due to the potential of having a significant adjustment of premiums, as well as providing some protection for the insurer. They stated that clauses are undoubtedly fully observed and voluntarily accepted by the insured, therefore, by removing these clauses there would be a '*genuine grievance*' within the driver community.¹⁴⁸ There was, however, a noticeable omission in the BIA's memoranda in relation to the potential hardship of the third party by use of these exclusion clauses, whether the insured accepts the use of these clauses is less important than the protection offered to the third party victim, who will not be compensated if an exclusion clause was used against them. Of course, it would be expected that this evidence would carry a significant amount of bias as this was an organisation representing the interests of insurers, rather than the victims of a road traffic accident.

The BIA suggested, however, that there were possible ways in which the position could be improved to ensure that victims, in the majority of circumstances, were compensated. They proposed that **Section 12** should be amended to permit only specified restrictions rather than referring to prohibited exclusion clauses.¹⁴⁹ These specified restrictions, the BIA argued, should be determined after a consultation between vehicle users, insurers, and the public.¹⁵⁰

The Ministry of Transport (henceforth '*MoT*') also submitted lengthy memoranda in relation to exclusion clauses. They gave a list of 27 cases of the most common complaints the Ministry received,¹⁵¹ because the vehicle was used outside the terms of the policy. These included several cases where the vehicle was unfit for use (such as where the tyres or brakes were defective or in a poor condition). Moreover, cases where the purpose of travel was not within terms of the policy (such as where the vehicle was used for pleasure but was only insured for business purposes or *vice versa*). Furthermore, cases where the vehicle should not carry a pillion passenger or passenger under a certain age, and finally, cases where the driver of the vehicle had no licence. There was also a clause relating to a driver

¹⁴⁸ Ibid

¹⁴⁹ Ibid

¹⁵⁰ Ibid

¹⁵¹ Departmental Committee on Compulsory Insurance, "Memorandum Submitted by the Ministry of Transport", 18th March 1936, 7-8 (Available at the National Archives).

who had ‘*entered an insane asylum*’.¹⁵² The MoT stated that the list is by no means exhaustive of the provisions that have been used by the insurer. They stated, however, that, ‘*For the most part, these cases would be ruled out of **Section 12** of the (Road Traffic) Act 1934*’.¹⁵³ In fact, it was agreed in the consultation that less than half (13) of the cases in the evidence would be ruled out by **Section 12**. The majority of these related to the carrying of a passenger (prohibited by **Section 12 (c)**), the vehicle’s condition, (**Section 12 (b)**) and the age and mental condition of the driver (**Section 12 (a)**).

Moreover, in their memorandum, the MoT defended the decision to only list certain prohibited exclusion clauses in the **RTA 1934** and stated beliefs that compensation should not be guaranteed, the MoT stated:

“The scheme of protection for third parties embodied in the Road Traffic Acts was not put forward with the idea that it would secure compensation to third parties in every case”.¹⁵⁴

This can be supported by the preparatory documents to the original **RTA 1930**, as well as the MoT statement in the House of Commons.¹⁵⁵ In preparation for the **RTA 1930**, the MoT recognised that there would be a, ‘*minority of cases which would not be covered (by insurance)*’,¹⁵⁶ such as those where the insurer can rely on certain exclusion clauses.

In relation to criticism that insurers often had the propensity to deny claims unfairly, the MoT defended the insurance industry, by stating that it is ‘*invariable practice*’ for insurers to negotiate settlements with third parties.¹⁵⁷ Moreover, it is evident that in the majority of circumstances these *ex gratia* settlements are fair.¹⁵⁸ The MoT further stated that as insurers are not under any direct obligation to compensate, it is unfair to criticise them for failing to meet a claim outside the scope of their policy.¹⁵⁹ This is because their freedom of contract was only partially limited under

¹⁵² Ibid

¹⁵³ Ibid, 1.

¹⁵⁴ Ibid.

¹⁵⁵ See Evidence by the Minister of Transport in the House of Commons (n 126).

¹⁵⁶ Ibid, [7].

¹⁵⁷ Ministry of Transport (n 154), 7.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

the **RTA 1934**. This accords with the reasoning of Hector Hughes KC, (whose paper will be discussed below on pages 60-63), Hughes stated:

*“If the third party is entitled to damages and the wrongdoer has an insurance policy, he will get his damages by direct right from the insurer, provided the general basis of the policy covers the circumstances of the injury. No matter if the policy is avoidable: no matter if the insured has broken contractual obligations into which he freely entered; no matter if the insurers have been tricked and defrauded; the third party will get his damages. That is the position in fact”.*¹⁶⁰

These comments from Hughes and the MoT are conflicting with the comments made by Barry O’Brien. As can be recalled, O’Brien stated that although insurers were often willing to negotiate settlements, despite absence of legal obligations, these settlements were usually minimal. This is because the insurer would often strongly negotiate any settlement which was outside the terms of the policy, knowing that they had the right to refuse to compensate if a settlement in their best interests was not achieved.¹⁶¹

Moreover, whilst insurers would often give *ex gratia* payments. Opinions from judges, such as Goddard J show a different picture where insurers would refuse to compensate in a ‘*disturbing number of cases*’. It is submitted that whilst many insurers were willing to negotiate, many would use the exclusion clauses as leverage in negotiations, and in a minority of cases would refuse to pay claims. Little is known about these cases, apart from where judges such as Goddard J have spoken. It is possible that in some circumstances insurers utilised exclusion clauses where they suspected fraud but could not prove it, or had other issues with the claim. As noted by Professor Merkin, it is clear in insurance law generally, that the, ‘*reason given for not paying a claim is rarely the reason for not paying the claim*’.¹⁶²

¹⁶⁰ Hector Hughes, “The Position of the Injured Third Party”, (1939) M.L.R, 2(1), 297.

¹⁶¹ Barry O’Brien (n 116), 232.

¹⁶² Robert Merkin, “Tort and insurance: some insurance law perspectives” (2010) P.N. 26(4), 194-218, 199.

The MoT was questioned, at length, by the Cassel Committee on their evidence, particularly where the terms used for repudiation were abnormal. The MoT defended the use of abnormal exclusion clauses, such as those relating to use by ‘airmen’ (which was utilised in **Richards**¹⁶³), by stating:

*“There is no doubt that some insurance companies will not accept certain classes of people like airmen at ordinary rates, and we occasionally get complaints about that but our reply is that you can go to some other company”.*¹⁶⁴

It is submitted that although it would be reasonable to exclude compensation to an airman who himself drives the vehicle, because the airman knowingly entered themselves into the contract. It seems unreasonable to exclude compensation to a third party because of the airman’s decision. This shows a contradiction between contractual freedom and third party compensation because the third party simply cannot ‘*find another insurer*’.

It is clear from the evidence of both the BIA and the MoT, that whilst there were cases where some exclusion clauses should not have been used, exclusion clauses are important from both rating and safety purposes. It is apparent that the emphasis was put on keeping the premiums lower, rather than providing guaranteed protection for third parties. This is compatible with the discussion earlier in this chapter relating to **RTCAB**, where pressure was coming from the motoring lobbies to keep premiums down.

The Cassel Committee’s Recommendations

On July 1937, the Cassel Committee released their report named: ‘*Report of the Committee on Compulsory Insurance*’ with recommendations to address this ‘*gaping hole*’ in third party coverage.¹⁶⁵ The exclusion clause chapter of the report began by comparing the prohibition of certain clauses within the **1934 RTA**, with the **Air Navigation Act 1920** (henceforth ‘**ANA**’). The **ANA** prohibited all exclusion clauses in relation to third parties, in cases of aviation accidents, except exclusion clauses which were expressly permitted rather than expressly prohibited exclusion

¹⁶³ Richards (n 92).

¹⁶⁴ Ministry of Transport evidence (n 154), [736].

¹⁶⁵ Phrase used by Donald Williams, *The Motor Insurers’ Bureau* (Oyez Publishing: London, 1972) 4.

clauses as in the **RTA 1934**. The Committee stated that it would be preferable to follow the **ANA** by expressly permitting some exclusion clauses and prohibiting the rest. They stated that the permitted exclusion clauses listed must be '*indispensable*' for the insurer or motorist in relation to pricing risks.¹⁶⁶

The Committee further reinforced the argument made earlier by the BIA that this was the preferred option rather than a blanket prohibition because, '*such a suggestion would render a differentiation of risks practically impossible and would deprive many motorists of the benefit of reduced premiums*'.¹⁶⁷ The Committee further thought that parity was needed between cases involving exclusion clauses and those involving misrepresentation and non-disclosure. Under the **1934 RTA**, the insurer needed to obtain a declaration from the Court to avoid the policy, the Committee stated a similar process should be followed when an exclusion clause is breached to ensure parity.

Numerous suggestions were made in evidence to the Committee, mainly from the BIA, as to clauses deemed fundamental to the insurance industry, drivers, and the public. These clauses would usually materially affect the risk and ensure lower premiums. The Cassel Committee took this on board when drafting the new proposed provision and further divided the proposed permitted exclusion clauses into two, first in relation to limitations of vehicle use, and second, exclusion clauses in relation to the driver of the vehicle. In relation to vehicle use, the Committee's proposed provision stated that the following exclusion clauses should be permitted:

“

- (1) Use for Business purposes except by the insurer (or some named individual) in person*
- (2) Use for Business Purposes other than the business purposes of the insured*
- (3) Use for the carriage of goods of samples in connection with any trade for business*

¹⁶⁶ Board of Trade (n 134), 51-52.

¹⁶⁷ Ibid.

- (4) Use for hire or reward*
- (5) Use for organised racing and speed testing*
- (6) Use, in the case of a public service or goods-carrying vehicle for a purpose not permitted by the licence under which the vehicle is operated*
- (7) Use of a motor cycle without side car being attached* ¹⁶⁸

The second proposed provision relating to the driver of the vehicle stated: “

- (1) Limiting driving to:-*
 - (a) The insured or any person driving with the permission of the insured, permission being assumed if it can be inferred in the circumstances*
 - (b) The insured or persons employed by the insured;*
 - (c) Named persons*
- (2) Excluding driving by:-*
 - (a) A named person or persons*
 - (b) A person whose driving licence has been suspended (during the period of suspension) or a person who is disqualified from attaining a driving licence”.* ¹⁶⁹

These exclusion clauses are therefore analogous to ‘use’ exclusion clauses in the BIA evidence¹⁷⁰ deemed integral for insurers to control their premiums, as well as for consumers who benefited from cheaper rates, by being able to personalise their policies to their needs.

The Committee further thought that it was necessary to provide protection to insurers on the occurrence of extreme events which could lead to many expensive claims, potentially leading to financial issues for insurers. Consequently, the

¹⁶⁸ Ibid, 80.

¹⁶⁹ Ibid.

¹⁷⁰ Discussed above on pages 53-54.

Committee recommended that conditions should continue to be permitted relating to 'war, civil war, riot or commotion'.¹⁷¹ These terms were inserted into many different types of insurance policies, especially after the First World War and were frequently challenged in the courts.¹⁷²

The Committee finally recommended that a Central Insurance Fund should be established as a 'second line of defence'.¹⁷³ The Committee was particularly concerned with the insolvency of major insurance companies which would often leave the victim with no compensation. Consequently, the Central Fund would pay when the insurer was insolvent. The unjust absence of compensation for third parties when an exclusion clause was breached was also recognised,¹⁷⁴ and therefore in the event of a declaration being made by the insurer that a breach was established, the injured victim could recover from the central fund. Moreover, to ensure deterrence against the breach of an exclusion clause, it was recommended that the Central Fund could recover any compensation from the insured, this would also be positive in keeping premiums lower, as ultimate burden of paying would not be on the average motorist who pay for the Central Fund in their premiums.

Reaction to Cassel: The Hughes-Chorley Debate

The Committee's report stirred up a major debate which was played out in the *Modern Law Review*. Hector Hughes K.C. in his article titled '*The Position of the Injured Third Party*' was particularly sceptical of the Cassel Committee's report and proposals. Hughes stated that the proposals in relation to exclusion clauses constituted; '*a series of important interferences with the contractual freedom of insurers in the name of third parties*'.¹⁷⁵ Hughes further argued that if the recommendations in relation to exclusion clauses were implemented then it would; '*go far to impairing the bases upon which the insurance contract is built at present*'.¹⁷⁶ He focussed particularly on the business side of compulsory insurance and stated:

¹⁷¹ Board of Trade (n 134), 80.

¹⁷² See *Curtis and Sons v Matthews* [1919] 1 K.B. 425.

¹⁷³ Board of Trade (n 134), 74.

¹⁷⁴ *Ibid*

¹⁷⁵ Hector Hughes, "The Position of the Injured Third Party", (1937), *M.L.R* 1 (4), 258, 260. The Hughes-Chorley debate was discussed within Matthew Channon (n 24) in relation to balancing third party rights and premiums. This was more to do with how consumers viewed motor insurance.

¹⁷⁶ *Ibid*, 265.

“(The Insurance Contract) as a business agreement...essentially rests on a variety of facts, without the incorporation of which it would be impossible to carry on insurance business at all. To pursue the interests of third parties in total disregard of these important features would have defeated its own purpose”.¹⁷⁷

Hughes’ argument is that motor insurance contracts are unique, because they are assessed on the basis as to which the vehicle is used, and the person driving it. By removing these variants, Hughes believes that the purpose of the insurance contract would be defeated, and was further critical of the shifting of the burden to the insurer to prove that an exclusion clause was breached.¹⁷⁸ Whereas with the **RTA 1934**, the onus fell on the victim to prove that the accident was within the insurers’ policy, the Committee proposed that the burden should put on the insurer to prove that the claim was outside the scope of the policy. Hughes stated that this would impair the ability of the insurers to avoid a contract. Finally, Hughes was sceptical of the proposed Central Fund and argued that it would ‘*open up a sea of litigation*’, encouraging a greater number of claims from ‘*victims*’ knowing that they would be guaranteed compensation.¹⁷⁹ Hughes’ overall argument therefore is in providing a balance between ensuring that compensation is paid to the innocent victim, whilst also not penalising the insurer and average motorist who would ultimately be forced to pay higher premiums.

Hughes’ comments provoked a large amount of scepticism and with the Editor of the Modern Law Review, Professor Chorley (as he then was).¹⁸⁰ Professor Chorley challenged Hughes on both narrow and wider grounds, and asserted that the burden put on insurers to pay was ‘*superficial*’, because the financial cost would be borne by the motorist through higher premiums. Moreover, Professor Chorley argued that it was likely that the majority of injured third parties were likely to be motorists themselves and therefore the proposed provisions would benefit all parties.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid

¹⁷⁹ Ibid.

¹⁸⁰ See Lord Chorley, “Third Party Insurance: Compulsory Third Party Insurance”, (1938) M.L.R 2 (1), (June), 36.

Professor Chorley further opined that ‘*strictures*’ such as those made by Hughes were common when a new piece of social legislation was introduced and are eventually met with positivity. An example of employment legislation in the ***Workman’s Compensation Act 1906*** was used to justify this, which gained severe criticism from many but was eventually deemed to be a successful and vital piece of legislation in the protection of employees.¹⁸¹ Finally, Professor Chorley stated that insurance companies are often met with ‘*undue tenderness*’,¹⁸² since they were able to use a variety of defences to avoid payment of a claim, and this substantially weakened the protective effect of the ***RTA 1930***.

Hector Hughes was then granted leave to reply to Professor Chorley’s comments and introduced another article in the *Modern Law Review*.¹⁸³ Hughes stated in relation to Professor Chorley’s argument, that if exclusion clauses were introduced, insurers could just increase their premiums:

“Does Professor Chorley know that the motor insurance rating system is anything but nicely calculated? Does he know that insurers are not making profits out of home motor insurance? Does he know that intense competition by one hundred insurance companies and Lloyd’s prohibits any general increase of premiums until years of loss have been traversed? And does he know that the necessity of maintaining their position and of absorbing their overhead charges dis-enables insurers from refusing to underwrite business which turns unprofitable?”¹⁸⁴

According to Hughes motor insurance is unprofitable for insurers, and due to the competitiveness of the industry, it is not easy to increase the premium for motorists if exclusion clauses are prohibited. Hughes went a step further and stated that if the law went further and prohibited the insurers’ right to repudiate liability then it would, ‘*destroy the bases upon which insurers at present seek to gauge their risks and calculate premiums*’.¹⁸⁵ Furthermore, Hughes stated that:

¹⁸¹ Ibid, 40.

¹⁸² Ibid, 38.

¹⁸³ Hector Hughes, “The Position of the Injured Third Party”, (1939) *M.L.R* 2 (4) (March), 295.

¹⁸⁴ Ibid, 298.

¹⁸⁵ Ibid, 299.

*“In addition to an aggregate increase of premium charges, all pretence of making the premium commensurate with the risk would fall away, and numerous individual hardships would result”.*¹⁸⁶

Hughes argued that the removal of exclusion clauses would result in significant hardship to the innocent motorist. He argues, similarly to the BIA, that if exclusion clauses were prohibited then it would be impossible to differentiate between risks. Hughes did not answer any of Chorley’s remarks on the wider sociological aspects of this and stated that there could be no comparisons between previous social legislation and the law relating to running down.

The above articles show that there were two very contrasting views relating to the insurers’ right to repudiate liability against third parties. There was a clear divide between those who thought that the victim should be protected in all cases, and those who thought that the freedom of contract between the insured and the insurer should be maintained. Evidently, third party motor insurance is not as straightforward as compensating all victims, as previous academic commentary advocated. Insurers are primarily a (profitable) business and traditionally rely on freedom of contract to enable them to avoid liability, as well as offer premiums prices based on risk, which is fundamental to the insurance practice. Consequently, by removing this differentiation of risk through removing exclusion clauses, insurance practice would be substantially different and unprofitable. This, it is submitted, is contradictory to the purpose of third party insurance which is to ensure that the innocent victim is compensated.

Implementation of the Cassel Committee’s Recommendations

Some of the Committee’s proposals, involving the extension of the deposit system, were implemented immediately. However, due to the distraction of the Second World War, it was not until 1946 that the Committee’s most significant proposals were revisited.¹⁸⁷ In 1946, the MoT met with major insurance companies to form the MIB. This was due to pressure on the insurance industry to ensure that a last resort was in place if the insurer decided to repudiate liability against third parties. An agreement was formed to implement the Cassel Committee recommendations,

¹⁸⁶ Ibid.

¹⁸⁷ See Shawcross (n 74), 362.

to provide victims of an accident with compensation when the driver could not be identified, had no insurance, or the insurance was not effective due to a clause in the policy. The Bureau consists of every insurance company in the UK and is funded by them and therefore indirectly funded through the premiums of the motorist.¹⁸⁸

Because of the MIB's role in ensuring that victims are guaranteed compensation, the Government did not think of it as a priority to reform the law on exclusion clauses as the injustice caused to the innocent third party victim was supposedly removed by creating a backup compensation scheme,¹⁸⁹ although this ignored the fact that the Cassel Committee had proposed to reform exclusion clauses also. Consequently, **Section 12** continues in existence today under **Section 148 RTA 1988** with all exclusion clauses in the original **Section 12** (albeit with occasionally slight changes in wording) continuing to be prohibited.

Conclusion

This Chapter has emphasised that although the **RTA 1930** was a significant step forward for the rights of victims, it failed to address the insurers' right to exclude claims due to exclusion clauses. The **RTA 1934** was a further substantial step forward, but continued to leave a substantial gap. The list of prohibited exclusion clauses within the **RTA 1934** were introduced to help meet the needs of the innocent victim of the time, by removing the most commonly used exclusion clauses and it seems that this did not go far enough.

Further emphasis in this Chapter was placed on the regulatory challenges faced by attempting to balance the need to ensure compensation for the most vulnerable, whilst ensuring that the insurance rating system and public protection were not undermined, although there is uncertainty as to the effect of exclusion clause use on public protection, through attempting to provide a deterrent. It is submitted that the regulator went too far in protecting the insurer, rather than providing adequate third party protection. Pre-1946 victims were left without compensation, and

¹⁸⁸ For more discussion of the MIB see Chapter Seven.

¹⁸⁹ Ibid.

insurers could go further by repudiating liability in situations which had little to do with rating. Moreover, it is apparent that insurers utilised exclusion clauses as bargaining chips, allowing the reduction of compensation. Pre-1946 victims were left without any compensation, and insurers were often able to go further by repudiating liability in situations which had little to do with rating. Moreover, it is apparent that insurers utilised exclusion clauses as bargaining chips, which allowed them to reduce compensation payments.

This Chapter has examined the Cassel Committee's recommendations to reverse exclusion clauses from prohibited to permitted, which attempted to effectively balance the interests of the insurance industry, the insured, and the vulnerable victim. It is not clear whether the reversal of exclusion clauses would have been effective. Although some indication of effectiveness can be found in Chapter Four, as this is an approach partially taken by the EU. The enacted Cassel Committee recommendation to introduce the MIB has certainly increased the protection offered to third parties, although the extent of this will be discussed on Chapter Seven.

Overall therefore this Chapter has significantly contributed to this thesis through providing an analysis of the difficulties faced through the introduction of the original legislation, which clearly struggled to regulate exclusion clauses effectively. Moreover, this Chapter emphasises the conflicts arising from the provision of lower premiums and the protection of third parties in the Cassel Committee consultations and subsequent debate.

With background examined, it is important to consider the approach taken by the UK currently, in the **RTA 1988**. It is important to understand how the list of prohibited exclusion clauses in the **RTA 1988** have been interpreted and the extent to which exclusion clauses are permitted beyond those.

Chapter Three: Exclusion Clauses under the Road Traffic Act 1988

Introduction

The most substantial regulation of motor insurance exclusion clauses is in the **RTA 1988** and the interpreting case law. The Act remains fundamentally the same as its predecessor, the **1934 RTA**. However, it is clear from recent cases, that the exclusion clause provisions within current legislation are the ongoing subject of debate. The list of prohibited exclusion clauses in **Section 148 RTA 1988** is identical to those found in **Section 12** of the 1934 Act, although an additional list of prohibited exclusion clauses can be found in **Section 151 RTA**.

It is, however, questioned in the absence of an exhaustive list from the legislature, whether these lists of prohibited exclusion clauses are exhaustive, and the extent to which other exclusion clauses are permitted under the **RTA 1988**. This subject has only been dealt with on few occasions due to the role of the UK MIB, who frequently pay third party claims when an exclusion clause is breached.¹⁹⁰

In Part I, this Chapter will examine the interpretation of each of the prohibited exclusion clauses contained within the **RTA 1988**. Part II of this Chapter will then examine whether the exclusion clauses in **Sections 148** and **151** are exhaustive. This will be through examining lines of case law which have examined both the **RTA** itself but also the conflicting policies behind the Act. Finally, Part III of this Chapter will assess potentially permitted exclusion clauses by examining dictum which have permitted certain exclusion clauses.

Part I: Prohibited Exclusion clauses under the Road Traffic Act 1988

As stated above on this page the prohibited exclusion clauses contained within the original **RTA 1934** have not changed, and are currently contained within the **RTA 1988**. These are: the age or physical or mental condition of persons driving the

¹⁹⁰ This will be discussed in the Sixth Chapter.

vehicle,¹⁹¹ the condition of the vehicle,¹⁹² the number of persons that the vehicle carries,¹⁹³ the weight or physical characteristics of the goods that the vehicle carries,¹⁹⁴ the time at which or the areas within which the vehicle is used,¹⁹⁵ the horsepower or cylinder capacity or value of the vehicle,¹⁹⁶ the carrying on the vehicle of any particular apparatus,¹⁹⁷ or the carrying on the vehicle of any particular means of identification, other than any means of identification required to be carried by or under ***the Vehicle Excise and Registration Act 1994***.¹⁹⁸

In addition, exclusion clauses relating to liability due to action that the insured should or should not have taken after the happening of the accident, which were restricted under the ***1930 RTA***,¹⁹⁹ remain invalid under ***Section 148 (5) RTA***.²⁰⁰ Moreover, the insurer can continue to recover from the insured for any damages paid due to breach of an exclusion under ***Section 151 (8) RTA***.²⁰¹ Prohibited clauses within ***Section 148*** have rarely been examined by the courts or academics because of the MIB acting as last resort. Consequently, in interpreting these exclusion clauses, early case law will be relied upon alongside the Shawcross 'Law of Motor Insurance' editions, Hughes' 1937 Book,²⁰² and Professor Merkin's recent 'Law of Motor Insurance' edition.

Section 148

The Age, Physical or Mental Condition of Persons Driving

Insurers must not utilise clauses relating to the age of the person driving the vehicle, even if the driver is below the legal age to drive. The age prohibition was introduced since it was one of the most criticised exclusion clauses, especially when used in relation to drivers under the age of 21, who were often restricted from driving within policies due to concerns about their level of skill or experience.²⁰³

¹⁹¹ Section 148 (2) (a) RTA.

¹⁹² Section 148 (2) (b) RTA.

¹⁹³ Section 148 (2) (c) RTA.

¹⁹⁴ Section 148 (2) (d) RTA.

¹⁹⁵ Section 148 (2) (e) RTA.

¹⁹⁶ Section 148 (2) (f) RTA.

¹⁹⁷ Section 148 (2) (g) RTA.

¹⁹⁸ Section 148 (2) (h) RTA.

¹⁹⁹ Section 38.

²⁰⁰ A discussion of these can be found in the previous Chapter on pages 37-39.

²⁰¹ This interpretation of this clause can be found in the next Chapter on pages 139-140.

²⁰² See Hughes H (n 100).

²⁰³ See previous Chapter and Department for Transport's consultation with Cassel on pages 54-57.

Consequently, the provision prohibits the insurer from using this clause and restrictions where the driver incorrectly states their age on a proposal form.²⁰⁴ Attempts have been made to extend this condition to all drivers irrespective of their age, physical or mental condition, however this was rejected recently in **Sahin v Harvard**²⁰⁵ (henceforth '*Sahin*') by Longmore LJ who stated that this was '*obviously wrong*'.²⁰⁶

Although it has not been interpreted as all encompassing, the courts have interpreted the phrase '*mental condition*' widely. It is apparent that this would almost certainly involve clauses in relation to the driver being intoxicated through either drink or drugs. In **Louden v British Merchants Insurance Co**,²⁰⁷ when examining whether an intoxication clause could be used against a first party, the Court reaffirmed previous case law²⁰⁸ that intoxication '*disturbs the balance of a man's mind*'.²⁰⁹ This was relied upon in the Singaporean case of **Tan Ryan v Lua Ming Feng Alvin** (henceforth '*Tan Ryan*').²¹⁰ This is highly persuasive authority, as the Singaporean **Motor Vehicles (Third Party Risks and Compensation) Act 1960** is based on the English **RTA 1988** with the same prohibited exclusion clauses. The Court in **Tan Ryan** held that intoxication would clearly affect the drivers '*mental condition*' and comparably that the, '*contamination of a person's bloodstream by a foreign substance (such as alcohol) seemed ...to be eminently a matter of that person's "physical... condition"*'.²¹¹ The Court further held that the driver's intoxication falls alongside the other exclusion clauses most commonly used by insurers and therefore were intended to fall within the prohibited exclusion clauses.²¹²

An argument reinforcing the restriction of driving in relation to intoxicated drivers is that they are expressly prohibited in EU Law under **Article 13** of the **Sixth**

²⁰⁴ See *Merchants and Manufacturers v Hunt and Thorne* [1941] K.B. 295.

²⁰⁵ *Sahin v Harvard* [2016] EWCA Civ 1202.

²⁰⁶ *Ibid*, [22].

²⁰⁷ [1961] 1 W.L.R. 798.

²⁰⁸ *Mair v Railway Passengers Assurance Company Ltd* (1877) 37 LT 356.

²⁰⁹ *Louden* (n 210), 157.

²¹⁰ *Tan Ryan v Lua Ming Feng Alvin* [2011] SGHC 151.

²¹¹ *Ibid*, [41].

²¹² *Ibid*.

Directive,²¹³ due to their consistent use against third parties throughout the EU.²¹⁴ The UK have used **Section 148 (2)** to show compliance with that provision. Consequently, there is little doubt that exclusion clauses relating to intoxicated drivers are prohibited.

However, in **National Farmers' Union Mutual Insurance Society Ltd v Dawson**,²¹⁵ the High Court held that this provision does not extend to a condition requiring the insured to employ only steady and sober drivers. Viscount Caldecote C.J. noted that, at most, the exclusion clause relating to employing drivers who are sober purports to restrict the insurance from applying to cases where the insured has not used all care and diligence, to do the things specified in the condition. His Lordship stated that is very different from a restriction which refers to the physical or mental condition of persons driving the vehicle.

Moreover, mental condition would also include clauses involving those who are mentally incapable, such as clauses highlighted in the Cassel Committee consultation, involving those who had entered an '*insane asylum*'. Although it would be improbable that this clause would ever be utilised today. Similarly, with those who are physically unable or impaired to drive due to a disability.

The Condition of the Vehicle

As stated in the previous Chapter on page 44, significant concerns were raised about the use of exclusion clauses involving the condition of the vehicle, especially when vehicle condition had not contributed to the accident. Consequently, **Section 148 (3) RTA 1988** prohibits exclusion clauses in relation to vehicle condition and roadworthiness, even where poor vehicle condition was partially or wholly responsible for the accident. Generally, the exclusion clause used is that, '*the vehicle should be maintained in a roadworthy condition*' but the prohibition also extends to clauses involving maintaining the vehicle in an '*efficient*' or '*safe*' condition. This, however, does not extend to clauses in relation to the age, make,

²¹³ Also see Bernáldez [1996] 2 C.M.L.R. 889 from the ECJ which will be discussed on pages 118-124.

²¹⁴ Further see the case of *Candolin v VahinkovakuutuMoTakeyhtio Pohjola* (C-537/03) [2005] E.C.R. I-5745 where compensation in Finland was denied to the passengers due to intoxication.

²¹⁵ [1941] 2 K.B. 424.

type or carrying capacity of the vehicle as this would clearly go beyond the intention of the provision.²¹⁶

Moreover, clauses relating to the roadworthiness of the user of the vehicle, such as through inexperience, do not fall within this prohibition.²¹⁷ Likewise, use of the vehicle without lights at night, due to the fault of the road user, is also not prohibited, as well as clauses relating to the weight of the vehicle.²¹⁸ It is unclear whether overloading of a vehicle would fall under the condition of the vehicle. For example, **Clarke v National Insurance and Guarantee Corp**,²¹⁹ held that carrying too many passengers made the vehicle unroadworthy. In contrast, **A P Salmon Contractors Ltd v Monksfield**²²⁰ (henceforth 'Salmon') held that faulty loading did not make the vehicle unroadworthy, the vehicle itself was not faulty. This it is submitted, is a clear distinction to be made.

Although overloading has only been discussed in determining if an exclusion clause had been breached, this can also determine whether an exclusion clause is prohibited. It is submitted that overloading of a vehicle would fall within this prohibited exclusion clause, as this has the potential to make a vehicle unroadworthy. In **Salmon**,²²¹ it was not the overloading but rather method of loading that caused the accident. Whereas in **Clarke**,²²² the overloading caused the vehicle to be unroadworthy. It is clear though, that overloading could also fall within the prohibited exclusion clause in **Sections 148 (c)** in relation to passengers and **Section 148 (d)** in relation to goods, showing that these prohibitions do often overlap.

It is notable that the prohibition of the roadworthiness exclusion clause satisfies one of the prohibited exclusion requirements in **Article 13** of the **Sixth Directive** which prohibits insurers from using exclusion clauses relating to the safety of the vehicle.²²³

²¹⁶ Shawcross (n 74).

²¹⁷ This was argued and dismissed in *Rendlesham v Dunne* [1964] 1 Lloyd's Rep. 192.

²¹⁸ Section 148 (d) 1988.

²¹⁹ *Clarke v National Insurance and Guarantee Corp* [1964] 1 Q.B. 199.

²²⁰ *Monksfield v Vehicle and General Insurance Co* [1971] 1 Lloyd's Rep. 139.

²²¹ *Ibid.*

²²² *Clarke* (n 222).

²²³ Article 13 (c) Sixth Consolidated Motor Insurance Directive 2009/103/EC of the European Parliament and Of the Council of 16 September 2009 relating to insurance against civil liability in

The Number of Persons that the Vehicle Carries

This provision prevents the use of exclusion clauses in relation to the number of persons being carried in or on the vehicle. Although this was seemingly a prevalent exclusion clause used by insurers' pre-1934, there is little evidence of use or interpretation of this exclusion clause through case law. A clause of this type was examined in ***Bright v Ashfold***²²⁴ which involved a clause prohibiting a motor cycle from carrying a pillion passenger; the case was decided before the introduction of the **RTA 1934**, and it is submitted, would almost certainly fall within this prohibition. It is important to note that this clause only refers to the number of passengers and does not include the weight of the vehicle due to passenger overloading which is highlighted in the judgment of Lord Denning in ***Houghton v Trafalgar Insurance Co.***²²⁵ Consequently, a '*Houghton*' clause can be used under the **RTA 1988** as far as it applies to the carrying of people but not when it applies to goods (as shown directly below).²²⁶

The weight or physical characteristics of the goods that the vehicle carries

This clause prevents the insurer from relying on policy terms related to the weight of the vehicle or the physical characteristics of the goods which are carried by the vehicle. This, it seems, does not cover the quantity of goods carried, but rather their weight. For example, as noted by Shawcross, a clause which limited a milk lorry to a certain number of milk churns would continue to be valid even if this went beyond the lorry's capacity.²²⁷ It is clear, however, that this prohibited exclusion clause is rather limited in its' effect. For example, in ***Jones v Welsh Insurance Corporation Limited***,²²⁸ an insurer utilised an exclusion clause limiting the use of the vehicle to '*social, domestic or pleasure purposes*', although the insured's brother used the vehicle to carry sheep as part of his business. The plaintiff argued that this exclusion clause could not be used under **Section 12 (2) (d)** because the exclusion related to the physical characteristics of the goods. Goddard J rejected this

respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability.

²²⁴ *Bright* (n 79).

²²⁵ *Houghton v Trafalgar Insurance Co Ltd* [1954] 1 Q.B. 247.

²²⁶ Robert Merkin *Colinvaux* (n 3), 1395

²²⁷ *Shawcross* (n 74), 321.

²²⁸ [1937] 4 All E.R. 149.

argument and stated that in this case, the question was not as to the nature of the goods or their characteristics, but rather the nature of the journey. For example, whether the vehicle was used for domestic purposes or whether the goods carried, whatever their nature, were carried in connection with business. This, it is submitted, is an important distinction, as exclusion clauses involving, '*social, domestic and pleasure purposes*' are used in the majority of policies to define the risk.

By essentially equating the characteristics of goods with the purpose of travel, insurers would be deprived of using an exclusion clause which they deem essential to limit risk. It is submitted that Judge Goddard is correct in this distinction, as the exclusion clause was not based on the physical characteristics of the goods, but rather that they were carried for a specific purpose, the insurer would not have repudiated liability if the goods were carried for social purposes.

Time and Area of Use

This clause refers to the time and area of use; including prohibiting exclusion clauses relating to the use of a vehicle within certain hours. An example can be found in *Farr v Motor Traders Mutual Insurance*,²²⁹ where a taxi cab could not be driven more than once in 24 hours. The exclusion clause further prohibits clauses relating to use of a vehicle on certain days or within certain areas and geographical locations such as in *Palmer v Cornhill Insurance Co Ltd*.²³⁰

The Horsepower or Cylinder Capacity or Value of the Vehicle

Shawcross noted that the introduction of a prohibited exclusion clause in the *RTA 1934* in relation to the horsepower or cylinder capacity (added by *Finance (no.2) Act 1945, Section 5 (2) (c)*) of the vehicle seems to doubt that the list of prohibited exclusion clauses in **Section 12** were limited to exclusion clauses, and did not include misrepresentation or non-disclosure. The main reference to the horse power and value of the vehicle are in the proposal form and not the policy itself. This, therefore, is still a valid observation to make presently, as proposal forms usually ask for this data and it is not included within the actual terms of the policy.

²²⁹ Farr (n 112).

²³⁰ AW&E Palmer v Cornhill Insurance Co Ltd (1935) 52 Ll. L. Rep. 78.

This provision, however, is rather limited, as although it touches some of the major defining characteristics of the vehicle, it does not touch other significant characteristics which could increase risk. These include the age or model of the vehicle or its alterations.

The Carrying on the Vehicle of any Particular Apparatus

This prohibited clause relates to the carrying of certain apparatus which is either prohibited or necessary under the policy. Prohibited apparatus can include substances such as the carrying of any radioactive or potentially explosive material on the vehicle; this would also apply to bulk transportation of liquefied petroleum, gasoline or any inflammable liquid. It can also include, apparatus carried for a purpose. It is submitted, however, that this does not include apparatus which substantially changes the character of the vehicle such as the adding of a side-car to the vehicle or making it amphibious, as this does not restrict the insurance but rather defines it.²³¹ Moreover, it is evident that this prohibition does not apply to clauses which restrict the carrying of goods completely.²³² Finally, Hector Hughes notes that a borderline case is where a clause is found in a private motor car policy in the description of use, which prohibits, '*carriage of goods or samples in connection with any trade or business*'²³³. This prohibits carriage of goods of a description and does not prevent the carrying of goods in general. Consequently, it seems to refer to the '*characteristics of goods*' albeit the circumstantial characteristics, as the same goods could be carried with different vehicle uses. Accordingly, Hughes submits that this is not an exclusion clause which falls under the prohibition.²³⁴

Necessary apparatus can include the carrying of fire extinguishers, mirrors, and headlights, although it is unlikely to find exclusion clause in a private motor vehicle for fire extinguishers', and this provision rather relates so some vehicles carrying potentially flammable material.

²³¹ See Shawcross (n 74), 324.

²³² See Piddington v Co-operative Insurance Co Ltd [1934] 2 K.B.236 cited in Hughes H (n 95), 356.

²³³ Hughes H (n 100), 356.

²³⁴ Ibid.

Carrying of Identification

This provision prohibits the insurer from utilising an exclusion clause relating to the means of identification other than identification required to be carried by or under the ***Vehicles Excise and Registration Act (VERA) 1994***. As it is no longer a legal requirement to carry a tax disk (***VERA***), it seems that nearly all exclusion clauses relating to carrying identification are invalid against third parties. Moreover, it is unlikely that such exclusion clause would ever be used currently as there is no legal requirement to carry a licence or an insurance certificate.

Liability Required to be Covered

It is finally important to note that the eight named prohibited exclusion clauses in ***Section 148*** only apply in relation to '*Liabilities which are required to be covered by a policy in Section 145 RTA*'. ***Section 145 (3) (a)*** requires all liability to be covered, '*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 a vehicle on a road*'. Consequently, if the vehicle is being used outside of the requirements for compulsory insurance within ***Section 145***, then a prohibited exclusion clause within ***Section 148*** could be used against a third party.

There are certain areas where the vehicle is being used outside of ***Section 145***. For example, in relation to the term '*vehicle*' which is defined within ***Section 185 (1) RTA 1988***, '*a mechanically propelled vehicle intended or adapted for use on roads (and other public places)*'. This definition therefore excludes vehicles which are only intended to be used on private land.

Similarly, the use of any vehicle on private land does not require insurance coverage according to the ***RTA 1988***, insurance is only required for roads or '*other public places*' (***Section 143 (1) (a)***). Public places are defined as places in which the public have access, which is largely unrestricted, and open to the public in general.²³⁵ Whether land is deemed '*public*' for compulsory insurance purposes is decided on a case by case basis. It is worth noting, however, that due to the recent CJEU decision in ***Vnuk***,²³⁶ the distinction between public and private land does not exist at EU level, as insurers must cover for use of a vehicle on both. Furthermore,

²³⁵ *Police v Smith* [1976] 2.Z.L.R. 412.

²³⁶ *Vnuk v Zavarovalnica Triglav dd* (C-162/13) [2016] R.T.R. 10.

any vehicle must be covered if its use is consistent with the '*normal function of that vehicle*'. There is little doubt that due to the differences in approaches, the UK is currently infringing EU Law in this regard.²³⁷ However, with the UK negotiating to leave the EU (which will be discussed in the next chapter on page 177) and EU reform imminent, there is difficulty in determining exactly what the law will be in the future.

Moreover, with the likelihood that all vehicles and types of land will not require coverage in the future, this provision of **Section 148**, essentially permits the insurer to use any exclusion clause against a third party in these instances. The practical consequence of this is minimal, as the insurer would be repudiating liability anyway, due to the circumstances of the accident being outside of the scope of their cover.

Prohibited Exclusion Clauses in Section 151

Section 151 (3) of the **RTA 1988** contains a prohibited exclusion relating to the use of the vehicle by an unlicensed driver. This clause evidently provides an important inroad in the insurers' utilisation of exclusions,²³⁸ as exclusion clauses relating to unlicensed drivers were prevalent in earlier policies and deemed vital by the insurance industry.²³⁹ It seems that this was a clause which was forced to be prohibited by EU law as it comes within one of the prohibited exclusion clauses in **Article 13 (1)**. Consequently, victims of accidents relating to unlicensed drivers can claim back directly from the insurer for any losses.

Moreover, since the UK's implementation of **Article 13 (1)**, through **Section 151 (2) (b) RTA 1988**, the insurer cannot repudiate liability due to an unauthorised person using a vehicle, and must satisfy a judgment.

Part II: Are Exclusion Clauses Completely Prohibited under the RTA?

²³⁷ See *UK Insurance Ltd v Holden* [2016] EWHC 264 (QB).

²³⁸ *Merkin* (n 23), [5-198].

²³⁹ See evidence to Cassel in the previous Chapter.

Whether exclusion clauses can be used against a third party in UK law, other than the prohibited exclusion clauses in **Section 148**, has rarely been discussed in the Courts. This is because of its' limited importance to the majority of third parties or insurers, as the insurer would usually need to handle the claim and pay compensation anyway due to **Article 79** of the MIB **Uninsured Driver's Agreement**. In fact, only four cases have dealt with this directly, with the most thorough examination by **Ward LJ** in **Bristol Alliance**.²⁴⁰

Bristol Alliance Partnership v Williams

In **Bristol Alliance**²⁴¹ the driver of the motor vehicle, when attempting to commit suicide, deliberately drove into a House of Fraser Store in Cabot Circus, Bristol causing over £200,000 damage with no personal injury caused. The driver's insurance policy contained the following exclusion clause:

*"We will not pay...any loss, damage, death or injury arising as a result of a 'road rage' incident or deliberate act caused by you or any driver insured to drive your car".*²⁴²

The shop recovered reparation costs from their property insurers, and the property insurers therefore applied to subrogate the claim to the motor insurers, who refused to refund the property insurers. This was due to the clear breach, by the driver, of the exclusion clause in his policy. Consequently, the shop received compensation to fix the damage caused by the driver, with the losses remaining with the property insurers, who took the matter against the motor insurers to the High Court. What followed, therefore, was a dispute between two insurers as to the payment of damages. It is notable that, whereas a third party victim, if refused compensation due to breach of a policy term, could potentially claim compensation under the MIB's **UDA**, insurers could not, as the **UDA** does not allow subrogated claims.²⁴³ Subsequently, the property insurers could only claim, under the insureds' name, directly from the motor insurers under the standard avenue given to third party victims through **Section 151 RTA**.

²⁴⁰ Bristol Alliance (n 15).

²⁴¹ Ibid.

²⁴² Ibid, 817.

²⁴³ Art 6 (1) Motor Insurers' Bureau: Uninsured Drivers Agreement.

Clauses which exclude '*deliberately caused damage*' are not listed under **Section 148 RTA**, and therefore the courts were asked to decide whether the list of prohibited exclusion clauses was exhaustive. If **Section 148 RTA** was not exhaustive, then the property insurers could not recover, whereas if other exclusion clauses were prohibited also, the property insurers could potentially recover against the motor insurers. Both Tugendhat J in the High Court Queen's Bench Division,²⁴⁴ and then Ward LJ in the Court of Appeal, examined UK and EU law in determining the outcome.²⁴⁵ In relation to UK law, the judges paid attention to a line of cases which concentrated on the issue of public policy which prohibits payment of compensation for illegal acts (*ex turpi causa non oritur action* (henceforth '*ex turpi causa*'²⁴⁶)), and its' relationship with the duty to provide compensation to all injured third parties of road accidents under the **RTA 1988**. These cases will now be examined.²⁴⁷

Unlimited Duty to Provide Compensation?

In ***Hardy v Motor Insurers' Bureau***²⁴⁸ (henceforth '*Hardy*'), a security officer was injured after the driver of a vehicle drove away with the officer partially inside the vehicle. The driver was convicted under the ***Offences against the Persons Act 1861*** for maliciously inflicting grievous bodily harm on the officer. The driver was uninsured and therefore the security officer claimed to the MIB. Under the **UDA**, the MIB would only pay when the liability was one which, '*is required to be covered by a policy of insurance*'²⁴⁹ within the **RTA 1960**. The MIB argued that they were not required to compensate the officer due to a line of authority establishing that a contract of insurance, to cover the performance of a deliberate criminal act, is unenforceable as being contrary to public policy which does not cover illegal acts. Whereas the plaintiff argued that the **RTA**, through its requirement in **Section 145** that the insured is covered for '*any liability*' which may be incurred by the driver, as well as the victim's direct right of action in **Section 151**, intended that third parties

²⁴⁴ Bristol Alliance Ltd Partnership v Williams [2011] EWHC 1657 (QB).

²⁴⁵ For EU Law examination by both judges see next Chapter.

²⁴⁶ This will be referred to as '*ex turpi causa*'.

²⁴⁷ Note, this is *ex turpi causa* in relation to Acts by the Driver, a later Chapter will examine this issue in more depth with emphasis also placed on illegal Acts by the third party.

²⁴⁸ Hardy v Motor Insurers' Bureau [1964] 2 Q.B. 745.

²⁴⁹ Motor Insurers' Bureau Agreement June 17th, 1946.

should always be entitled to recover even in cases of the insured's illegal activities.²⁵⁰

Lord Denning M.R stated that it is based on the rule of public policy that no person can claim indemnity for his own wilful crime; however, the obstacle which is attached to the driver is also not attached to the third party claimant who can continue to make a claim. Lord Denning further stated that the policy of insurance which a motorist is required by statute to take out must cover, '*any liability which may be incurred by him (the driver of the vehicle) arising out of the use of the vehicle by him*', including, '*any use by him of the vehicle, be it an innocent use or a criminal use, or be it a murderous use or a playful use*'.²⁵¹ Liability arising from deliberate misconduct must be insured in the same way as negligence, and, consequently, the victim should be able to recover. The issue was again examined by Pearson LJ who gave three potential consequences of deliberate running down on an insurance policy:

*(1) a wide implied exception under the policy, the effect of which was that the policy would not cover liability arising from an intentional criminal use of the vehicle; (2) a narrower implied provision that a policy complying with the legislation would cover liability, but that the wrongdoer himself and his personal representative could never recover; (3) the policy covered full liability, but with a personal ban preventing the wrongdoer and his personal representative from recovering".*²⁵²

Pearson LJ excluded the first possibility that the policy would not cover intentional criminal use by citing Fry LJ in ***Cleaver v Mutual Reserve Fund Life Association***, (henceforth '*Cleaver*')²⁵³ a case concerning life insurance, who stated that, '*The rule of public policy should be applied so as to exclude from benefit the criminal and all claiming under her, but not so as to exclude alternative or independent rights*'.²⁵⁴ However, Pearson LJ did not distinguish between the other two

²⁵⁰ Hardy v MIB (n 251), 759.

²⁵¹ Ibid.

²⁵² Ibid, 764-765.

²⁵³ [1892] 1 Q.B. 147.

²⁵⁴ Ibid, 159, emphasis added.

possibilities as to whether there was an implied exception or just personal ban and left this open to future Courts to examine.

Finally, Diplock LJ in **Hardy** stated that the scheme of the motor insurance legislation is not to affect a statutory assignment of the insured's rights under his contract of insurance, but to confer on a third party, a direct right of action against the insurers.²⁵⁵ Additionally, the judgment which gives rise to the direct liability of the insurers to the third party under **Section 207 RTA 1960** must be a judgment in respect of a liability of the insured covered by the terms of the contract of insurance. The Court of Appeal, therefore unanimously held that because there was no contract to construe, despite the driver's illegal act and although the driver could not recover from his own insurers, the victim was entitled to recover from the driver's insurers as a separate cause of action. Consequently, the Court of Appeal considered that the public policy of the **RTAs**, which is fundamentally aimed at protecting the innocent victim by ensuring that they receive compensation, overrides the public policy from previous case law, in relation to the non-compensation of illegal acts.

Hardy was then challenged before the House of Lords in **Gardner v Moore**²⁵⁶ (henceforth 'Gardner'), with facts resembling **Hardy** whereby a car was deliberately driven into a pedestrian causing severe injuries. Lord Hailsham in **Gardner** confirmed the **Hardy** judgment was correct by reiterating the words of Lord Denning, that although the insured may not be able to recover, the innocent victim should be able to recover from the insurers.²⁵⁷ Lord Hailsham also relied on **Cleaver**, that a personal bar on the insured did not automatically rule out a later claim by an injured party. It is clear therefore that the restricted relationship of both **Hardy** and **Gardner** is that all accidents on a road and public place are required to be insured and adequately compensated. The Courts were not required to resolve the further question of whether the Section confers a right of action in favour of the victim, even though the insured is personally barred from recovering, although it is

²⁵⁵ *Hardy* (n 251), 767.

²⁵⁶ [1984] A.C. 548.

²⁵⁷ *Ibid*, 558.

evident that in both cases there were powerful dictum in favour of the potential occurrence of such an action.²⁵⁸

The Court of Appeal in **Charlton v Fisher** (henceforth '*Charlton*')²⁵⁹ then examined the issue, although this was *obiter*. In **Charlton**, a passenger of a vehicle was seriously injured when another vehicle deliberately reversed into her vehicle in a private car park. As a private car park falls outside the **RTA**'s compulsory coverage of '*a road or public place*',²⁶⁰ the passenger could not recover any damages. However, it was left to the Court of Appeal to decide, *obiter*, whether the passenger could have claimed damages if the accident had in fact occurred on a road or public place.

Both Kennedy LJ and Laws LJ followed previous dictum in **Hardy** and **Gardner** by stating that although the driver of the vehicle was prohibited from claiming from the insurer, the third party was not.²⁶¹ Rix LJ, however, took a different approach, by stating that despite there being a '*respectable*' argument in allowing the third party to recover, technically the cause of action upon which the third party sues is the insured's cause of action, albeit transferred into the hands of the third party.²⁶² Consequently, the policy approach that third parties should always be compensated is largely irrelevant. Further, the third party cannot take the rights under a contract separately from its defences and is therefore tainted with the disability given to the insured. Tugendhat J in **Bristol Alliance** agreed with Laws LJ in **Charlton** and stated that Laws LJ's judgment is:

*"consistent with earlier dicta ... and it gives effect to the policy of the legislation that innocent third parties should be protected so far as money can to it from the harm that may be inflicted by dangerous and criminal drivers".*²⁶³

Hence, Tugendhat J stated, the insurer must cover the third parties' loss despite breach of an exclusion clause, because innocent parties must be protected. The

²⁵⁸ Robert Merkin (n 23), 425.

²⁵⁹ [2001] EWCA Civ 112

²⁶⁰ Section 192 Road Traffic Act 1988.

²⁶¹ Charlton v Fisher (n 262), [82].

²⁶² Ibid, [92].

²⁶³ Bristol Alliance Ltd Partnership v Williams (n 43), [54].

honourable judge stated that this overrides the insurers' right to utilise an exclusion clause to repudiate liability. It is, however, unclear whether Tugendhat J declared that all exclusion clauses under the **RTA 1988** are invalid or whether protection should only be given to third parties in cases of '*dangerous and criminal drivers*'.

Ward LJ in **Bristol Alliance**, however, disagreed with Tugendhat J, and stated that **Hardy** and **Gardner** were cases involving the principle of public policy, with no exclusion clauses to interpret, and that the interpretations given in **Charlton** were *obiter*. Overall, despite Ward LJ's and Rix LJ's dictum to the contrary, it is evident that the consensus is that public policy does not automatically restrict the third party from claiming. Although, as Ward LJ stated, this is not directly relevant to exclusion clauses, it is an important issue indirectly. This is because if public policy prevented the third party from claiming, this would arguably reinforce that the third parties' right to gain damages under the **RTA 1988**, is not absolute. Further, that insurers can avoid policies through exclusion clauses. This issue, however, is not settled; there is a clear judicial divide between arguments as to whether victims should be entitled to damages, or whether public policy prevails in relation to the drivers' criminal and dangerous acts.

The next issue to be examined is the interpretation of policy terms. This has rarely been discussed by the courts, as when a collision occurs and exclusion clause has been breached, the MIB will usually compensate the victim.²⁶⁴ Although in **Charlton** the Court was not obliged to deal with an exclusion clause *per se*, the Court had to examine the policy term '*accident*', and the consequences if the collision fell outside of this term.

Meaning of 'Accident' in Charlton v Fisher

In **Charlton**,²⁶⁵ the judges, *obiter*, were interpreting the meaning of the term '*accident*', commonly used in motor insurance policies, and the extension of this to incorporate deliberate acts. If the term was interpreted widely then all collisions including deliberate damage would be covered under the policy and further terms could be manipulated by the Courts to ensure compensation for third parties. Kennedy LJ in **Charlton** stated that '*accident*' could be interpreted widely and

²⁶⁴ Whether the MIB provides adequate protection will be discussed in Chapter Seven.

²⁶⁵ Charlton v Fisher (n 262).

consistently to include acts caused deliberately. The honourable judge further stated that due to the background of **Section 151**, which is ultimately to secure compensation for third party victims, the **RTA 1988** covers any use of the vehicle even if seemingly outside of the terms of the policy. Laws LJ agreed and stated that if ‘*accident*’ was constrained by the need to ensure that deliberate conduct was not compensated, it would undermine the purpose and utility²⁶⁶ of **Section 151**. This is to ensure that the victim of the **RTA 1988** has a direct right of action to receive compensation from the insurer.

Alternatively, Rix LJ stated that deliberate conduct would not come within the meaning of ‘*accident*’. His Lordship further relied on judgments from general insurance cases such as **Gray v Barr**,²⁶⁷ involving property insurance, where Lord Denning stated that: ‘*the word 'accidents' does not include injury which is caused deliberately or intentionally*’²⁶⁸ and relied on leading textbooks²⁶⁹ reinforcing this. Rix LJ further differentiated purposeful damage to cases of speeding, intoxicated driving, or wilful negligence such as in the pre-1930 cases of **Tinline v White Cross Insurance Association Ltd** (henceforth ‘*Tinline*’)²⁷⁰ and **James v British General Insurance Co Ltd** (henceforth ‘*James*’).²⁷¹ In **Tinline**, Bailhache J stated that in cases of manslaughter where the driver is driving at excessive speed, the victim of the accident should always be entitled to recover. However, in cases of murder and the deliberate running down, this could not be classed as an accident and insurance would not cover the victims loses.²⁷²

Rix LJ was seemingly persuaded by the reality that the insured would undoubtedly not be covered for deliberately damaging his own vehicle as this would not be classed as an accident. This means that the same term would be interpreted differently in certain scenarios and in different parts of the policy. Consequently, Rix LJ argued that this interpretation would allow the courts to ‘*manipulate*’ the

²⁶⁶ Ibid, [36].

²⁶⁷ Gray v Barr [1971] 2 QB 554.

²⁶⁸ Ibid, 566.

²⁶⁹ Jon Birds et al, *MacGillivray on Insurance Law*, (9th edition, Sweet and Maxwell 1997) [25-1], also see updated version John Birds et al, *MacGillivray on Insurance Law* (13th edition, Sweet and Maxwell, 2015), [14-038].

²⁷⁰ Tinline v White Cross Insurance Association Ltd [1921] 3 K.B. 327.

²⁷¹ James v British General Insurance Co Ltd [1927] 2 K.B. 311.

²⁷² Tinline (n 273).

policy depending on the circumstances of the case and would render the introduction of the term '*accident*' in third party policies meaningless.²⁷³

It is submitted that Rix LJ's interpretation of the word '*accident*' is correct. Historically the term connotes fortuitous and unforeseen events, this is the interpretation of early motor insurance textbooks,²⁷⁴ and case law as mentioned above. To construe it any other way, as stated by Rix LJ in **Charlton**, is to manipulate the policy beyond the will of the legislature, to ensure that a third party gains compensation.

It appears, therefore, that similar to the issue of public policy, the judge's arguments depend on either a literal and substantive law based interpretation of the **RTA 1988**, or a purposed and principled based approach by ensuring that the third party receives compensation. Unlike **Bristol Alliance**, this discussion involved third party compensation, rather than loss of a subrogated right by an insurer. The cases show that the Courts are reluctant to allow an insurer to refuse compensation to a third party. Of course, this is only *obiter* discussion in which the Court was not required to give confirmation. The above examination has been preliminarily about the exclusion clause relating to '*deliberately caused damage*' and whether deliberate acts, in general, would allow third party compensation. Moreover, as well as the individual exclusion clause, the Courts have been required to examine whether the scheme in general is to allow exclusion clauses to be used.

Moreover, there is a significant issue here in balancing the rights of third parties to receive compensation, and attempting to ensure that premiums are kept lower. A wide interpretation of '*accident*', it is submitted, would almost certainly increase premiums as it significantly increases the risk to the insurer. Additionally, it would certainly increase potential fraud by incentivising deliberate damage for the third party.

Interpreting All Exclusion clauses under the RTA

Both Rix LJ and Ward LJ's judgments came down to the question as to whether a different approach to interpreting exclusion clauses was needed under the **RTA 1988**, compared to the interpretation of other forms of contract and insurance,

²⁷³ Charlton v Fisher (n 262).

²⁷⁴ Hughes H (n 100), 289-290.

which do not completely invalidate exclusion clauses. There were three possible outcomes. First, the complete prohibition of use of all exclusion clauses against third parties limiting or invalidating third party coverage;²⁷⁵ second, a strict exclusion clause interpretation, which would not be a complete ban but rather a limitation on the use of types of policy term. Finally, allowing the insurer to limit their policy in any way except for the prohibited exclusion clauses in **Sections 148 and 151 RTA**. In deciding this, both Ward LJ in **Bristol Alliance** and Rix LJ in **Charlton v Fisher**, focused on the wording of the **RTA 1988**, and the obligations that it imposes upon both the insured and insurers.

Insured's Duty

In **Charlton**, Rix LJ first and most crucially notes that the, '*statutory duty to comply with the requirements in respect of compulsory insurance is upon the driver, not the insurer*'.²⁷⁶ Consequently, it is the driver rather than the insurer who carries the obligation to comply with the compulsory insurance requirements within the **RTA**, the insurer is not under a correlative duty to provide insurance. Rix LJ noted this by stating that the insurers' duty, under **Section 151**, to meet a judgment obtained against a person in respect of third party liability, is something separate. Consequently, although the user is obliged to obtain a policy of insurance which covers him for whatever use he puts his vehicle, statute requires him to be insured for it in respect of third party risks, there is not a similar obligation on the insurer to cover him in respect of any and every use to which the user may put his car.²⁷⁷ This is crucial because if there was a duty on the insurer to cover every use rather than the driver, then exclusion clauses would be prohibited due to the insurers' unlimited duty. Ward LJ in **Bristol Alliance** agreed with Rix LJ's dictum in **Charlton**, and stated:

*"The important words in section 143 are "in relation to the use of the vehicle". In other words **the user's duty (and no one else's)** is to ensure that insurance cover is in place **whenever and however he***

²⁷⁵ Therefore, policy terms could still be used in the contract against the insured.

²⁷⁶ *Charlton v Fisher* (n 262), [63].

²⁷⁷ *Ibid.*

uses the vehicle. If the use is not covered then he is not insured and criminal sanctions will follow that illegal use".²⁷⁸

This accords with the judgment of Branson J in **Gray**²⁷⁹ who stated that, '*if the insured takes the car upon the road in breach of those conditions, it cannot thereby throw a greater obligation upon the underwriter*'.²⁸⁰ This is in contrast with the approach of Lord Hailsham in the House of Lords in **Gardner**,²⁸¹ who stated that there is a duty on the insured to cover for the use of the vehicle reinforced by criminal sanction. Overall, however, the honourable judge treated the primary obligation to cover for all uses as one which falls upon the insurer to cover, rather than the insured.²⁸² This is contrary to the cases mentioned above, as well as the dictum of Lord Denning in **Hardy**,²⁸³ who stated:

"The policy of insurance which the motorist is required by statute to take out must cover any liability which may be incurred by him arising out of the use of the vehicle by him...for it is a liability which the motorist, under the statute, was required to cover".²⁸⁴

It seems the consensus, therefore, is to follow Lord Denning, Rix LJ, and Branson J, that the duty to comply with the requirements is one which rests upon the insured and not the insurer.

Implications within the Current Law

Another powerful argument made by both Rix LJ and Ward LJ was that **Section 148**, through giving a list of prohibited exclusion clauses, implies that other exclusion clauses are valid. This is an interesting argument, as it is a general rule that when there is a list of invalid exclusion clauses, anything that is not on that list is valid. However, it is arguable that this is not always the case. For example, **Article 13** of the **Sixth Directive** comparably gives a list of invalid exclusion clauses, however, these are not deemed as exhaustive by the CJEU,²⁸⁵ and other

²⁷⁸ Bristol Alliance (n 15), [36], emphasis added.

²⁷⁹ [1934] 1 K.B. 95.

²⁸⁰ Ibid, 108.

²⁸¹ [1984] AC 548.

²⁸² This was argued by Professor Merkin (n 23), 427.

²⁸³ Hardy (n 251).

²⁸⁴ Ibid, 757.

²⁸⁵ See Bernáldez (n 216) and Chapter Four.

exclusion clauses have later been regarded as prohibited. It is difficult to establish, therefore, whether this is also the case for **Section 148**, as case law, other than mentioned in this chapter, has not questioned its exhaustiveness.²⁸⁶

Unfortunately, little exists historically which aids the interpretation of **Section 148**, although all evidence points to **Section 148** being exhaustive of prohibited exclusion clauses. For example, the leading motor insurance text in the 1930's written by Shawcross simply differentiates between the listed clauses which he argues are prohibited and those which are not listed, which he argues are permitted exclusion clauses.²⁸⁷ Similarly, in the Cassel Committee consultation (as examined on pages 50-57) a list of commonly used exclusion clauses was provided which were again divided between clauses which were valid and those which were invalid based on whether they were included within **Section 148**.²⁸⁸

The issue is not completely clear, as **Section 148** remains fundamentally unchanged from the originally enacted Section in the **RTA 1934** with little clarity or interpretation. Prohibited terms listed within the Act were the most commonly used exclusions against third parties in the 1930's. Consequently, as policies have changed drastically since then, it is arguable, that other terms could be added into **Section 148**, or possibly implied into **Section 148** by the Courts where they are used most often. This would seemingly satisfy the original intention of the legislature and would further suggest that the UK follows a comparable route to the EU which introduced a limited list of exclusion clauses in **Article 13**. The Article would be expanded later by the courts or through another Directive. Of course, this issue has been overlooked, as exclusion clauses have not been added by either the courts or Legislature in the UK, because of the limited practical importance due to the role of the MIB.²⁸⁹

Another implication within the current legislative regime utilised by Ward LJ in **Bristol Alliance**, can be found in the **Motor Vehicles (Third Party Risks) Regulations 1972**, which prescribed the form of a certificate of insurance required

²⁸⁶ See for example *Keeley v Pashen* [2005] 1 W.L.R. 1226 where the Court did not have to decide whether the exclusion used was prohibited because it was found not to have been breached.

²⁸⁷ Shawcross (n 74), 316.

²⁸⁸ Departmental Committee on Compulsory Insurance, "*Memorandum Submitted by the Ministry of Transport*" (18th March 1936).

²⁸⁹ The effect on third party claims will be discussed in the MIB Chapter.

to be issued by the authorised insurer. **Regulation 5 (1)** of the **1972 Regulations** states:

“A company shall issue to every holder of a security or of a policy other than a covering note issued by the company...in the case of a policy...relating to one or more specified vehicles a certificate of insurance in Form A”

‘Form A’ requires the following information to be given within the certificate:

“Certificate number...policy number...Registration mark of vehicle...Name of policy holder...Effective date of commencement of insurance for the purposes of the relevant law... Date of expiry of insurance...Persons or classes of persons entitled to drive...Limitations as to use”.²⁹⁰

It is evident, therefore, that this form appreciates that the insurer may use limitations or exclusion clauses, it is unclear whether the use of exclusion clauses are related first or third parties, however, the provision says nothing which would prevent their use or validity.

This is not an entirely new concept as the original 1930 and 1934 **RTA**'s evidently anticipated the use of limitations such as with **Regulation 12 (1) (d) of the Motor Vehicles (Third Party Risks) Regulations 1933** requiring ‘the conditions subject to which the persons...specified in the policy will be indemnified’ to be inserted into the policy. Consequently, the insertion of use limitations in the standard form of policy has been pre-empted by the legislature since the introduction of compulsory insurance.²⁹¹ It is apparent that judges agree that the effect of the current Legislation and Regulations is that these limitations are contemplated. As stated by Brooke J in **Keeley v Pashen** (henceforth ‘Keeley’),²⁹² which examined the limitation involving the interpretation of the limitation to ‘social, domestic and pleasure purposes’:

²⁹⁰ emphasis added.

²⁹¹ See form S.R & O 1934 cited in Hughes H (n 100), 144.

²⁹² Keeley (n 289).

*“In Gardner v Moore [1984] AC 548, 555, 562, Lord Hailsham of St Marylebone LC overlooked the possibility that under the Act and **the Regulations**²⁹³ a motor insurer may impose express limitations on the third party cover it provides”.²⁹⁴*

Consequently, the consensus between judges and academics is that the Regulations and standard form of policy allude to the fact that the utilisation of exclusion clauses is expected. Of course, this does not automatically validate exclusion clauses. Arguably, the legislature would rather that the insurer inserts exclusion clauses transparently to the third party in standard form, than disguise them.

Section 151

“Covered by the Terms of the Policy”

Despite evidence clearly pointing to the allowance of terms due to implications within the **RTA 1988** and Regulation, both Ward LJ and Rix LJ decided to strengthen their judgments, through the examination and interpretation of **Section 151**. Ward LJ stated that under **Section 151**, to gain compensation there are four conditions which the third party must satisfy:

*“(1) that “a certificate of insurance has been delivered under section 147 ” (section 151); (2) that “a judgment to which this subsection applies is obtained” (section 151(1)); (3) 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 (4) that the liability is “**covered by the terms of the policy ... to which the certificate relates**”: section 151(2)(a)”.²⁹⁵*

Ward LJ stated that the first three conditions had been satisfied, as a certificate had been issued and a judgment had been obtained, which related to the liability

²⁹³ The honourable judge early in the judgment expressly pointed to the 1972 regulations and prescription for the “limitations of use” and therefore it is submitted that these were the regulations he was pointing to.

²⁹⁴ Keeley (n 289), [19].

²⁹⁵ Bristol Alliance (n 15), [34], emphasis added.

required to be covered. It was only the final condition, that the accident was 'covered by the terms of the policy' which was to be considered. This key phrase was initially contained within **Section 10 RTA 1934** with Shawcross noting that:

*"It is enough to refer the reader to the phrase...."covered by the policy", and to remind him that a policy of motor insurance, whether made by means of a proposal form or an automatic money-in-slot machine, is and will remain a contract, and the fundamental rule of English law still lives that people can make whatever contract they please".*²⁹⁶

Shawcross believed that due to the introduction of this term in the **RTA 1934**, insurers were entitled to avoid liability under the policy against third parties.. Shawcross gave the example of a policy containing a clause which stated that the car is not covered when being used for the purposes of the motor trade, if the car is used for that purpose, the terms of the policy do not cover the accident. Consequently, Shawcross noted, the third party would not receive compensation.²⁹⁷

This seems to be the consensus amongst judges past and present. For example, in the Scottish case of **Robb v M'kechnie**,²⁹⁸ the driver of a lorry was prosecuted for being uninsured, after driving a lorry with a trailer attached, which was excluded under the policy. The driver was prosecuted and tried to utilise **Section 10 RTA 1934** to show that the third party would be compensated. The judges disagreed and Lord Justice-Clerk (Aitchison) stated:

*"Where a person with a claim against the person insured, in respect of a liability which is covered by the terms of the insured person's policy, has obtained judgment, he may go against the insurance company. But, then... upon the wording of the section itself, that the necessary condition precedent is not only judgment in respect of the liability but—and this is the important thing... the liability be a liability covered by the terms of the policy. **If that condition is not satisfied,***

²⁹⁶ Shawcross (n 74), 297.

²⁹⁷ Ibid.

²⁹⁸ 1936 J.C. 25. The RTA applies in Scotland the same as in England.

*then the section has no application...the policy does not cover the use of the vehicle when drawing a trailer”.*²⁹⁹

This therefore seems to follow the opinion of Shawcross. Rix LJ in **Charlton** was cautious about limiting the usefulness to third parties of the direct right of action under **Section 151** and therefore only briefly examined it. Rix LJ examined the **Hardy** and **Gardner** judgments, which inferred that policies must cover all uses of the vehicle even in cases of deliberate acts, and stated that this would fall within its’ terms. Rix LJ stated that these cases did not have an insurance policy to construe and therefore the Courts could take a different direction where a policy fell to be construed. His Lordship stated:

*“The difficulty then, as it seems to me, is that it would seem to be arguable that the direct cause of action against an insurer vested in a third party who has obtained a judgment relating to a third party liability in respect of which the insured is required to be covered does not cover every situation but only, for instance, situations where it is ‘a liability covered by the terms of the policy’”.*³⁰⁰

This interpretation of **Section 151** was propounded by the motor insurers in both **Bristol Alliance** cases. The insurers argued that because there was an exclusion clause in the policy allowing repudiation in relation to deliberately caused damage, the incident and subsequent damage was not covered within the terms of the policy, a requirement of **Section 151**. Tugendhat J in the High Court recognised the force of the propositions expounded by Rix LJ in relation to **Section 151**, but did not examine the provision in any depth. Instead, his Lordship, preferred the analysis of Laws LJ in **Charlton**, that third parties should be protected from harm, and this overrides requirement for compensation to be within the terms of the policy in **Section 151**.³⁰¹ Ward LJ took the alternative view that:

“Liability for this damage is not covered by the terms of the policy because the terms of this policy expressly exclude any damage caused by the deliberate act of the driver. It is as short and as simple

²⁹⁹ Ibid, 29, emphasis added.

³⁰⁰ Charlton v Fisher (n 262), [76].

³⁰¹ Bristol Alliance (n 43).

*and as attractive as that...The meaning is clear enough: the insurers' liability must not only be of the kind which the Act requires must be covered but it must also actually be covered by the policy".*³⁰²

Consequently, it is clear from Ward LJ's judgment that the damage fell outside of the scope of the policy due to the exclusion clause. It is submitted that this is clearly the correct interpretation by Ward LJ. This can be seen through the Privy Council judgment in **Insurance Company of the Bahamas Ltd v Antonio** (henceforth 'Antonio').³⁰³ Privy Council judgments are not binding in UK law, although they are persuasive, and the Bahamas has comparable legislation under its' **Road Traffic Act 1991** including the use of term, 'covered by the terms of the policy' in the same context as used in the UK's **Section 151 RTA**. The **Antonio** case concerned an incident where a driver lost his sight after a collision with a bus; the vehicle driver gained a judgment for negligence against the bus driver's employers whose insurers refused to pay because the driver of the bus was not within the coverage of the policy.

The claimant argued that all exclusion clauses of coverage were invalid under **Section 12** of the Bahamas **RTA** (identical to **Section 151** in UK), and consequently, the insurer was liable to pay. The Privy Council held that the insurers could repudiate liability, because the accident was not within the scope of the policy. Lord Mance stated that:

*"Nothing... in the language of section 12(1) of the Road Traffic Act makes insurers liable to meet a third party liability judgment against their insured regardless of any restriction in the scope of cover. The Court of Appeal's (in this case) second ground of decision amounts to deleting from section 12(1) the critical bracketed qualification "being a liability covered by the terms of the policy".*³⁰⁴

Consequently, with no Bureau to compensate, the injured victim was left without a remedy. It is submitted that Lord Mance effectively gives the terms, 'covered by the

³⁰² Bristol Alliance (n 15), [47], emphasis added.

³⁰³ [2015] UKPC 47.

³⁰⁴ Ibid, [28-29].

terms of the policy' important meaning due his Lordship's status as a Supreme Court judge (despite being in relation to a case from a different jurisdiction). This therefore enforces the dicta of Ward LJ, that this term allows the insurer to repudiate liability if the accident does not come within its' terms. This gives the term the meaning which was clearly intended in the original **RTA 1934** which was criticised for permitting insurers to repudiate liability as previous cases such as **Robb v M'kechnie** signify.

“To which the certificate relates”

The claimant's final argument in **Bristol Alliance**, was that the words '*to which the certificate relates*', inserted in the **RTA 1960** under **Section 207** should be given meaning. It has long been held that the certificate of insurance does not override the policy; the policy prevails in any potential conflict.³⁰⁵ However, as highlighted by Professor Merkin there was a, '*possible argument that the certificate did override the policy where the policy itself did not provide the cover required by the RTA*'.³⁰⁶

The claimants suggested that the interpretation of the phrase should be that the certificate of insurance amounted to confirmation that the policy conformed to the requirements of the **RTA 1988**, meaning, that it should cover all liability including deliberate acts. Ward LJ, however, disagreed with the claimant's interpretation of the term, and stated that they have not made any difference in relation to exclusion clauses. Ward LJ stated that these additional words do serve a purpose, namely to link the first requirement (delivery of a certificate of insurance) to the policy which covers the liability. His Lordship stated:

“This section applies where; after a certificate of insurance has been delivered to the person ... judgment is obtained... The judgment is defined in section 151(2) being a judgment relating 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, note the indefinite article ...Clarification is given by section 151(2)(a) . The liability must be “covered by the terms of the policy to which

³⁰⁵ See *Spraggon v Dominion Insurance Co* (1937) 59 Ll. L.R. 1. Also see *Braggan J in Gray v Blackmore* (n 82), 95.

³⁰⁶ Professor Merkin (n 23), [5-39].

*the certificate relates” ...We are looking for the policy to which the certificate of insurance relates”.*³⁰⁷

Consequently, the words ‘*to which the certificate relates*’ are not otiose, if the certificate does comply with the **RTA 1988**, it does not override the terms of the policy. This argument, however, is no longer significant, as the **Deregulation Act 2015**³⁰⁸ repealed the words ‘*to which the certificate relates*’. This essentially means that it is the policy of insurance which is important to the coverage and not the certificate. Thus, the certificate’s interpretation does not play an important role in deciding whether the policy covers the accident.

It is evident that two very different approaches were taken by Ward LJ in **Bristol Alliance** and Rix LJ in **Charlton**, compared to Tugendhat J in **Bristol Alliance** and Laws LJ in **Charlton**. Whereas the later took a principled approach based on the original premise of the **RTA 1988** the former focussed on statutory interpretation by applying the provisions of the **RTA 1988** to the accident. It is submitted that Rix LJ and Ward LJ’s judgments are to be preferred as this is the interpretation that Parliament took when introducing the original statute, third parties of road traffic accidents were never meant to be fully covered in every situation by the insurance policy.

The above cases, however, show the difficulty in interpreting the **RTA 1988** in relation to exclusion clauses. There are significantly different interpretations of the Act both of which are reasonable. The **Hardy** and **Gardner** cases have added another layer of complexity by examining the Act from a much wider perspective through the policy approaches. Consequently, whilst Ward LJ’s interpretation in **Bristol Alliance** is to be preferred, it would be unsurprising if another future court examined this, particularly as the main source of motor insurance law through the EU is likely to be removed through Brexit.³⁰⁹

The MIB

The MIB will be discussed in Chapter Seven, however the use of **Article 79** in the MIB Agreements is clear evidence for the permission of exclusion clauses beyond

³⁰⁷ Bristol Alliance (n 15), [50].

³⁰⁸ Schedule 3 Section 9.

³⁰⁹ This will be examined in the next Chapter.

the **RTA**. The MIB is a private body containing all insurers who conduct motor insurance business in the UK, its' Uninsured and Untraced Drivers' Agreements are entered with the Department for Transport. Under **Article 79** of the MIB's Articles of Association,³¹⁰ if an insurer can be found, but it has repudiated liability, then they must pay as an agent of the MIB and under the MIB's Agreements. These, '*Article 79 Insurers*' include where, '*iii) the use of the vehicle is other than that permitted under the policy*'.³¹¹

It is arguable that **Article 79** is merely within the Articles of Association of a private body, and therefore does not determine whether insurers can repudiate liability against third parties. However, as noted within the MIB's **2015 UDA**, which is between itself and Secretary of State for Transport, '*MIB may perform its obligations under this Agreement by agents*',³¹² which would certainly include insurers. This fits with the idea that insurers could utilise exclusion clauses other than in **Section 148**.

Post-Bristol Alliance

Ward LJ's judgment and reasoning in **Bristol Alliance** was later re-affirmed by the judgment of Longmore LJ in **Sahin**.³¹³ His Lordship examined both UK and EU law relating to exclusion clauses, although in much less depth than Ward LJ. Here, Ms Havard, who had insurance and hired a vehicle, permitted someone else, who did not have insurance, to drive. The claimant made a claim against the insurer of the hire car company for damages caused. The insurer argued that the damage caused by a person who gave their vehicle to an uninsured person was not required to be covered under the policy, and the policy did not cover this either, because the policy contained the following exclusion clause:

*“any liability loss of damage incurred whilst any Insured Vehicle is:
... Being driven by any person not permitted by the Certificate of*

³¹⁰ Articles of Association of the Motor Insurers' Bureau (amendment passed by Special resolution on 29th June 2016), available at <<https://www.mib.org.uk/media/310534/mib-articles-of-association-290616.pdf>> [Accessed 11th August 2017].

³¹¹ Article 79 (2) (a) (iii) Uninsured Drivers' Agreement.

³¹² MIB Uninsured Drivers' Agreement, Article 1 (3).

³¹³ Sahin (n 208).

*Insurance or any Endorsement(s) attaching to and forming part of this Policy Document”.*³¹⁴

Longmore LJ followed Ward LJ’s judgment in relation to domestic law.³¹⁵ His Lordship re-affirmed Ward LJ’s dictum that: ‘*there is no exhaustive list of matters which cannot be excluded and other exclusion clauses are “effective”*’,³¹⁶ and further stated that, ‘*an exclusion for liability for loss incurred by someone driving a vehicle without permission will be effective as a matter of domestic law*’.³¹⁷ This therefore confirms Ward LJ’s UK law interpretation. It is notable, however, that Longmore LJ’s judgment was much shorter than Ward LJ’s in relation to national law, as his Lordship did not examine previous judgments relating to the policy behind the **RTA 1988** such as ***Charlton v Fisher***,³¹⁸ potentially because Ward LJ’s judgment is very persuasive.

The claimants in ***Sahin*** had requested permission to appeal to the Supreme Court, however, this was refused due to reasons relating to EU law. Consequently, the case alongside ***Bristol Alliance*** is currently binding, meaning that under UK law some exclusion clauses are permitted.

Part III: Which Exclusion Clauses are prohibited and permitted under the RTA?

In re-visiting the original potential outcomes which were to be decided by Ward LJ, it is clear to see that the first outcome, ‘*the complete prohibition of use of all policy terms against third parties which limit or invalidate third party coverage*’,³¹⁹ has been disregarded by Ward LJ and Longmore LJ. Thus, one of the other outcomes are valid, which is either, ‘*a strict policy term interpretation which would not be a complete ban but rather a limitation on the use of particular policy terms*’ or, ‘*allowing the insurer to limit their policy in any way except for the prohibited policy terms in Sections 148 and 151 RTA*’.³²⁰ With the issue largely irrelevant in

³¹⁴ Ibid, [31].

³¹⁵ And EU law which will be discussed on pages 169-171

³¹⁶ Ibid, [22].

³¹⁷ Ibid.

³¹⁸ *Charlton v Fisher* (n 262).

³¹⁹ Discussed in Part II of this Chapter.

³²⁰ Ibid.

Charlton, it was only Ward LJ in **Bristol Alliance** and Longmore LJ in **Sahin**, who could authoritatively answer the question as to which exclusion clauses are permitted and prohibited against third parties.

Longmore LJ in **Sahin** gave two examples of exclusion clauses which are permitted. First, in relation to deliberately caused damage as was used in **Bristol Alliance**, and second, in relation to, '*an exclusion for liability for loss incurred by someone driving a vehicle without permission*'.³²¹ This exclusion clause is comparable to the '*unlawfully taken*' exclusion expressly permitted in **Section 151 (4) RTA 1988**, although it goes beyond the permitted '*stolen vehicle*' exclusion in EU Law.³²²

Ward LJ did not specify which exclusion clauses are permitted, although his Lordship stated that, '*There is no exhaustive list of matters which cannot be excluded from the cover of the policy. Other exclusion clauses are effective*'.³²³ Consequently, his Lordship seemingly pointed towards validity of most other exclusion clauses which are not contained in **Section 148**. This still does not conclusively determine whether there are other clauses which cannot be used against a third party, but that there is no exhaustive list which is permitted.

Ward LJ pointed to the permitted, '*limitation of use*' clauses which have, '*never been doubted*'³²⁴ and the clause restricting coverage to, '*social domestic and pleasure purposes*', therefore excluding business use. Ward LJ argued that, if this clause was broken, it would mean that the driver is uninsured, and further opined that this was to ensure that insurers could reduce the cost of premiums and drivers could obtain a policy which suits their needs which, '*has to be good for us all*'.³²⁵ This follows the arguments made by the BIA in the Cassel Committee Consultation (Pages 51-55) that some '*limitations of use*' are beneficial, due to potential to offer lower premiums resulting from decreased risk.

It is apparent that Ward LJ's analysis of '*social domestic and pleasure purposes*' clauses is compatible with the majority of previous cases. For example, in **Seddon**

³²¹ Sahin v Havard (n 208), [22].

³²² This will be discussed in the next Chapter, however see the case of McMinn v McMinn [2006] EWHC 827 (QB) for the key differences between 'stolen' and 'unlawful taking'.

³²³ Bristol Alliance (n 15), [45].

³²⁴ Ibid.

³²⁵ Ibid.

v Binions,³²⁶ the Court permitted the exclusion clause to be used against a third party when it was broken by a father giving a lift to his son in course of business. Similarly, in *Keeley*,³²⁷ there was no question as to the use of this exclusion although there was no evidence of breach in that case.³²⁸ In *Wastell v Woodward*³²⁹ the Court did not permit an exclusion clause relating to ‘business use’ and failed to acknowledge that any exclusion clauses are valid by relying on **Section 145**. This, therefore, contrasts significantly with Ward LJ’s reasoning in *Bristol Alliance* that these clauses have, ‘never been doubted’, and doubts the relevance and applicability of this most utilised clause.

Apart from the Courts’ reluctance to allow an exclusion relating to business use in *Wastell v Woodward*, it seems that the majority of, ‘limitations of use’ clauses are seen favourably, as previous cases demonstrate. For example, excluding ‘use’ in the motor trade was permitted in *Browning v Phoenix Assurance Co Ltd*.³³⁰ Moreover, an exclusion clause is evidently permitted in relation to towing, as found in the early case of *Gray v Blackmore*.³³¹ Moreover, an exclusion clause relating to the use of the vehicle for, ‘hire or reward’, such as in the criminal case of *Singh v Solihull Metropolitan Borough Council*,³³² (henceforth ‘*Singh v Solihull*’) where Collins J inferred that this was permitted by stating:

*“The prohibited conditions shows that there may well be other conditions which are not prohibited and, as it seems to me, to use the vehicle in contravention of one of those conditions would mean that there was no insurance within the terms of the Act in s.143”.*³³³

Collins J therefore reinforces the majority of previous judgments that the contravention of a ‘limitation of use’, would mean that the insurer could repudiate liability. Of course, as stated previously on page 53, there is evidently a clear

³²⁶ Seddon v Binions [1978] 1 Lloyd's Rep. 381.

³²⁷ [2004] EWCA Civ 1491.

³²⁸ See also earlier case of Jenkins v Deane (1933) 103 L.J.K.B 250 containing similar clause.

³²⁹ Christopher Wastell v The Estate of Gordon John Woodward (Deceased), Chaucer Syndicates Limited 2017 WL 00956511.

³³⁰ [1960] 2 Lloyd's Rep. 360.

³³¹ [1934] 1 K.B. 95.

³³² [2007] EWHC 552 (Admin).

³³³ Ibid, [30], emphasis added.

rationale for the allowance of these clauses as they affect the rating of vehicles as well as public safety. Similarly, in relation to public safety, exclusion clauses have been successfully used in relation to 'racing'. In *Pinn v Guo*,³³⁴ an insurer could transfer liability to the MIB in relation to a claim from a spectator, for participation in an illegal race on public roads. Whilst there were issues in relation to the interpretation of policy wordings and whether the facts of the case covered these, Judge Vosper QC found that the accident was outside of the policy, and therefore, racing was permitted.

With 'limitation of use' clauses being examined favourably by the courts, it is questionable whether other exclusion clauses are also permitted beyond these. In relation to the term involving 'deliberately caused damage', Ward LJ in *Bristol Alliance* found that there was no adequate reason that the clause would not be permitted, as it is, *prima facie*, comparable to 'limitation of use' clauses.³³⁵ Hemsworth,³³⁶ however, noticed a flaw in such reasoning, as 'use' refers to the insured vehicle in the sense of the activity, such as for a purpose. Whereas, 'intentionality' (of the insured/driver) in causing damage refers to an individual's state of mind. Accordingly, 'one is simply not comparing like with like'.³³⁷ It is submitted that Hemsworth is correct and that Ward LJ was mistaken in comparing 'limitation of use' clauses and exclusion clauses in relation to the insured's state of mind. The latter is determined using the term 'accident', which, as stated previously on pages 81-82, is interpreted as including damage caused deliberately. The term 'accident' was inserted within policy by the insurers in *Bristol Alliance*, and therefore following on from the interpretation given by Laws LJ in *Charlton*, the policy is contradictory. This is because the policy permits deliberate damage in utilising the term 'accident', but then prohibits it by using an express exclusion clauses damage deliberately caused. It is therefore, unclear whether the 'deliberately caused damage' term is indeed permitted, due to the difficult reasoning of Ward LJ and the contradictory insurance policy.

³³⁴ Miss Sian Pinn, Mr Huw Rhodri Bevan v Mr Jia Guo, Zenith Insurance Management Ltd, Mr Michael Vincent Palumbo, AIG Europe Limited 2014 WL 12546268.

³³⁵ *Bristol Alliance*, (n 15), [45].

³³⁶ Hemsworth M, (n 22).

³³⁷ *Ibid*, 360.

Ward LJ only mentioned limitation of use clauses and deliberately caused damage, and therefore as stated above, it is unclear whether other exclusion clauses are permitted. An area, which it is submitted, an exclusion clause could be used is in relation to the driver. It could be imputed that, as Ward LJ mentioned that '*limitation of use*' clauses could be '*good for us all*', due to a reduced premium, the judge would also have been in favour of exclusion clauses limiting driving to a person or classes of person. This is because, as emphasised by the BIA in the Cassel Consultation,³³⁸ these too would confer a substantially less premium. Of course, **Section 151 RTA** states that so much of the policy which purports to restrict the use of the vehicle, '*by reference to the holding of the driver of the vehicle of a licence authorising him to drive it*' is ineffective on the right of the victim to bring a direct action against the insurers. Accordingly, third parties can recover in relation to unlicensed drivers, this also includes clauses in relation to drivers who only have provisional licences,³³⁹ or who breach license terms as well as disqualified drivers.³⁴⁰ This, however, may not extend to exclusion clauses relating to drivers who may not be competent, clauses relating to vehicles taken without consent or if the driver has a criminal conviction.

It is clear therefore that there is difficulty in deciding which terms are permitted and which terms are prohibited. This is likely to either be clarified eventually in statute, or through further individual judgments. It is submitted that this is an unsatisfactory situation due to significant uncertainty, and as evidenced by ***Wastell v Woodward***, contradictory judgments. The list of prohibited exclusion was introduced 80 years ago, and it is therefore inexcusable that the legislature has largely ignored this provision.

Conclusion

In this Chapter, we have attempted to examine the validity of exclusion clauses within the **RTA 1988**. This has been complex due to competing policy considerations.

³³⁸ See pages 50-57

³³⁹ See Professor Merkin (n 23), 184.

³⁴⁰ Ibid.

However, it is notable that the list of prohibited exclusion clauses in **Section 148** are relatively straight forward, due to clear interpretation by both courts and academics. The interpretation of these is also consistent and is aided by occasional case law from other jurisdictions, making it uncomplicated to see what fits within these provisions.

Conversely, the difficulty arises in determining whether the list of prohibited exclusion clauses is exhaustive. The Courts, when interpreting the Act have found difficulty in balancing the policy considerations. As noted in both **Hardy**³⁴¹ and **Gardner**,³⁴² the duty to compensate third parties, is in conflict with the insurers' right to repudiate liability and needing to keep premiums low. The **Hardy** and **Gardner** cases were balanced in favour of the third party, although later cases such as **Charlton**,³⁴³ have left the judge's finding difficult in balancing this. A further difficulty is whether the Act should be interpreted based on its policy aims or through its wording. Laws LJ in **Charlton** and Tugendhat J in **Bristol Alliance**³⁴⁴ both used the policy of the **RTA 1988** and policy behind motor insurance, whereas Rix LJ in **Charlton** and Ward LJ in **Bristol Alliance** used the wording of the Act.

Ward LJ's in **Bristol Alliance** is the authoritative judgment, which was later re-affirmed by Longmore LJ in **Sahin**.³⁴⁵ Ward LJ utilised **Section 151 RTA** and meaning of the phrase '*covered by the terms of the policy*' in finding that exclusion clauses can be used. It is submitted that Ward LJ was correct in that **Section 151** clearly shows that the legislature intended for exclusion clauses to be permitted.

Uncertainty exists, however, as to the extent that exclusion clauses are permitted, it seems from Ward LJs' judgment that exclusion clauses relating to '*use*' are permitted, although doubts exist as to Ward LJs' interpretation of deliberate use. The prohibition of other exclusion clauses, however, is not entirely clear and this is clearly an uncertain and unsatisfactory situation. The author submits that it is likely that future courts will continue to permit exclusion clauses unless otherwise stated by the legislature in updates to the **RTA**.

³⁴¹ Hardy (n 251).

³⁴² Gardner (n 259).

³⁴³ Charlton (n 262).

³⁴⁴ Bristol Alliance (n 43).

³⁴⁵ Sahin (n 208).

Overall therefore, this Chapters' contribution to the thesis is through the interpretation of the prohibited exclusions in **Section 148**, and further through the examination of complex judgments, particularly from Ward LJ, providing that exclusion clauses, beyond **Section 148**, are permitted. It has further provided significant discussion on the extent to which exclusion clauses are permitted in UK law, which, due to confliction case law, is still uncertain and will be determined on a case by case basis.

It is clear to see that the EU has influenced significant parts of the RTA 1988, particularly with exclusion clauses added **Section 151** and, it seems to some extent, in the way in which exclusion clauses have been interpreted strictly on occasions such as was shown in **Wastell v Woodward**. It is important, therefore to examine the Directives and their implementation in the next chapters.

Chapter Four: The Motor Insurance Directives

Introduction

A significant influence upon UK law in recent history, in relation to exclusion clauses, comes from the EU. The EU regulates motor insurance law through the **Sixth Directive**, with the preliminary aims of harmonising cross-border travel, whilst ensuring consistently high protection for third party victims. Numerous decisions have further come from the then ECJ and CJEU, clarifying and reinforcing the Directives' protective purpose. It is therefore important to examine EU regulation, its overall objectives, and its impact on exclusion clauses in motor policies.

This Chapter will begin by examining the Directives individually, to see how each Directive has attempted to enhance third party protection and certainty, paying attention to the development of the law relating to exclusion clauses. It will then examine subsequent ECJ and CJEU decisions to see how they have interpreted the exclusion clause provisions of the Directives. It will pay attention to the issue of blameworthiness, which has caused the EU courts great difficulty, to understand whether exclusion clauses can be used against blameworthy third parties.

Background

As it became clear that disparities between the motor insurance laws of different EU Member States were becoming a major hindrance to the key European principle of the freedom of movement, which is crucial to the completion of a Single Market, the EU was forced to intervene to remove these disparities. The European Union (previously known as the European Community) introduced five Motor Insurance Directives to remove any inconsistencies, whilst ensuring that there is a minimum standard of protection for third party victims.

The Directives have grown out of the green card scheme, introduced by the United Nations in 1949, to reduce cross-border litigation by permitting driving across borders on production of a green card. The scheme, however, resulted in long queues at borders, due to the need to check every green card and did nothing to harmonise substantive motor insurance laws. An attempt was further made to harmonise motor insurance through the **European Convention on Compulsory**

Insurance Against Civil Liability in Respect of Motor Vehicles 1959, although this only had five signatories and did little to harmonise motor insurance laws.³⁴⁶ This Convention was later overtaken by a new harmonised system through the Motor Insurance Directives. The Directives were implemented to counter issues faced by the green card scheme (such as abolishing checks), and to harmonise substantive motor insurance laws across EU Member States.

In relation to exclusion clauses, differences in Member States laws were one of the key hindrances to free movement. Cross border litigation issues were increased due to conflicts between Bureaux³⁴⁷ and insurers as to the compensation of victims when a clause was breached, causing delays. Consequently, the regulation of exclusion clauses was a key part of the implemented reforms. Of course, Directives are notoriously vague, and therefore much of the law comes from the judicial interpretation of Directives by the CJEU and further at domestic level through the implementation into statute and by the Courts.

The Motor Insurance Directives

There are currently five substantive Motor Insurance Directives and one codifying Directive, each with different aims to reflect the expanding EU. The Directives collectively represent social policy, seeking to minimise the impact on victims of large volumes of loss and injury occurring within the EU as a result of road traffic accidents.³⁴⁸ The Directives are progressive. As weaknesses became apparent, risking the creation of a barrier to free movement; a new Directive was introduced to reform those weaknesses. To minimise complexity, wherever possible, discussion will be made using the Articles of the ***Sixth Directive*** which consolidated all the currently enforced provisions from the other previous Directives.

³⁴⁶ For greater discussion, as to the provisions of the Convention see Victor Gerdes, "The European Convention on Compulsory Motor Vehicle Insurance" (1971), *The Insurance Law Journal*, 297-303.

³⁴⁷ For the sake of clarity and consistency, the term '*bureau*' will be used in this thesis, they are often referred to as the '*compensation body*' also, particularly in the Directives.

³⁴⁸ Papettas J, "*The Law Applicable to Cross Border Road Traffic Accidents*" PhD Thesis, University of Birmingham, September 2013, 133.

The First Motor Insurance Directive

The First Motor Insurance Directive³⁴⁹ (henceforth '*First Directive*') was introduced in 1972 to: '*liberalize the rules regarding the movement of persons and motor vehicles travelling between Member States*'.³⁵⁰ Through **Article 3 (1)** of the **First Directive**, each EU Member State was required to, '*take all appropriate measures to ensure that all civil liability in respect of the use of motor vehicles normally based in its territory is covered by insurance*'.

Accordingly, all EU Member States were obliged to ensure that insurance was compulsory for every driver, essentially ensuring payment of all civil liability claims. There was uncertainty, however, as to the measures Member States were required to take to ensure that all civil liability was covered, although it was expected that this would be expanded in subsequent Directives.

Article 4 permitted derogations from the requirement of compulsory insurance, as long as these derogations could still be paid by a compensation scheme or body from that Member State.³⁵¹ These derogations were not explicitly set out, although the guidance from the Directive was that they could involve, '*certain natural or legal persons, public or private*'.³⁵² The UK was already mostly compliant with the **First Directive** as compulsory insurance was introduced forty years earlier in the **RTA 1930**. The **Motor Vehicles (Compulsory Insurance) Regulations 1973** were introduced to extend compulsory motor insurance to territories other than the UK for the use of motor vehicles within the UK, ensuring full compliance with the Directives.

Although the **First Directive** can be considered as a significant step towards the harmonisation of motor insurance, substantial disparities continued to exist between the different scopes and amounts of insurance coverage, as well as exclusion clauses in each Member State, which continued to become a substantial barrier to free movement. As emphasised by the Commission of European Communities, there were, '*certain shortcomings or inaccuracies which are such as*

³⁴⁹ Council Directive of 24th April 1972 on the Approximation of Laws of the Member States Relating to Insurance Against Civil Liability in Respect of the Use of Motor Vehicles, and to the Enforcement of the Obligation to Insure Against Such Liability (72/166/EEC).

³⁵⁰ Ibid, [12].

³⁵¹ Which in the UK is the Motor Insurers' Bureau.

³⁵² The Member States were given a deadline of 31st December 1973 to implement the Directive.

may impede the smooth operation of the system'.³⁵³ Moreover, as stated by Dr Bevan: '*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*'.³⁵⁴ Hence, it was clear that these shortcomings needed to be eliminated to ensure that free movement and the EU's ambition of a Common Market was not hindered.

The Second Motor Insurance Directive

A **Second Motor Insurance Directive**³⁵⁵ (henceforth '*Second Directive*') was introduced precisely to remove some of these inconsistencies and shortcomings. The fundamental objectives of the Directive were, first in the technical improvement of the **First Directive**, and second, by seeking to make the guarantees offered in various Member States more favourable for victims, by preventing the injured third party from being treated differently according to the Member State in which the accident took place. This was whilst at the same time ensuring that cover enjoyed by the insured person would not differ significantly depending on the Member State in which he was travelling.³⁵⁶ There were two key reforms within the Directives impacting exclusion clauses.

It was evident that Member States had contrasting regulations in respect of Bureaux. For example, in Belgium, the Republic of Ireland, and Italy, if the uninsured vehicle responsible was registered in the Member State in which the accident occurred, the Bureaux would assume responsibility for personal injuries only.³⁵⁷ Whereas in Germany, France and the Netherlands, damage to property was payable. This resulted in substantial differences in the treatment of accident victims when the vehicle was uninsured.³⁵⁸ Consequently, to remove this anomaly,

³⁵³ Commission for European Communities, "Proposal for a Second Council Directive on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles" (Com (80) 469 final), 1.

³⁵⁴ Nicholas Bevan "Mind the Gap: 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)" (2016) British Insurance Law Association Journal Issue 129, 2.

³⁵⁵ Second Council Directive of 30th December 1983 on the Approximation of the Laws of Member States Relating to Insurance Against Civil Liability in Respect of the Use of Motor Vehicles (84/5/EEC).

³⁵⁶ Objectives stated by Mr Zeccino, EU Parliament Resolution and Minutes, Sitting of Tuesday, 13th October 1981 at 65. Also see definition given in *White v White* [2001] UKHL 9, 485.

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.*

Article 1 (2) of the **Second Directive** ensured that both property damage and personal injuries were covered by the respective Bureaux subject to limited exceptions.³⁵⁹ As far as the UK was concerned, compensation was already available in cases of both personal injury and property damage through the MIB,³⁶⁰ and therefore no statutory amendment was needed.

The second key reform came in the form of exclusion clauses. The European Commission, in the EU consultation for the **Second Directive**, emphasised that each Member State had different requirements when it came to the regulation of exclusion clauses, and their use against third parties.³⁶¹ For example, in the Netherlands, France, Belgium, and Luxembourg, the Bureaux would take over all third party claims from the insurer where an exclusion clause was breached by the insured. Consequently, the use of exclusion clauses against third parties was permitted.³⁶² Whereas in the UK and Ireland, insurers could repudiate liability under the insurance contract, but would continue to compensate even when an exclusion clause was breached, but rather under an agreement with their respective Bureaux.³⁶³ Finally, in Italy, Germany, and Denmark, insurers were prohibited from availing themselves of exclusion clauses and were forced to compensate in every situation, even where the insured had breached an exclusion clause. The Bureaux were only liable for vehicles which had no insurance.³⁶⁴

Because of these disparities, it was evident that third parties were being treated differently depending on the Member State where the accident occurred, causing confusion, as it was immediately unclear to the third party where they should direct their claim. Another issue caused by differences was that there were often:

“Conflicts... between the fund and the bureau concerning the interpretation of the law of the country in which the accident occurred

³⁵⁹ According to Article 1 (4) the only exclusion permitted to be used by Bureaux was where a passenger entered into a vehicle knowing it to be uninsured.

³⁶⁰ Which will be discussed in the next Chapter.

³⁶¹ Report Drawn Up on Behalf of the Legal Affairs Committee on the Proposal from the Commission of the European Communities to the Council (Doc 1-466/80) for a Second Directive on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (Document 1-427/81) 2.

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ Ibid.

*on the question whether the permitted exclusion amounts to a case of non-insurance or one in which the vehicle need not be insured”.*³⁶⁵

This was clearly an unsatisfactory situation, which made free movement much more difficult, as uncertainty concerning the interpretation of the laws of member states caused lengthy and expensive cross-border litigation proceedings, which was fundamentally detrimental to the accident victim. It was further an impairment of the Single Market by hindering the free movement of persons. Accordingly, in its’ recommendations for the **Second Directive**, the Commission proposed that all national laws on exclusion clauses should be harmonised to remove any disparity and confusion. The recommended provision stated:

*“Where an insurer refuses to make payment by the virtue of the law or of a contractual provision **authorised by law, the vehicle shall be treated as an uninsured vehicle**”.*³⁶⁶

This provision, therefore, would have left it to the Bureau of each Member State to compensate when the insurer refused to pay. Insurers could then easily transfer liability to the Bureau and rely on exclusion clauses to repudiate liability against the injured victim. The European Commission argued that the proposed article would improve the position of the victim by guaranteeing compensation, without affecting the insurers’ obligation nor negating the insurance rating system or raising premiums.³⁶⁷ It is clear furthermore, that this provision would have enhanced the role of the respective Bureaux, whilst ensuring that the injured victim was compensated, because of the responsibilities conferred to the Bureaux in the eventually enacted **Article 1 (4)** of the **Second Directive**. This would lead to greater uniformity amongst Member States in respect of the effects of a contractual provision, which would arguably result in less confusion. It appears that conferring an enhanced role on the Bureaux was unpopular within the EU, as it would put the Bureaux under greater pressure, and would further encourage insurers to avoid liability in relatively easy circumstances.³⁶⁸ Moreover, the expression ‘*authorised*

³⁶⁵ Ibid, 3.

³⁶⁶ Ibid, 9, emphasis added.

³⁶⁷ See the last Chapter for discussion as to potential consequences for insurers if exclusions were void.

³⁶⁸ Commission for European Communities (n 364).

by law in the proposed provision lacked clarity, as the definition and scope of the term, were not outlined. This would have been left open to the courts to interpret. The term would have almost certainly been interpreted differently by Member States, and would therefore increase potential conflict.

The UK was sceptical of the provision and the enhanced role of the Bureaux. On 19th May 1981, the House of Lords Select Committee on the European Communities took evidence from the UK insurance industry on the proposed **Second Directive** and **Article 2 (1)**. The MIB argued that the proposed increase in responsibility given to the Bureaux was '*misconceived*',³⁶⁹ as by equating insured vehicles and uninsured vehicles, a situation would be created with potential for discrimination between the insurers of the Member State where the accident occurred and the insurers of visiting motorists coming from other Member States. The MIB argued, therefore, that such a provision would have, '*much wider implications than is perhaps realised and would go much further than is necessary to deal with the existing problem*'.³⁷⁰ The MIB was concerned that the introduction of the proposed provision would leave the situation unresolved, as there would continue to be discrimination between Member States. This, the MIB argued, would increase cross-border complexities and differences rather than remove them, which was something that the proposed provision had intended to avoid.³⁷¹

With such scepticism from the UK, changes to **Article 2** were recommended, although uncertainty existed as to how to manage exclusion clauses. For example, in a European Parliament debate on the **Second Directive**, the Vice-President of the European Commission highlighted two alternative approaches to the regulation of contractual exclusion clauses:

“There are two possible approaches: we could...establish a list of exceptions which could not be invoked against a victim but the list of exceptions...is not necessary exclusive...the second possible approach would be to set out a general rule...that no exceptions shall be valid against third parties. Here the difficulty would be that

³⁶⁹ House of Lords Select Committee on the European Communities, “Motor Insurance”, 25th Report, 19th May 1981, 9747/80: Com (80) 469, 6.

³⁷⁰ Ibid, 7.

³⁷¹ Ibid.

*the same situation might be considered as an exception in one country and as a case of non-insurance in another. In our view, it is difficult to make an exhaustive list as to find a formula which is wide enough to all necessary cases”.*³⁷²

From the above statement, some restriction on the use of exclusion clauses was necessary, but the extent of that restriction was uncertain. This is because differences in interpretation by national courts meant that it was problematic to find a list of invalid or valid exclusion clauses which would fit every possible scenario and would be interpreted uniformly. Moreover, an exclusion clause in one Member State could be a case whereby the insurer would not need to insure a motor vehicle in another Member State. A difficulty would also be faced in complying with the key EU principle of subsidiarity³⁷³ which is where decisions are to be taken as closely as possible to the citizen. As by establishing a list of exclusion clauses which are void, the law is being decided by the European judicature rather than by the individual Member States. Accordingly, finding consistency and a satisfactory conclusion in this area seemed almost impossible, and it was therefore rather about finding a solution which would be implemented as consistently as possible throughout the EU.

Reform, however, was clearly needed, and the UK MIB played a major role within the EU, through their consultation with the House of Lords, in deciding which approach was best suited. Ultimately, a compromise was reached, which did not seemingly provide for a complete prohibition on the use of exclusion clauses, nor provide that the Bureaux had an advanced role. The proposed and subsequently implemented **Article 2 (1)** (now **Article 13**) stated:

*“Each Member State shall take **all necessary measures** to ensure that any contractual provision contained in an insurance policy issued in accordance with Article 3 (1) of the Council Directive ...which excludes from insurance vehicles driven by: persons who do not have explicit or implicit authorisation, or persons who are not in possession of a valid driving licence for the type of vehicle*

³⁷² Tugendhat, EU Parliament Resolution and Minutes, Sitting of Tuesday, 13th October 1981, 70.

³⁷³ Under Article 5 Consolidated version of the Treaty on the European Union [2010] OJ 83/13–45.

*concerned , or persons who are in breach of legal regulations of a technical nature in respect of mechanical condition or safety of the vehicle concerned, shall be considered invalid...in respect of claims for damages by third parties”.*³⁷⁴

Evidently, the EU did not attempt to introduce a full prohibition on exclusion clauses, and preferred to list three exclusion clauses which could not be utilised against third parties. Moreover, the preamble to the **Second Directive** also stated that: *‘it is in the interests of victims that the effects of certain exclusion clauses be limited to the insurer and the person responsible for the accident’*. Consequently, the **Second Directive** is directed at the victim rather than the driver of the responsible vehicle, meaning, that under the **Directive**, exclusion clauses continue to be valid towards the responsible driver. It is notable that the provision does not, comparable to many Member States,³⁷⁵ provide the injured party with a right of direct action against the insurer, as the insured will be indemnified and will in turn pay the third party.

Another provision included within **Article 2** permitted the insurer to avoid payment for compensation paid by the social security body. Furthermore, the insurer could transfer liability to the Bureaux, when they could prove that the passenger entered the vehicle knowing that the vehicle was stolen, although completely refusing compensation in relation to a passenger in a stolen vehicle was avoided.

It is further important to note that **Article 2 (1)** was limited purely to exclusion clauses. The EU Commission clarified during the consultation process that it would not intervene when Member States allowed cases involving false declaration of risk or deliberately caused damage (which the Commission pointed out was the case in France) to be treated as cases of non-insurance.

The Third Motor Insurance Directive

Although the Second Motor Insurance Directive partially eliminated the differences between Member States, especially in relation to policy coverage, it was

³⁷⁴ This article was almost identical to the one proposed by the UK MIB in the House of Lords Select Committee Report. It is therefore submitted that the MIB were the proposers of the provision, emphasis added.

³⁷⁵ Such as the UK in Section 151 RTA.

recognised by the EU Legal Affairs Committee, that not all difficulties faced which affect victims of accidents could be overcome.³⁷⁶ A **Third Motor Insurance Directive** (henceforth '*Third Directive*') was proposed to remove some of the most prominent difficulties which became clear from the first two Directives. One significant area of concern for the European Legislature was the rights of passengers. The **Second Directive** enhanced passenger rights by making it compulsory for insurance to cover the insured's family members,³⁷⁷ and by nullifying certain exclusion clauses. Yet this continued to leave the majority of passengers who were not family members exposed, and often without compensation. It was highlighted by the European Commission, that some Member States such as Greece and Ireland did not provide compulsory cover for passengers,³⁷⁸ and many Member States did not cover where the insured or owner of the vehicle was a passenger.³⁷⁹ Moreover, some Member States had specific legislation excluding passengers in situations where their conduct may have contributed to the damage caused and insurers were inserting exclusion clauses to restrict their liability to passengers.³⁸⁰ The European Commission therefore contended that the situation was '*unsatisfactory*', as passengers would often face unpleasant surprises when finding that they were unable to obtain compensation even when they were not at fault for the accident.³⁸¹

The **Third Directive**³⁸² was therefore introduced, and provided that any personal injury liability towards passengers must be covered by insurance.³⁸³ The Directive stated that: '*Whereas there are gaps in the compulsory insurance cover of motor vehicle passengers in certain Member States...such gaps should be filled*'.³⁸⁴ The Directive further emphasised that this was necessary to, '*protect this particularly*

³⁷⁶ Commission of the European Communities (n 364), 26.

³⁷⁷ Through Article 3.

³⁷⁸ Proposal for a Third Council Directive on the approximation of the laws of the Member States Relating to Insurance Against Civil Liability in Respect of the Use of Motor Vehicles (COM (88) 644 final-SYN 165, Brussels, 20th December 1988).

³⁷⁹ Ibid, 2. Such as in the UK which still does not have compulsory protection where the passenger who is insured allows another person to drive their car. See *Churchill v Fitzgerald* [2013] 1 W.L.R. 1776.

³⁸⁰ See *Farrell v Whitty* (C-356/05) [2007] E.C.R. I-3067 which will be examined later in the Chapter which involved exclusions for passengers in a vehicle which was not designed for seating.

³⁸¹ Proposal for Third Council Directive, (n 381), 5.

³⁸² Third Council Directive of 14th May 1990 on the Approximation of Laws of the Member States Relating to Insurance Against Civil Liability in Respect of the Use of Motor Vehicles (90/232/EEC).

³⁸³ Ibid, Article 1.

³⁸⁴ Ibid.

vulnerable category of victims'.³⁸⁵ This, however, did not extend to the driver of the responsible vehicle, but went further to allow the insured who was passenger in the responsible vehicle to be covered. Of course, the legislature continued to allow an exclusion of passengers, with the passenger entering the vehicle knowing that the vehicle was stolen. However, it is unclear whether a passenger who was partially to blame would be excluded, the term '*vulnerable*' appears incompatible with criminal or blameworthy. Although the **Third Directive** primarily relates to ensuring that insurance covers passengers, this seems to connote that exclusion clauses, which relate to passengers, would additionally be prohibited,³⁸⁶ and except for the exclusion mentioned above.

Another important reform in relation to exclusion clauses came in the form of **Article 4** of the **Third Directive**. As mentioned previously, a consequence of having different rules on exclusion clauses, depending on the Member States, was that there would often be conflicts between Bureaux and the insurer as to who would pay damages to the innocent victim, this would often be a time-consuming process. The Commission of the European Communities recognised that this continued to be problematic, and therefore proposed **Article 4**, which was subsequently enacted. **Article 4** states that when there is conflict between Bureaux and insurers, Member States will designate the responsibility of paying to one of these who will then be able to gain re-imbursment from the other if necessary. This eliminates the potential time-consuming conflicts which are detrimental to the rights of third parties.

Another area of reform for the **Third Directive** was in relation to differences between minimum amounts of cover required in Member States. **Article 2** of the Directive stated that every motor insurance policy must guarantee the minimum amount of cover prescribed in the Member State visited, however, when the Member State where the vehicle is normally based prescribes a higher amount of cover, the latter determines the extent of compensation. Hence, this provision outwardly allows countries to have differing laws relating to insurance coverage, as long as the higher amount of cover is used. It is submitted, however, that Member

³⁸⁵ Ibid.

³⁸⁶ This will be discussed later in the Chapter.

States must always have cover which is above the minimum prescribed by the Directives.

The UK was one of the latter Member States to introduce passenger insurance in the ***Motor Vehicle (Passenger Insurance) Act 1971***, but continued to comply with the ***Third Directive***'s need to ensure that passengers were covered and therefore no change to the UK domestic regulation was warranted, except in relation to employees.³⁸⁷

The Fourth and Fifth Directives

Although the ***Third Directive*** helped close many of the loopholes in relation to passengers, some gaps in protection existed. It was argued that the previous system did not enable victims of road accidents outside their country of residence to be covered adequately in practice.³⁸⁸ The ***Fourth Motor Insurance Directive***³⁸⁹ (henceforth '*Fourth Directive*') was introduced in 2000, and expanded the compulsory insurance scheme for the benefit of persons injured whilst visiting another Member State. The ***Fourth Directive*** gave a choice to the injured party as to whether they would like to pursue the negligent drivers' insurers in either the Member State in which the accident occurred, or through the victims' home Member State. Moreover, the Directive conferred the right upon the individual party to sue the insurer directly.³⁹⁰

The ***Fifth Motor Insurance Directive***³⁹¹ (henceforth '*Fifth Directive*') attempted to further enhance the rights of passengers and other vulnerable victims. Moreover, it was acknowledged that the Directives needed to be updated and improved, as

³⁸⁷ The RTA originally excluded compulsory liability to employees so as to avoid overlap with compulsory employer's liability insurance legislation. However, after the creation of the Third Directive, the UK amended this through the Motor Vehicles (Compulsory Insurance) Regulations which amended Section 145 (4) (a) of the RTA 1988 to allow employees to be covered under Motor Insurance Rules.

³⁸⁸ Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Directive on the approximation of laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending directives' 73/239/EEC and 93/49/EEC (Fourth Motor Insurance Directive)' (98/C 157/02), [2.5].

³⁸⁹ Fourth Council Directive of 11th May 2000 on the Approximation of Laws of the Member States Relating to Insurance Against Civil Liability in Respect of the Use of Motor Vehicles (2000/26/EEC).

³⁹⁰ Ibid.

³⁹¹ Directive 2005/14/EC of the European Parliament and of the Council of the 11th May 2005 amending Council Directives 72/166/EEC 84/5/EEC 88/357/EEC 90/232/EEC 2000/26/EEC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles.

harmonised protection was still missing in certain situations due to gaps which became clear over time.³⁹² Hence, the **Fifth Directive** amended each Directive individually. In relation to exclusion clauses, it became apparent through several cases being referred to the CJEU,³⁹³ that Member States had express legislation, or allowed insurers to repudiate liability through exclusion clauses. This was particularly when the insurer could prove that the passenger entered the vehicle knowing that the driver was intoxicated. The Directive highlighted that clauses such as these were placing into *'jeopardy'* the major achievements of the Directives.³⁹⁴ The Directive stated that, *'the passenger is not usually in the position to assess the intoxication level of the driver'*,³⁹⁵ and further that the objective of discouraging the driver from driving whilst intoxicated would not be achieved by reducing the insurance coverage of the passenger, even if they were aware of the increased risk due to the driver's intoxication.³⁹⁶ Accordingly, legislative provisions and exclusion clauses that restricted insurance coverage for a passenger, when they knew that the driver was intoxicated, were required to be removed from the legislation, and contractual clauses were to be prohibited.

This exclusion was subsequently introduced alongside the other prohibited exclusion clauses from the **Second Directive** within **Article 13** of the **Sixth Directive**. Another significant provision of the **Fifth Directive** is in **Recital 16** which states:

"Personal Injuries and damage to property suffered by pedestrians, cyclists and other non-motorised users of the road, who are usually the weakest party in an accident, should be covered by the

³⁹² See Proposal for a Directive of the European Parliament and of the Council amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC, 90/232/and Directive 2000/26/EC on insurance against civil liability in respect of the use of motor vehicles COM (2002) 244 final at Recital 3.

³⁹³ *Candolin* (n 217), and *Storebrand Skadeforsikring AS v Finanger* (E-1/99) [1999] 3 C.M.L.R. 863.

³⁹⁴ Directive 2005/14/EC of the European Parliament and of the Council of the 11th May 2005 amending Council Directives 72/166/EEC 84/5/EEC 88/357/EEC 90/232/EEC 2000/26/EEC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles, recital 15.

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*

*compulsory insurance of the vehicle involved in the accident where they are entitled to compensation under national civil law”.*³⁹⁷

This provision recognises that, as well as the strong emphasis on the protection of passengers, protection must also be offered to those physically weaker parties when involved in an accident, such as pedestrians.³⁹⁸ This provision, alongside the protection of passengers, fills many of the remaining gaps. It is uncertain whether because of this provision, victims of accidents who are driving, and who are not at fault, would receive similar treatment, as they are not expressly mentioned as a third party which require special protection in either the **Third** or **Fifth Directives**.

Evidently, therefore, the overall theme of the Directives is to ensure the protection of the injured victim, and further that any inconsistencies between the national laws of Member States, which prejudice the rights of the victims, are removed. The Directives have attempted to limit the insurers’ right to introduce exclusion clauses within policies, although it is unclear from reading the **Sixth Directive**, the extent of this limitation. Of course, these Directives only provide a framework of the rules, which necessitate subsequent interpretation. Directives are not directly applicable and therefore require the Member State to implement them into their national law.

A significant amount of interpretation was left to be decided by the CJEU, national legislatures and national courts. We, therefore, turn briefly to examine how the UK legal landscape had immediately changed due to the provisions limiting exclusion clauses.

Immediate Impact of the Directives on the UK Legal Landscape in Relation to Exclusion Clauses

³⁹⁷ Directive 2005/14/EC of the European Parliament and of the Council of the 11th May 2005 amending Council Directives 72/166/EEC 84/5/EEC 88/357/EEC 90/232/EEC 2000/26/EEC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles at Recital 16

³⁹⁸ It is also interesting to note that the proposed provision was much more controversial as it would have harmonised civil liability. It is not known why the EU judicature had altered the provision although this may have been in the face of fierce scepticism, especially amongst European Tort Academics, see for example Koch A in Koziol H and Steininger B, *European Tort Law 2007: Tort and Insurance Law Yearbook* (Springer, 2007) 610 who was very much against the harmonisation of tort law in Motor Insurance.

The **RTA 1988** came into force midway through the consultation process for the creation of the **Third Directive**, and before any case law arose before the CJEU, concerning the issue of exclusion clauses. It was clear from consultation documents during the creation of the **Second** and **Third Directives**, alongside the implementation documents released subsequently, that the UK considered that the **RTA 1988** would be virtually compliant with the Directives in relation to the use of exclusion clauses. Consequently, any amendments made due to the Directives would be minor. Professor Lewis writes:

*“It (the MIB) covers, at least in theory not only the bankrupt insurer, but also the driver who has taken out a policy but liability under it is successfully challenged by an insurer, with the driver being left uninsured for the accident in question”.*³⁹⁹

Professor Lewis did not examine the legality of this under EU law. However, UK legality was not questioned within the critical analysis of the article. A similar position was taken within the industry, as highlighted by the MIB in the House of Lords during the consultation for the **Second Directive**:

*“Article 2 would cause no difficulty in the United Kingdom since ...measures have already been taken by the UK Government to see that contractual clauses cannot be used as a defence to third party claims”.*⁴⁰⁰

Since it was the MIB which originally proposed the text in the subsequently enacted **Article 2 (1)** during House of Lords consultation process, it is easy to see why there was confidence that the UK would be fully compliant. The **RTA 1988**, via **Section 148**, restricted the use of certain exclusion clauses (these were discussed in Chapter Three).

Article 13 listed three void exclusion clauses and the UK had already prohibited the use of one of these by inserting it in **Section 148 (2) (b)** (i.e. where the insured

³⁹⁹ Richard Lewis “Insurers’ Agreements not to Enforce Strict Legal Rights: Bargaining with Government and in the Shadow of the Law”, (1985), M.L.R., 48 (3), 280.

⁴⁰⁰ Although it was the original Second Motor Insurance Directive proposal which the House of Lords had looked at, the MIB made recommendations which were identical to those enacted in Article 2 (1) of the Second Directive. See House of Lords Select Committee on the European Communities, “Motor Insurance” 25th Report, 19th May 1981, 9747/80: Com (80) 469, 6.

is in breach of legal regulations of a technical nature in respect of mechanical condition or safety of the vehicle). In relation to the other two express exclusion clauses prohibited by **Article 13** (i.e. persons who do not have explicit or implicit authorisation to drive the vehicle, or persons who are not in possession of a valid driving licence for the type of vehicle concerned), it was recognised that the **RTA 1988** would need to be amended. This is because although the outcome in these circumstances had the practical benefits of extending voidance to use by unauthorised or unlicensed drivers by the recourse to the MIB, there were questions surrounding the acceptability of this. The Department for Transport, for example, were unsure and stated that: '*The Department is advised that it must have regard to specific results required by the Directive and not just the practical outcome*'.⁴⁰¹

Despite the victim being guaranteed compensation through the MIB, the **RTA 1988** would need to be altered to comply with the Directives, by ensuring that such exclusion clauses could not be used by the insurer. These provisions were inserted in **Section 151 (3)**, which stated that when deciding whether a liability would be covered by the terms of the policy, any reference to the holding by the driver of the vehicle of a licence authorising him to drive it, was treated as void. Moreover, in relation to the expressly nullified exclusion in the **Fifth Directive** (where the passenger enters a vehicle when they know that the driver is intoxicated), this would most likely be covered by **Section 148 (2)** preventing exclusion clauses from being utilised in relation to the age or physical or mental condition of persons driving the vehicle. Thus, whilst some minor amendments were needed to be made by the UK, the introduction of the **Second Directive** only minimally affected the immediate legal landscape.

Although the UK government made changes enforced by the Directives quickly, uncertainty existed because the Directives had not been interpreted before by either EU or UK Courts. It is therefore important to examine how the European Courts have interpreted the Directives.

⁴⁰¹ Department for Transport, "*Giving Effect to the Second European Community Motor Insurance Directive*" London, 1984 (DEP 1024), [2.3].

Directives Interpreted by the CJEU

Many cases have come before the CJEU as well as other European Courts⁴⁰² which have been referred up by appellate courts in different Member States. It is now important to examine two key questions which concern the Directive's provisions relating to exclusion clauses contained in **Article 13** which were considered in the key ***Criminal Proceedings Against Bernáldez*** (henceforth '***Bernáldez***')⁴⁰³ decision. This Chapter will then examine the issues which were left open by ***Bernáldez*** and which were later addressed in subsequent ECJ and CJEU decisions.

Is the List of Void Exclusion clauses in Article 13 of the Sixth Directive (Formerly Article 2(1) of Second Directive) Exhaustive or Illustrative?

The Directive's effect on exclusion clauses can be examined from two potential angles, first whether **Article 13** of the ***Sixth Directive*** provides the exhaustive list of exclusion clauses which cannot be utilised against the third party. Second, whether the stolen vehicle exclusion in **Article 13** is exhaustive of exclusion clauses that can be utilised, and whether the insurer can utilise an exclusion beyond the exclusion expressly provided for.

The first EU case to examine the scope of exclusion clauses is ***Bernáldez***.⁴⁰⁴ Here, the defendant crashed his vehicle whilst intoxicated and was ordered to pay damages for property damaged as a result. The Seville Criminal Court absolved the defendant's motor insurer from any liability to pay the compensation based on national motor insurance legislation,⁴⁰⁵ which provided that insurers were not liable in respect of property damage where the driver was intoxicated. On appeal, the Seville Provincial Court stated its' belief that legislation which limits exclusion clauses should be read in line with the EU Directives and therefore insurers should not be able to utilise exclusion clauses against third parties. The Provincial Court, however, sought a preliminary ruling from the then ECJ as to whether the Spanish

⁴⁰² For example, the matter has been examined to some extent by the European Free Trade Association Courts as will be discussed on pages 130-132

⁴⁰³ *Bernáldez* (n 216)

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Article 3(4) of the Real Decreto Legislativo (Royal Decree) 1301/86 of 28 June 1986 and Article 12(3)(b) of the Royal Decree 2641/86 of 30 December 1986.

legislation was compatible with the Directives.⁴⁰⁶ One of the five questions referred up to the Court was:

*“Must the cases referred to in Article 2(1) of the Second Council Directive be regarded as a precise and exhaustive enumeration of the statutory provisions and contractual clauses which may remove insurance cover but which are not valid as against a person who has suffered harm, so that any other statutory or contractual exclusion would be valid as against him?”*⁴⁰⁷

In their pleadings, representatives from the Spanish, Greek, and UK Governments stated that the purpose of the obligation on Member States was to ensure a high level of protection for the victim.⁴⁰⁸ Moreover, permitting the use of an exclusion is incompatible with **Article 13**.⁴⁰⁹ They submitted, however, that Member States have wide discretion when drawing up the legal rules on insurance, so that exclusion clauses are permissible as between the insured and the insurer, although these rules must not result in the absence of compensation for the third party victim.⁴¹⁰ The Spanish Government, however, argued that an exclusion from insurance cover as against the intoxicated driver who caused the accident is entirely another matter due to criminality.⁴¹¹ The European Commission alternatively argued that the prohibited exclusion clauses set out in **Article 13** are exhaustive and that in the case of other exclusion clauses, the motor vehicle must be deemed to be uninsured, which results in the transfer of liability to the Bureau of the Member State in which the accident occurred.⁴¹²

Advocate General (henceforth ‘AG’) Lenz argued that **Article 13** must be regarded as a minimum requirement, in the sense that certain lawful exclusion clauses from insurance cover may not be invoked, at least against an injured third party.⁴¹³ AG Lenz further utilised Recital 7 of the **Second Directive**, which stated:

⁴⁰⁶ It is important to note that Bernáldez went before the ECJ before the fifth directive, which expressly prohibits such an exclusion, was introduced.

⁴⁰⁷ Bernáldez (n 216), [7].

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid, 893.

⁴¹⁰ Ibid.

⁴¹¹ Ibid.

⁴¹² Ibid, 895.

⁴¹³ Ibid, 898.

*“(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”.*⁴¹⁴

Accordingly, AG Lenz argued, the prohibited exclusion clauses in **Article 13** cannot be exhaustive and therefore other exclusion clauses were prohibited. In its’ decision, the EU Court affirmed the AG’s opinion by stating that **Article 13** is merely illustrative of the possible exclusion clauses from cover that could not be used and is not an exhaustive list.⁴¹⁵ Any other interpretation, the Court argued, would allow disparities of coverage from State to State which was what the provisions on exclusion clauses intended to avoid.⁴¹⁶

It is submitted that the then ECJ in **Bernáldez**⁴¹⁷ interpreted the **Second Directive** correctly, in that the three exclusion clauses expressly prohibited are not exhaustive. This was a very challenging decision to make, because generally, lists of prohibited exclusion clauses mean that everything else is valid. However, as previously noted⁴¹⁸ by the preparatory work to the **Second Directive**, the Vice President of the European Commission during a European Parliament Debate, stated: *‘it is difficult to make an exhaustive list’*. The exclusion clauses listed were only expected to be illustrative and it was left to EU Member States and then ECJ, utilising **Marleasing**,⁴¹⁹ to interpret and expand the list of void exclusion clauses beyond those prescribed by the Directives.

Are Any Other Exclusion Clauses Permitted other than the Stolen Vehicle Exclusion?

With it being made clear in **Bernáldez**⁴²⁰ that the list of exclusion clauses in **Article 13** are merely illustrative rather than exhaustive, one must question whether the expressly permitted stolen vehicle exception in the **Second Directive** is exhaustive, or whether other exclusion clauses can be used by the insurer to

⁴¹⁴ Ibid.

⁴¹⁵ Ibid, 907.

⁴¹⁶ Ibid, 906.

⁴¹⁷ Ibid

⁴¹⁸ On page 109.

⁴¹⁹ *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-106/89) [1993] B.C.C. 421.

⁴²⁰ *Bernáldez* (n 216).

repudiate liability against third parties. It is arguable from the preamble to the **Second Directive** that other exclusion clauses are permitted. The preamble states that ‘*certain*’ exclusion clauses should only be effective between the driver and the insurer. The term ‘*certain*’ is usually incompatible with a blanket prohibition, and therefore, it is arguable that other possible exclusion clauses would go beyond the insurer/driver relationship and be valid against a third party. It is submitted that such an argument is weak as ‘*certain*’ is vague, and could easily connote the already permitted stolen vehicle exclusion alongside the exclusion in **Article 1 (4)** relating to the Bureaux.⁴²¹ The question as to whether the stolen vehicle exception is exhaustive was analysed in **Bernáldez**⁴²² in two parts, first in relation to whether a clause could be utilised:

“Does the wording of Article 3(1) allow...the system of compulsory insurance ...in respect of the use of motor vehicles in each Member State to lay down any exclusion... or must exclusion clauses...be limited to those expressly provided for in the ...Directive?”.⁴²³

Second, whether such a clause, if it could be utilised, would render non-insurance and any claim would therefore be picked up by the Bureaux of the respective Member State:

“If the provisions of the ...directives...allow exclusion of compulsory insurance cover...which is valid as against the victim where the driver was intoxicated, may it be considered that such a case entails an absence of insurance...which would determine payment and cover by the body provided for?”.⁴²⁴

In case of an intoxicated driver, AG Lenz stated that such a provision could not be utilised against a third party, as this will go directly against the primary objective of the directives, which is to protect accident victims and to ensure uniformity across the EU. In an unusual turn, however, AG Lenz seemingly argued that there could

⁴²¹ See Professor Merkin, *The Law of Motor Insurance*, 2015 (n 23), 464.

⁴²² Bernáldez (n 216).

⁴²³ Ibid, [7].

⁴²⁴ Ibid, [7].

be cases other than the stolen vehicle exclusion where the insurer could repudiate liability. AG Lenz argued:

*“Under the system established by the directive, a defence as against the person who has suffered harm appears to be conceivable only if it can be proved that he was himself guilty of misconduct. That tends to be indicated by the second subparagraph of Article 2 (1) (the stolen vehicle exclusion) ... Apart from those highly exceptional cases of the victim's own blameworthy conduct, it must be assumed that there is a need to ensure that there are no gaps in the duty to compensate the victim. That principle can be seen to be the guiding principle of the directives”.*⁴²⁵

AG Lenz appears to suggest that in cases of the victim's own blameworthy conduct the victim could be denied damages. AG Lenz's use of the term 'blameworthy' indicates that there must be a causal link between the conduct of the victim and the accident, although the use of the term 'misconduct' evidently goes further, and could refer to criminal or improper behaviour. Furthermore, AG Lenz does not state the extent that the victim must be to blame for the accident, although in the use of 'highly exceptional cases', and by AG Lenz's reference to the stolen vehicle exclusion, it is inferable that the degree of blameworthiness must be relatively high.

It is arguable that gaps in the duty to compensate are those already expressed through **Article 10** (the uninsured driver exclusion) and **Article 13** (stolen vehicle exclusion already mentioned by AG Lenz) of the Directive. However, AG Lenz could be referring to exclusion clauses under civil liability rules, which are unaffected by the Directive,⁴²⁶ potentially preventing the victim from receiving compensation. This, however, is unlikely, because AG Lenz refers specifically to the exclusion in insurance law already permitted under the Directives. It must be remembered, however, that although AG Lenz's opinion is highly instructive, it is

⁴²⁵ Ibid, 901, emphasis added.

⁴²⁶ Although as this thesis will discuss later in the Chapter with some limits.

only advisory,⁴²⁷ and therefore cannot bind either the same court or any other future court.

The then ECJ found that a compulsory insurance policy cannot provide, where the driver of the vehicle was intoxicated, that the insurer is not obliged to compensate the third party victim. In relation to the general use of exclusion clauses the Court found:

*“In view of the aim of ensuring protection... Article 3(1) of the First Directive...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 injuries sustained”.*⁴²⁸

The Court further argued that:

*“Any other interpretation would have the effect of allowing Member States to limit payment of compensation to third party victims of a road-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”.*⁴²⁹

From the above statements, the ECJ were firmly of the belief that all damage should be compensated, as disparities could occur between Member States. There is uncertainty as to the extent to which an insurer can utilise exclusion clauses in their policies. The ECJ only stated that victims of the accident must be compensated in every situation, but omitted to state whether the compensation must be paid by the insurer or the backup compensation body. In the next paragraph, however, the Court states:

*“That being so, Article 3(1) of the First Directive **precludes an insurer** from being able to rely on statutory provisions or*

⁴²⁷ This was highlighted in Nicholas Bevan “A World Turned Upside Down” (2014) J.P.I. Law, 3, 136-152.

⁴²⁸ Bernáldez (n 216).

⁴²⁹ Ibid.

contractual clauses to refuse to compensate third party victims of an accident caused by the insured vehicle".⁴³⁰

This is clearer from the then ECJ, and confirms that the insurer cannot utilise statutory provisions or exclusion clauses in their policies to refuse to compensate the injured third party victim. The then ECJ finally stated that although the insurer cannot utilise exclusion clauses against third parties, there are no limitations on the use of exclusions against the insured driver who was responsible for the accident.⁴³¹ The Court, however, did not specifically address the issue of passenger blameworthiness, as this was covered by AG Lenz. The then ECJ only dealt with circumstances put before them, and therefore as there was no third party blameworthiness in the case. It would appear, however, from the strong message portrayed above by the then ECJ, that all damage to third parties must be compensated.

Issues Left Open by Bernáldez

Although the ECJ in **Bernáldez** aided in the clarification of some of the provisions of the Directives, there were still some issues which were left open for a later Court to decide. The two most important issues left unresolved by **Bernáldez**⁴³² was discussed briefly in the guidance from AG Lenz in the fifth question. First, whether the Bureau can take over any claims when there is an exclusion clause in the policy, and second, whether exclusion clauses could be relied upon when there is a degree of blameworthiness from the injured third party.

Can the insurer transfer liability to the Bureau?

The first issue, which was not addressed directly by the then ECJ in **Bernáldez**,⁴³³ was whether an insurer could utilise an exclusion, with the Bureau taking over any claims for compensation when an exclusion clause was breached. It is arguable that preventing an exclusion from being used is tantamount to preventing the insurer from transferring liability to the Bureau. Potentially, however, the Directives are primarily concerned with the protection of third party victims and if

⁴³⁰ Ibid, emphasis added.

⁴³¹ This was expressly stated in the Preamble to the Second Directive Ibid [21].

⁴³² Bernáldez (n 216).

⁴³³ Ibid.

compensation is paid, the EU legislature would be unconcerned as to where the compensation comes from, as the spirit of the Directive is achieved, the Directives, are unclear on the issue. **Article 10 (1)** of the **Sixth Directive**, which sets out the rules for Bureaux, states:

*“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**”.*⁴³⁴

An unsatisfied insurance obligation could occur where there is no policy in existence or where the obligation is unsatisfied because of an exclusion in the insurance policy. It is difficult to ascertain from the wording of **Article 10 (1)** whether the insurer could transfer liability, or pay under an agreement with the Bureau. The issue was first dealt with by AG Lenz in **Bernáldez**.⁴³⁵ AG Lenz examined the original **Article 2 (1)** and **Article 1 (4)** and stated:

*“The wording finally adopted and the provision's legislative history show 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.... Only if, for whatever reasons, he has no claim for compensation against an insurer, would the “body” have to pay compensation in the interest of the extensive protection of victims. Furthermore, the Member States are free to extend the competence of the “body” by statute, **provided complete protection is ensured for victims**”.*⁴³⁶

AG Lenz here considers that the insurer should be permitted to transfer liability to the Bureau when an exclusion clause is breached and states that if complete protection is guaranteed for victims, it is irrelevant whether the insurer or Bureaux pays. This, with respect, is very contradictory by AG Lenz, who argued previously

⁴³⁴ emphasis added.

⁴³⁵ **Bernáldez** (n 216).

⁴³⁶ **Ibid**, [51], emphasis added.

that there should only be very limited defences open to the insurer to use against a third party claim.

Further cases have examined, either directly or indirectly this issue. In **Evans v Secretary of State**,⁴³⁷ a case concerning interest rates in Bureaux agreements. The then ECJ repeatedly utilised the term, '*insufficiently insured vehicle*'⁴³⁸ to refer to Bureaux obligations. This term also seemingly refers to cases where the driver has insurance, but the insurance does not cover the use of the vehicle at that time, and therefore the insurance coverage is not sufficient. The then ECJ in **Evans**, however, did not expressly clarify their use of the term, which was not used by future courts.

This issue, however, was expressly dealt with and largely clarified by the CJEU in **Churchill Insurance Co Ltd v Wilkinson**⁴³⁹ (henceforth '*Churchill*') and **Csonka v Magyar Allam**⁴⁴⁰ (henceforth '*Csonka*'). In **Churchill**, the CJEU evidently disagreed with the opinion of AG Lenz in **Bernáldez** and held:

*“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”.*⁴⁴¹

The decision in **Churchill**⁴⁴² therefore confirms that the Bureau can solely be utilised as a measure of '*last resort*'. Of course, it is arguable that the breach of exclusion would make the insured technically uninsured, and therefore this would fall within the meaning of the '*last resort*' specified in **Churchill**.⁴⁴³ It is submitted, however, that this is a weak argument as the CJEU would have clarified that this was the interpretation.

⁴³⁷ Evans v Secretary of State for the Environment, Transport, and the Regions (C-63/01) [2003] E.C.R. I-14447.

⁴³⁸ Ibid, [54] and [55].

⁴³⁹ Churchill Insurance Co Ltd v Wilkinson [2013] 1 W.L.R. 1776.

⁴⁴⁰ Csonka v Magyar Allam (C-409/11) [2014] 1 C.M.L.R. 14.

⁴⁴¹ Wilkinson (n 442), [41], emphasis added.

⁴⁴² Ibid.

⁴⁴³ Ibid.

This issue, however, was left beyond doubt in the CJEU's ruling in **Csonka**,⁴⁴⁴ this case questioned whether the Bureau should pay for liabilities owed by the insurer to the victim when the insurer becomes insolvent. AG Mengozzi reinforced the dicta from **Churchill** that the Bureau's role is one of '*last resort*'.⁴⁴⁵ In giving his opinion, the AG focussed on the *travaux préparatoires* of the **Second Directive**. As explained on pages 107-108, the EU legislature, in its' proposal for the **Second Directive**, had originally intended to allow the transfer of liability to the compensation fund when an exclusion clause was breached. This was unpopular and was therefore later revoked in favour of the eventually enacted **Article 13**. The Court agreed with the AG's opinion and stated that the EU legislature:

*“did not restrict 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 art.3 (1) of the First Directive has not been satisfied, that is to say, a vehicle in respect of which **no insurance policy exists**”.*⁴⁴⁶

Accordingly, as made clear by the CJEU in **Csonka**,⁴⁴⁷ the only time in which Bureaux can compensate is where there is no insurance policy, not merely when policies' terms have been breached. It has been argued in the UK that the **Csonka** decision is not as wide as previously thought. As noted by the MIB in the judicial review proceedings taking place at time of writing:

*“It was not disputed (in Csonka) that the insurance policy would have covered the losses if the insurer had been solvent, the CJEU did not have to consider a situation where a policy did not provide cover for all uses to which a vehicle could be put”.*⁴⁴⁸

⁴⁴⁴ Csonka (n 443).

⁴⁴⁵ Ibid, AG28.

⁴⁴⁶ Ibid, 10.

⁴⁴⁷ Ibid.

⁴⁴⁸ R on the application of Road Peace Claimant v Secretary of State for Transport and Motor Insurers Bureau CO/4681/2015, Defendant's skeleton, [59]

The argument therefore is that **Csonka** only related to situations where insurer was insolvent. It is submitted that this is a weak argument, because the CJEU in **Csonka** was clear in its' decision. The matter was very recently made clearer by the CJEU in the **Fidelidade Companhia de Seguros SA**⁴⁴⁹ (henceforth '*Fidelidade*') ruling, concerning the validity of Portuguese legislation⁴⁵⁰ which declares invalid, insurance contracts obtained by false statements concerning the identity of the owner and driver. In this situation, the Fundo de Garantia Automóvel (Portuguese Guarantee Fund) would pay for the injury or damage. This is comparable to the UK position under **Section 152 RTA** which allows the insurer to transfer liability to the Bureau in this situation. The CJEU followed the lines of previously decided ECJ and CJEU decisions, and held that derogations from the requirement of insurers to compensate is only in that '*one specific case*'⁴⁵¹ involving stolen vehicles. The CJEU further stated:

*“The fact that a vehicle is driven by a person not named in the insurance policy relating to that vehicle cannot...support the conclusion that that vehicle is uninsured for the purposes of the third subparagraph of Article 1(4) of the Second Directive”.*⁴⁵²

A novel question was further put to the CJEU regarding whether nullity of an insurance contract is permitted against a third party, in the event that the person on whose behalf the insurance has been taken out, '*has no economic interest in the conclusion of that contract*'.⁴⁵³ The CJEU held that although legal validity as to the conditions of the insurance contract are done at Member State level, they must not deprive the Directives of their effectiveness. Further, that civil liability must be covered by insurance. The CJEU further stated that:

“Such provisions (the Portuguese Commercial Code) are thus liable to result in compensation not being paid to third-party victims and,

⁴⁴⁹ *Fidelidade Companhia de Seguros SA v Caisse Suisse De Compensation* (Case 287/16) [2017] EUECJ.

⁴⁵⁰ Portuguese Commercial Code Articles 428 and 429.

⁴⁵¹ *Fidelidade* (n 452), [26].

⁴⁵² *Ibid*, [29].

⁴⁵³ *Ibid*, [30].

*consequently, in those directives being deprived of their effectiveness”.*⁴⁵⁴

To put this issue beyond doubt and to reinforce previous CJEU decisions, the CJEU stated that the compensation body is only to be used as a, *‘measure of last resort, envisaged only for cases in which the vehicle that caused the injury or damage has not satisfied the requirement for insurance referred to in Article 3(1) of the First Directive, that is to say, it is a vehicle in respect of which no insurance contract is in place’.*⁴⁵⁵ Consequently, it is clear that Bureaux must not be compensating the injured victim when an exclusion clause is breached, it removes any doubt that the **Csonka** decision was relating to all cases including involving exclusions.

It is submitted that the CJEU are correct with its interpretation of the Directives. The *travaux préparatoires* show that the intention of the EU legislature shifted rapidly from making the Bureaux pay once an exclusion clause was breached to making it the insurers’ responsibility. The above cases therefore ensure certainty that insurers cannot utilise the compensating body, to compensate victims of insufficiently insured vehicles or particularly in situations where they have cover in place.⁴⁵⁶

Blameworthiness

The next issue which was left undecided by **Bernáldez**,⁴⁵⁷ due to the contradictory discussion by AG Lenz, was the issue of blameworthiness and, whether the insurer could utilise an exclusion or statutory term to repudiate liability, when the third party is fully or partially to blame for the accident. This can be divided into two parts. First, whether an exclusion relating to blameworthiness can be utilised within insurance law rules, and second, whether the insurer can limit or deny compensation under the rules of civil liability. These rules are often difficult to separate and have caused the courts considerable confusion. This Chapter will now examine the issue of blameworthiness in insurance law rules and will then examine the issue of blameworthiness under civil liability and the relationship between the two.

⁴⁵⁴ Ibid, [34].

⁴⁵⁵ Ibid, [35].

⁴⁵⁶ Nicholas Bevan, “Marking the boundary” (2013) J.P.I. Law, 3, 151-161, 151.

⁴⁵⁷ Bernáldez (n 216).

Blameworthiness under EU Insurance Law Rules

Storebrand v Finanger⁴⁵⁸ (henceforth '*Finanger I*') came before the European Free Trade Association Court⁴⁵⁹ (henceforth '*EFTAC*') allowing Court to examine the issue of passenger blameworthiness. Here, the respondent was injured in an accident due to an intoxicated driver (which was evident to the passengers within the vehicle) and was denied compensation under **Section 7 (b)** of the Norwegian ***Bilansvarsloven 1961***,⁴⁶⁰ which stated that, *inter alia*, the passenger cannot gain compensation if he enters into a vehicle when he knew that the driver was intoxicated. The Governments of Iceland and Norway argued that **Article 13** already contains a permitted exclusion of compulsory insurance cover and this should not be deemed exhaustive.⁴⁶¹ The Government of Liechtenstein, however, claimed that the provisions in **Article 13** were exhaustive, and therefore the exclusion was prevented under European Law.⁴⁶² The European Commission agreed with the Government of Liechtenstein and argued that it is clear from their whole rationale, that the Directives guarantee compensation for victims in all cases of accidents (except those listed as permitted), including where there is an element of blameworthiness from the passenger.

The EFTAC held that it is sufficient to state that the stolen vehicle exclusion contained within **Article 13** is an exception to the general rule and should be interpreted narrowly. Any other interpretation, the Court stated, would jeopardise the overall goal of the Directives, to ensure that innocent victims and passengers are covered.⁴⁶³ They stated that the majority of Member States do not prevent the passenger from obtaining compensation even if they knew that the driver was intoxicated⁴⁶⁴. Subsequently, the passenger would receive substantially more favourable treatment in other Member States which was something that the Directives had intended to avoid. The EFTAC further stated that differences would

⁴⁵⁸ *Storbrand Skadeforsikring v Veronika Finanger* (Case -1/99) [1999] 3 C.M.L.R. 863.

⁴⁵⁹ The European Free Trade Association (henceforth '*EFTA*') is an intergovernmental organisation set up for the promotion of free trade and financial integration to the benefit of its four Member States: Iceland, Liechtenstein, Norway, and Switzerland. These countries are not part of the EU, however in certain circumstances they agree to follow EU rules. The EFTAC decisions, although highly instructive, are not binding on the ECJ or the national courts of EU jurisdictions.

⁴⁶⁰ Also referred to as the Automobile Liability Act.

⁴⁶¹ *Storbrand Skadeforsikring v Veronika Finanger* (n 461), [7].

⁴⁶² *Ibid*, [11].

⁴⁶³ *Ibid*, [24].

⁴⁶⁴ *Ibid*

lead to a distortion of competition between motor vehicle insurers in different Member States which is incompatible with the aim of establishing a homogeneous European Economic Area. Accordingly, the EFTAC stated that such a provision cannot be utilised against a blameworthy third party.

The issue re-appeared in *Finanger v Norway*,⁴⁶⁵ (henceforth '*Finanger II*') as the Norwegian Court found it impossible to interpret **Section 7 (b)** in conformity with the Directives, and accordingly the victim initiated an action against the Norwegian government for its erroneous interpretation. The victim therefore sued the Norwegian Government for *Francovich*⁴⁶⁶ damages as a result of breaching the Directives. The case went to the Norwegian Supreme Court who held that the breach of the Directives was sufficiently serious to allow the claimant to gain *Francovich*⁴⁶⁷ damages. Gussgard J, in giving the leading decision stated:

*“The Motor Vehicle Insurance Directives do not grant national authorities a margin of political or economic discretion with regard to the requirement of insurance...The purpose was to pave the way for a Common Market with free movement, and one of the means was to achieve security for the survivors of road traffic accidents... The development from the first to the third Directive shows that a strong degree of protection was intended, so that the various exemption rules that existed in certain countries were forbidden”.*⁴⁶⁸

Both *Finanger* cases demonstrate that due to the strong protection of victims, which is clearly at the heart of the Directives, there is little discretion available in relation to whether liability can be avoided by way of exclusion, even when the injured party is wholly or partially to blame for the damage. Of course, this is not binding on non-EFTA Member States such as the UK. It does, however, act as a warning to other Member States that they should consider the protection of victims (even if they are partially or fully to blame for the accident) as of paramount

⁴⁶⁵ *Finanger v Norway* (National Association for Road Traffic Victims, intervening) [2006] 3 C.M.L.R. 13

⁴⁶⁶ *Francovich v Italy* (C-6/90) [1993] 2 C.M.L.R. 66, the requirements for *Francovich* damages will be discussed later in thesis pages 172-173.

⁴⁶⁷ *Ibid.*

⁴⁶⁸ *Finanger v Norway* (n 468), emphasis added.

importance, and should not permit exclusion clauses to be used against them or risk being liable for **Francovich** damages in the future.⁴⁶⁹

The next case to go before the European Courts, this time in the then ECJ, is **Candolin**, containing similar facts to **Finanger**.⁴⁷⁰ In this case, the claimants were passengers in a vehicle in Finland, owned by one of them and driven by the second defendant and subject to insurance provided by the insurer who was the first defendant. All passengers and the driver of the vehicle were intoxicated, and the second defendant lost control of the vehicle resulting in the death of one passenger and severe injuries to the other passengers. Under the Finnish Law on Motor Insurance, passengers can be deprived of compensation if they enter the vehicle knowing that the driver was intoxicated. The Finnish Court of first instance found that the claimants would have been aware of the first defendant's intoxication and accordingly held that none of the claimants could be entitled to receive compensation from the defendant insurer. On a further appeal by the claimants, the Supreme Court referred to the ECJ the question as follows:

*“Is it consistent with Community law, in any situation other than the cases mentioned in...Article 2(1) of the Second Directive, to exclude or limit, **on the basis of the conduct of a passenger in a vehicle**, his right to obtain compensation from compulsory motor vehicle insurance for road accident damage?”*⁴⁷¹

Another arising question was whether the owner of the vehicle, who was also a passenger in the vehicle, should be treated equally the other passengers. The majority of the arguments from the parties concerned civil liability rules (which will be discussed on pages 135-136), however, the European Commission's argument was analogous to its' discussion in **Finanger I** that there can be no exclusion clauses. The Commission further argued that the then ECJ in **Bernáldez**⁴⁷² considered the situations of the victims themselves, but only within the limits of **Article 13**.

⁴⁶⁹ Francovich (n 469) this case paved the way for state liability where Member States are obliged to make good the loss caused to individuals due to breaches of Community Law.

⁴⁷⁰ Candolin (n 217).

⁴⁷¹ Ibid, 6, emphasis added.

⁴⁷² Bernáldez (n 216).

AG Geelhoed in this case disagreed with the opinion of AG Lenz in **Bernáldez** by stating that **Article 13** provides the only exclusion which can be utilised against a third party. The AG further stated that in view of the principle aims of the directive, namely to provide the victim with adequate protection, a national provision which automatically excludes any cover from the outset is inconsistent with the directives. The AG further held:

*“The Community legislature's intention with this provision (the stolen vehicle exclusion) 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”.*⁴⁷³

The ECJ agreed with AG Geelhoed, and stated that as it is a provision which derogates from the general rule that exclusion clauses cannot be utilised, the stolen vehicle exclusion must be interpreted strictly, and is the only exclusion permitted by the Directives.⁴⁷⁴ The Court stated that a different interpretation would allow Member States to limit the payment of compensation to third parties in cases certain types of damage. This, they argued, would allow disparities to exist in the treatment of road accident victims depending on the Member State in which the accident occurred, which is something that the Directives had precisely intended to avoid.⁴⁷⁵ The ECJ further held that the only distinction that can be made in deciding compensation is between the driver and the passengers, therefore in cases whereby the original insured and owner of the vehicle allows an intoxicated person to drive, the legal relationship between the insured person and the insurer passes to the person causing the loss or injury. Consequently, the owner passenger of the vehicle is entitled to the same compensation as the other passenger victims and cannot have their coverage limited or removed.

⁴⁷³ Ibid, AG 42, emphasis added.

⁴⁷⁴ Ibid, [21].

⁴⁷⁵ Ibid.

Candolin⁴⁷⁶ has certainly clarified some inconsistencies, stating that the conduct of the victim does not decrease the amount of insurance protection offered to them. Contrary to the remarks of AG Lenz,⁴⁷⁷ it can be inferred from **Candolin**⁴⁷⁸ that Member States cannot limit the insurance coverage offered to third parties even in exceptional circumstances such where the passenger was partially or fully to blame for their injuries. The Court has clarified that the permitted stolen vehicle exclusion is to be interpreted restrictively, as it is a departure from the general rule that passengers should always receive compensation.⁴⁷⁹

This issue was again revisited by the then ECJ in **Farrell v Whitty** (henceforth '**Farrell**').⁴⁸⁰ Here, the passenger was injured whilst sat on the floor in the back of a van which was not constructed for the purpose of seating. The van driver was uninsured and the Irish MIB refused to compensate the plaintiff on the basis that liability for the personal injuries sustained by the plaintiff was not a liability for which insurance was compulsory under the Irish **Road Traffic Act 1961**. Ireland argued that its restrictive approach was justified by a desire for consistency with legislation on road safety, since the inclusion of such persons within the scope of compulsory insurance would be tantamount to requiring insurers to underwrite conduct that was deliberately dangerous. Therefore, they argued, exclusion clauses other than the stolen vehicle exclusion should be permitted when the victim is involved in dangerous conduct to provide a deterrent.

The issue was referred to the then ECJ which decided against the Irish Government, and emphasised that passengers were a potentially vulnerable class of victims with which the **Third Directive** attempts to ensure compensation. The Court stated that Member States are not entitled to introduce additional restrictions to the level of compulsory insurance cover to be accorded to passengers, and further reinforced previous ECJ decisions that exclusion clauses could not be utilised, because of the requirement for compatibility of treatment across Member States. Furthermore, in relation to blameworthy passengers, they argued that it

⁴⁷⁶ Ibid.

⁴⁷⁷ Bernáldez (n 216).

⁴⁷⁸ Candolin (n 217).

⁴⁷⁹ Subject to issues surrounding civil liability rules which will be examined in the next sub-Chapter.

⁴⁸⁰ Farrell v Whitty (n 383)

'seems difficult to make the concept of passenger for the purposes of Art. 1 of the Third Directive depend on the conduct of a victim of a road traffic accident'.⁴⁸¹

Referring to **Candolin**,⁴⁸² the AG argued:

*"Transposed to the instant case...that reasoning might mean that insurance cover for certain classes of persons carried cannot be reduced or excluded on the basis of considerations depending on the hazardousness in the abstract of their conduct".*⁴⁸³

Farrell reinforces the view of the Court in **Candolin**,⁴⁸⁴ that insurers cannot rely on the contributory conduct of the victim to repudiate liability under insurance law rules, even where the injured party's conduct is dangerous or even illegal. The then ECJ in **Farrell**, however, showed greater hesitation than in **Candolin** by the use of 'might mean', a term that does not suggest certainty. It is clear though that the then ECJ, especially in **Candolin**, have been stringent on the use of exclusion clauses or statutory terms. Consequently, it is extremely unlikely that any future CJEU decision would permit any clause which excludes from insurance coverage being used. Of course, dangerous or blameworthy conduct which contributes to the accident can allow a limitation of damages under civil liability rules which are not expressly dealt with by the Directives. This Chapter will now examine civil liability rules, their relationship with insurance law rules and how the Directives affect them.

Blameworthiness and Civil Liability Rules

The finding of civil liability and awarding of damages occurs before insurance coverage is decided. There is nothing in the Directives which expressly prevent the insurer from excluding liability, if civil liability itself is absent, or can be limited in some way due to contribution to the accident or damage from the injured party (i.e. in the UK through contributory negligence). The Directives are unclear on the issue and only indicate that all civil liability is to be protected by insurance.

Cases have come before the ECJ and CJEU questioning the relationship between civil liability and insurance law exclusion clauses, and the effect which the

⁴⁸¹ Ibid,1266.

⁴⁸² Candolin (n 217).

⁴⁸³ Ibid,1264.

⁴⁸⁴ Ibid.

Directives have on the law of civil liability. The question as to the effect of the Directives on civil liability was examined first by the then ECJ in **Ferreira v Companhia**.⁴⁸⁵ The case concerned an accident where a 12-year-old boy was fatally injured. The motor insurer refused to pay any damages because Spanish law, provided that passengers not carried for a fee could only claim compensation based on the fault of the driver and as the driver was not at fault for the accident, no compensation would be paid. The matter was taken to the then ECJ, which held that the Directives do not seek to govern the laws on civil liability, and it is left to the Member States to use the type of liability they choose (i.e. fault, no fault, or strict liability) as long as this liability is covered by insurance within the terms of the Directive. Accordingly, Spanish law could exclude liability to the injured victim under the law of civil liability.

The issue of civil liability rules was then considered by the then ECJ in **Candolin**.⁴⁸⁶ It is worth reiterating that this case concerned an intoxicated driver, and intoxicated passengers, who knew that the driver was intoxicated. As well as arguments based on insurance law exclusion clauses, the Finnish, German, and Austrian Governments argued that they could deny paying the passengers because Community law does not impose any restrictions on the appraisal, under national law on civil liability, of the extent to which the passenger contributed to the occurrence of his injuries.⁴⁸⁷ The Court partially agreed and stated:

*“It is clear from the aim of the First, Second and Third Directives...that they do not seek to harmonise the rules of the Member States governing civil liability...**Member States are free to determine the rules of civil liability applicable to road accidents**”.*⁴⁸⁸

The then ECJ recognised, however, that there is potentially a significant overlap between the Directives and civil liability rules and held that: ‘*The national provisions which govern compensation for road accidents cannot, therefore, deprive those*

⁴⁸⁵ Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correia Ferreira v Companhia De Seguros Mundia Confianca SA C-348/98.

⁴⁸⁶ Candolin (n 217).

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid, [24], emphasis added.

provisions of their effectiveness'.⁴⁸⁹ The Court further held that such would be the case where:

“Solely on the basis of the passenger's contribution to the occurrence of his injuries, national rules, established on the basis of general and abstract criteria, either denied the passenger the right to be compensated by the compulsory motor vehicle insurance or limited such a right in a disproportionate manner”.⁴⁹⁰

The Court finally held that: *'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'*.⁴⁹¹ It is clear, therefore, that the law of civil liability is in fact impacted considerably by the directives as any limit of damages based on civil liability must be done proportionately and based on the individual circumstances of each case. Moreover, it is evident that the then ECJ was concerned that substantial differences in damages under civil liability could create a barrier to the freedom of movement as there would be differences in the treatment of victims from State to State, which is something that the Directives had intended to avoid. Finally, it is possible that the reduction of damages under civil liability rules could be used as an alternative to the reduction of damages for the blameworthiness under insurance law rules, which would thereby limit the overall effectiveness of the Directives.

The Courts' decision in **Candolin**,⁴⁹² however, has been criticised vehemently by many tort law academics.⁴⁹³ One author stated that, *'the Court reads the Directive word for word and comes to the outrageous conclusion in this decision'*.⁴⁹⁴ The author then goes on to state that **Candolin** disregards the most fundamental of tort law principles, that the damages received by the third party should be based upon

⁴⁸⁹ Ibid, [28].

⁴⁹⁰ Ibid, [29].

⁴⁹¹ Ibid, [30].

⁴⁹² Ibid.

⁴⁹³ See Koch A in Koziol H and Steininger B, *European Tort Law 2005* (Tort and Insurance Law Handbook, 2005, Springer Wien New York, 599) also see Karolina Redo "The Road Traffic Act 1998 and EU motor insurance standards: a few reflections on Churchill" (2013) P.N. 29(1), 49-58, 50 who argues that this criticism is completely justified.

⁴⁹⁴ Ibid another author stated *"The ECJs decision in Candolin constitutes something of a bombshell"* in an area of law which in the UK was previously settled See Lunney and Oliphant, *Tort Law: Text and Materials*, (5th edition, Oxford University Press, 2013), 304-305.

the fault of that third party.⁴⁹⁵ By limiting this, the author argues that the fundamental principles of the law of tort are being undermined by the Directives and subsequent EU dictum.⁴⁹⁶ In spite of this, the importance of the ECJ's decision cannot be underestimated. The decision allows the courts to disregard any legal liability provisions, which it deems to be depriving the directives of effectiveness by limiting compensation disproportionately. It also goes a step further by potentially prohibiting tortious limitations other than those made in '*exceptional circumstances*'. The meaning of these terms was not expressly addressed by the Court in **Candolin** and were therefore left open to interpretation for future Courts.

The decision in **Lavrador**⁴⁹⁷ provides an example as to how the issue as to civil liability rules and '*exceptional circumstances*' should be interpreted. This case concerned a road accident where a child was clearly to blame due to cycling on the wrong side of the road towards traffic. The Spanish **Código Civil** provided that when the victim's fault has contributed to the occurrence or aggravation of the injury or loss, according to the seriousness of that fault, that person is to be deprived of some or all compensation. The CJEU held that this provision was lawful as it did not omit automatically compensation and only prevented compensation when the accident was caused exclusively by the victim. The Court held that unlike in **Candolin**⁴⁹⁸ and **Farrell**⁴⁹⁹ the right to compensation in this case is not affected by a limitation of the cover of insurance, but rather by a limitation of the insured driver's civil liability under the applicable civil liability rules.⁵⁰⁰ This was a relatively straightforward case as the **Código Civil** was legislation which solely examined civil liability rules whereas the **Irish Road Traffic Act 1961** in **Farrell** was legislation which dealt with the overall law of insurance.

In **Carvalho**,⁵⁰¹ an accident occurred where neither driver could be proven to be at fault. Therefore, the compensation given to both drivers was limited based on their contributions to the accident. The CJEU held that limiting damages in a manner which is not disproportionate but rather based on the fault of each party did not

⁴⁹⁵ Ibid.

⁴⁹⁶ Ibid.

⁴⁹⁷ *Lavrador v Companhia de Seguros Fidelidade-Mundial SA* Case C-409/09 [2012] R.T.R. 4.

⁴⁹⁸ *Candolin* (n 217).

⁴⁹⁹ *Farrell* (n 383).

⁵⁰⁰ *Lavrador* (n 500).

⁵⁰¹ *Carvalho v Companhia Europeia de Seguros SA* Case C-484/09 [2011] R.T.R. 32.

cause an *'impediment'* to free movement and therefore did not undermine the Directives.⁵⁰² The CJEU held that by intervening too much into the rights of jurisdictions to determine their laws on legal liability, it would be a *'significant intrusion'* into the legal systems of the member states which would cause uncertainty.⁵⁰³ Both **Carvahlo**⁵⁰⁴ and **Lavrador**⁵⁰⁵ were clear cases as the rules on which they were based, were clearly rules of civil liability which limited the compensation payable proportionately to the damage caused. Of course, it is arguable that in **Carvahlo**⁵⁰⁶ the circumstances in which compensation was limited were not *'exceptional'* as was required in **Candolin**,⁵⁰⁷ but nevertheless, the damages were limited proportionately based on the fault of the parties.

An example of the difficulties in establishing whether a rule is based on civil liability or insurance can be found in **Churchill**,⁵⁰⁸ where uncertainties were addressed as to whether **Section 151 (8) RTA** was either of these rules. **Section 151 (8)** provided that the insurer could recoup losses from the insured when the insured permits an uninsured person to drive the vehicle. This acted as an effective bar to recovery when the insured was himself a passenger, as the insurer could recoup any damages paid to the insured. It was uncertain, however, as to the nature of **Section 151 (8)**, as it only had the nature of an insurance law exclusion when the insured was a passenger. In the CJEU, AG Mengozzi found determining the differences between civil liability rules and insurance law rules problematic:

*"I may not... fail to observe that the distinction between the two stages can, in practice, present certain difficulties, and it is conceivable that the court may, in the future, be called upon to give further clarification on this point".*⁵⁰⁹

This was re-iterated in Aitkens J's decision in the Court of Appeal. Aitkens J found that the rule in **Section 151 (8)** was based on both insurance law and civil liability. In 'case 1' the insured is not a passenger in the vehicle and by seeking to recover

⁵⁰² Ibid, AG 69.

⁵⁰³ Ibid, AG 71.

⁵⁰⁴ Ibid

⁵⁰⁵ Lavrador (n 500).

⁵⁰⁶ Carvalho (n 504).

⁵⁰⁷ Candolin (n 217).

⁵⁰⁸ Churchill Insurance Co Ltd v Wilkinson (n 442)

⁵⁰⁹ Ibid, 1782.

the insurer is not prejudicing the insureds right to compensation, this situation, Aitkens J argued, concerns civil liability, and does not have an insurance law exclusion element. However, in 'case 2' the insured is a passenger who is injured and hence when the insurer seeks to recover damages paid to the insured, this is an exclusion based on insurance law rules which is affected by the Directives.⁵¹⁰ Accordingly, Aitkens J stated, that **Section 151 (8)** must be read with additional words stating:

*“where the person insured by the policy may be entitled to the benefit of any judgment to which this section refers, any recovery by the insurer in respect of that judgment must be proportionate and determined on the basis of the circumstances of the case”.*⁵¹¹

This demonstrates the difficulty which the Courts have found when deciding whether a rule is based on insurance law or civil liability. Some academics believe that Aitkens J's decision was incorrect, and that there does not appear to be an element of civil liability in **Section 151 (8)**.⁵¹² This is because it does not determine whether and to what extent compensation is due to the victim under tort law; it solely gives the insurer a right of recourse against the insured who caused or permitted the use of a vehicle by an uninsured person.⁵¹³

It is notable that although the Directives do already have a significant effect on civil liability as previous cases have highlighted, the EU have made attempts to alter the position, and harmonise civil liability through the Directives. When consulting for the **Second Directive**, a resolution was passed by the EU Parliament which called on the European Commission, without delay, to harmonise the rules of civil liability relating to victim.⁵¹⁴ This, however, had no effect as there was major opposition by many Member States.⁵¹⁵ The issue then re-appeared and was proposed in the **Fifth Directive**. The proposed recital stated:

⁵¹⁰ Ibid.

⁵¹¹ Ibid.

⁵¹² See Karolina Ludwichowska-Redo “The Road Traffic Act 1998 and EU motor insurance standards: a few reflections on Churchill” P.N. 2013, 29(1), 49-58, 52.

⁵¹³ Ibid.

⁵¹⁴ See OJ no C 293 of 13/12/1976, 18.

⁵¹⁵ Commission of European Communities, “Proposal for a Second Council Directive on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles” Com (80) 469 final, 1.

*“It should be ensured that pedestrians and cyclists are covered by the compulsory insurance of the vehicle involved in the accident, irrespective of whether the driver is at fault”.*⁵¹⁶

This would have ensured that insurers could not exclude compensation in any circumstances even based on the civil liability fault of the victim. This, however, gained numerous amounts of criticism especially from tort lawyers who argued that this would impose a system of strict liability against the wishes of the Member States.⁵¹⁷ The proposal was therefore subsequently dropped.

It is evident that there is some work to do to ensure certainty in this area, great disparities in civil liability has the potential to disrupt the effectiveness of system by making litigation difficult. Further, there is continued confusion as to the overlap between civil liability rules and insurance law rules. Moreover, the Courts need to clarify whether civil liability can only reduce damages in ‘*exceptional circumstances*’ as was explained in **Candolin**⁵¹⁸ and the circumstances involved, or whether Member States can reduce damages in non-exceptional circumstances as in **Carvahlo**.⁵¹⁹

The CJEU Expanding the Scope of Insurance

It transpires from the above CJEU jurisprudence that EU law has taken a protective stance towards compensation in relation to third parties and a restrictive stance towards exclusion clauses in both civil liability and insurance law. This protective stance has recently been entrenched in the case of **Damijan Vnuk v Zavarovalnica Triglav**⁵²⁰ (henceforth ‘*Vnuk*’). Here, a tractor and trailer reversed into a farmworker who was on a ladder on a private farm in Slovenia. The worker’s claim for compensation was refused in the Slovenian Courts because compulsory insurance did not cover for accidents involving farm machinery on private land. The worker appealed to the CJEU and argued that the use of machinery on private land

⁵¹⁶ Proposal for a Directive of the European Parliament and of the Council amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC, 90/232/EEC and Directive 2000/26/EEC on insurance against civil liability in respect of the use of motor vehicles (Com (2002) 244 final), Recital 14.

⁵¹⁷ See Robert Merkin and Jeremy Stuart-Smith, *Motor Insurance* (First Edition, Sweet and Maxwell: London, 2004), 1-45.

⁵¹⁸ Candolin (n 217).

⁵¹⁹ Carvahlo (n 499).

⁵²⁰ Vnuk (n 239)

should be covered; the Directives were not clear on the issue. However, the CJEU, in its' decision, stated:

*“The development of the European Union legislation concerning compulsory insurance shows that that objective of protecting the victims of accidents caused by vehicles has continuously been pursued and reinforced by the European Union legislature”.*⁵²¹

Consequently, the Court stated, the worker should be compensated because insurance should cover, ‘any use of a vehicle that is consistent with the normal function of that vehicle’,⁵²² and went as far as stating that this involves accidents that occur on private land.⁵²³

This decision has significant implications, as most Member States only require motor vehicles to be covered on public roads.⁵²⁴ The decision was unexpected and very few would have predicted that a case would expand the scope of compulsory insurance so far. The UK for example only provides compulsory insurance cover for certain types of vehicle and only on public land.⁵²⁵ The decision signifies that the CJEU is willing to go to great lengths to ensure that the third-party victim is always compensated.

The Future of EU Motor Insurance Law

The EU is beginning to retract slightly on the protection given to third parties, although this is only in relation to the **Vnuk** decision from the CJEU. The European Commission, in its' impact assessment, stated that the **Vnuk** decision would have a significant effect on premiums and would make some activities such as motor sports unviable.⁵²⁶ Subsequently, the Commission stated that a new Directive was needed to address and clarify the scope of cover.⁵²⁷

⁵²¹ Ibid, [52].

⁵²² Ibid, [56].

⁵²³ Ibid

⁵²⁴ See the UK which states that Motor Insurance is needed for vehicles on a ‘road (or public place)’ in Section 143 (1) (a) RTA 1988.

⁵²⁵ Road Traffic Act 1988.

⁵²⁶ European Commission, “Inception Impact Assessment Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/103/EC of the European Parliament and the Council 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”, June 2016.

⁵²⁷ Ibid.

With the potential for the EU to revert from the CJEU's very protective **Vnuk** decision, it is questionable as to whether the EU may clarify or indeed revert from its' decisions in relation to exclusion clauses. However, it is submitted that this is unlikely and the intention of the EU is clear. This is evident from the EU's announcement of a REFIT exercise⁵²⁸ in relation to Motor Insurance with the preparation for a new Directive which will include any reversal of **Vnuk**. This was announced in a Communication from the European Commission which, *inter alia*, examined motor insurance. The Communication stated:

*"The Commission will complete the REFIT review of the Motor Insurance Directive and will decide on any amendments required to **enhance the protection** of traffic accident victims".*⁵²⁹

This, therefore, seems to be an indication from the Commission that it will not take any measures that reduce protection for accident victims. In July 2017, the EU Commission again introduced an '*inception impact statement*' for a REFIT Review of the Motor Insurance Directive.⁵³⁰ The Statement stated in relation to context:

*"Evidence coming from court cases, complaints, enquiries and parliamentary enquiries suggests disparities in terms of its implementation at Member States level, in particular as regards the scope".*⁵³¹

The Commission stated that the REFIT review will examine four priorities relating to the Directive.⁵³² Whilst exclusion clauses were not mentioned within the four priorities, the Commission stated that, '*The REFIT review will evaluate the whole Motor Insurance Directive, including elements where no problems have so far been identified*'.⁵³³ The Commission within the document consistently mentioned higher

⁵²⁸ European Commission, "Communication from The Commission to The European Parliament, The Council, The European Central Bank, The European Economic and Social Committee and The Committee of The Regions: Consumer Financial Services Action Plan: Better Products, More Choice" Brussels, 23.3.2017 COM (2017) 139 final, 7

⁵²⁹ Ibid.

⁵³⁰ European Commission "Inception Impact Assessment: REFIT Review of the Motor Insurance Directive", 24/07/2017 Ref. Ares (2017)3714481.

⁵³¹ Ibid, 1.

⁵³² Information about claims, Guarantee Funds response to insolvency, adequacy of minimum amounts of cover and scope (focussed on Vnuk), Ibid.

⁵³³ Ibid.

scopes of cover, meaning higher premiums.⁵³⁴ There was no discussion in terms of reduction coverage or permitting exclusion clauses to be used. It is submitted, therefore, that it is unlikely that this REFIT exercise will alter the position with regards to exclusion clauses. There is potential, however, considering recent CJEU rulings, for later alterations in the Directive, to confirm that exclusion clauses cannot be used against third parties.

Conclusion

In this Chapter, we have examined the EU's attempt at harmonisation of the law of motor insurance and exclusion clauses across the EU Member States. This is to ensure consistency, remove confusion, and provide a high standard of protection for third parties through all EU Member States.

The Directives are vague and have needed significant interpretation by the then ECJ, the EFTA and the CJEU, particularly with regards to exclusion clauses as this provision in **Article 13** is particularly vague. Through the line of case law from the EU courts, a strict interpretation of EU law has been taken, with only one exclusion clause permitted, involving stolen vehicles. This is unsatisfactory, even if the Bureau picks up claims which are excluded by the insurer.

Moreover, the courts have taken a strict interpretation towards the use of insurance law exclusion clauses, even where the passenger is partially to blame for the accident. It is submitted that the CJEU's interpretation of the Directives is correct as is evident from the *travaux préparatoires* to the **Second Directive**, which emphasise the need for consistency.

However, some confusion remains in relation to the engagement of the Directives and civil liability rules, with confusion as to the extent to which courts can reduce damages through civil liability, before deciding on the insurance coverage. It is submitted that this needs to be clarified and the courts need to be careful, so as not to provide a back-door to the use of exclusion clauses.

This Chapter has contributed to this thesis through the analysis of EU law's restrictive effect on the validity of exclusion clauses. Providing a rationale behind

⁵³⁴ See particularly *ibid*, 2.

the EU's approach and consistency in the case law, clarifies that under EU law (with one narrow exception), exclusion clauses are not valid.

Thus, with a strict interpretation of the Directives taken by the EU courts, it is important to examine how UK Courts have interpreted EU law and the ways in which third parties could enforce their EU law rights. It is clear, as the next chapter will show, that the UK has taken inconsistent interpretive approaches. Moreover, it is important to examine the effects of Brexit on UK law.

Chapter Five: UK Interpretation of EU Law

Introduction

With the interpreting case law from the European Courts, EU law seems clear. However, as the CJEU only has the power to interpret European Law and not to apply it, application is left to the national courts. This is not always straightforward as there is possibility of inconsistent interpretation amongst appellate and first instance courts.

Moreover, it is apparent that the **RTA 1988** is not consistent with EU Law. For example, as shown throughout Chapter Three, the **RTA** only prohibits some exclusion clauses, whereas EU law prohibits almost all exclusion clauses, except for those relating to ‘*stolen vehicles*’. The UK appellate courts have attempted to manage these inconsistencies. Furthermore, since the UK voted in a referendum to leave the European Union in June 2016, the situation has become even more complex and uncertain. The UK did not invoke its’ **Article 50 Treaty on the Functioning of the European Union**⁵³⁵ (henceforth ‘*TFEU*’) rights until March 2017, and with negotiations still taking place before an official withdrawal (which takes a maximum of two years). The UK must continue to implement EU law until it formally withdraws from the EU and the authority of the CJEU and risks **Francovich** action if it refuses to comply.

This Chapter will examine the ways in which Directives can be enforced by third parties in national courts through direct and indirect effect. It will then examine the UK courts’ interpretation of EU law through the **Bristol Alliance** and **Delaney v Secretary of State for Transport**⁵³⁶⁵³⁷ (henceforth ‘*Delaney*’) cases as well as very recent case law. The chapter will finally look at the potential impact of Brexit and whether the UK is at threat of a state liability challenge due to non-compliance.

Direct Effect

The legal definition of a Directive can be found in **Article 288** of the **TFEU**⁵³⁸ which states that:

⁵³⁵ Treaty on the Functioning of the European Union, [2012] OJ C326/15

⁵³⁶ *Delaney v Secretary of State for Transport* [2014] R.T.R. 25

⁵³⁷ [2015] EWCA Civ 172

⁵³⁸ Treaty on the Functioning of the European Union, [2012] OJ C326/15

“A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”.

Accordingly, Directives are not directly applicable and Member States are required to introduce or amend national law to ensure that the Directive’s objectives are achieved, but are given a degree of latitude as to the form and methods used to achieve those objectives.

However, when a Member State fails to implement a Directive effectively, the principle of direct effect can allow individuals to immediately invoke EU Law in their national courts⁵³⁹ against the Member State or its emanation⁵⁴⁰ (henceforth ‘*vertical direct effect*’). Essentially, direct effect prevents the Member State from relying on national law provisions which infringe the Directive. However, for Directives to be capable of direct effect, three conditions must be satisfied: First, the provision which the individual seeks to rely must be sufficiently clear and unconditional,⁵⁴¹ second, the date for implementation of the directive must have passed,⁵⁴² and third, the individual must bring an action against the state or an emanation of the state.⁵⁴³ Consequently, it is clear from the third condition, that Directives cannot be directly enforced between individuals or businesses (‘*horizontal direct effect*’ (HDE)).⁵⁴⁴ This means that as an insurer cannot be deemed an emanation of the state, HDE cannot be used against an insurer when breaching European law by inserting an exclusion clause in its’ policy.

It is further ambiguous whether the Motor Insurance Directives could be subject to vertical direct effect because of the absence of clarity amongst the provisions and the way in which the Directives are to be implemented. The UK courts have not been decisive on this issue, Collins J in ***Singh v Solihull***,⁵⁴⁵ suggested that the

⁵³⁹ See *Van Duyn v Home Office* (Case 41/74 C) [1974] E.C.R. 1337.

⁵⁴⁰ This will be discussed later.

⁵⁴¹ *Van Duyn v Home Office* (n 542).

⁵⁴² *Ratti* (Case 148/78) [1979] E.C.R. 1629.

⁵⁴³ *Case 152/84 Marshall* (No.1) [1986] EC4. 335.

⁵⁴⁴ This was concluded in *Marshall* See *Ibid*. Also see article Sara Drake and Cathryn Costello, ‘Enforcing EC Motor Insurance Directives: Navigating the Maze’ (2003) *European Public Law* 9 (3) , pp. 371-398, 378.

⁵⁴⁵ *Singh* (n 335)

Directives are unclear in their wording and are therefore incapable of having direct effect:

“In this case it is clear that the limits are not exactly defined and there is a degree of discretion left to individual Member States as to what provisions they do enact in relation to the compulsory insurance of those who use motor vehicles”.⁵⁴⁶

Other cases have examined Direct Effect and have followed the same line of reasoning as Collins J in **Singh v Solihull**.⁵⁴⁷ For example, in **Mighell v Reading**,⁵⁴⁸ Hobhouse LJ stated:

“the Second Directive is sufficiently precise to enable the persons intended to benefit to be identified and it also sufficiently defines the scope of the rights which... persons are to have but it...leaves it to the Member States to decide how they will implement the Directive...The Directive therefore...fails to satisfy the third criterion of “direct effect””.⁵⁴⁹

It is submitted that Collins J and Hobhouse LJ are both correct, although the directives are sufficiently clear in defining the rights to be given to the victim, they provide significant discretion as to their limits and implementation. Thus, the Directives are incapable of direct effect.

Alternatively, however, individuals may invoke the doctrine of indirect effect. In fact, it is recognised that indirect effect is utilised more than direct effect in the UK.⁵⁵⁰ Indirect effect arrived in the case of **Von Colson**⁵⁵¹ but was later examined and applied in greater depth in the **Marleasing**.⁵⁵² The **Marleasing** decision found that the national court is required to interpret national law, ‘*in light of the wording and purpose of the directive in order to achieve the result (of the directive)*’.⁵⁵³

⁵⁴⁶ Ibid, [31].

⁵⁴⁷ Ibid.

⁵⁴⁸ Mighell v Reading and Another, Evans v Motor Insurers Bureau and White v White and Another [1998] EWCA Civ 1465.

⁵⁴⁹ Ibid, [71], emphasis added.

⁵⁵⁰ Chalmers D, ‘The Positioning of EU Judicial Politics within the United Kingdom’ (2000) 23 WEP 169, 190.

⁵⁵¹ Von Colson v Land Nordrhein-Westfalen (C-14/83) [1986] 2 C.M.L.R. 430 .

⁵⁵² Marleasing (n 422).

⁵⁵³ Ibid, [21].

Marleasing therefore strengthens the Courts' interpretative duty as it is, 'no longer sufficient for a national court to turn to Community law only if the national provision is ambiguous'.⁵⁵⁴ Moreover, indirect effect is not limited to disputes against the state and can be used between private parties, meaning that Courts are required to use indirect effect in disputes involving insurers and third party victims. **Marleasing** was expanded in **Pfeiffer v Deutsches Rotes Kreuz Kreisverband Waldshut eV** (henceforth '**Pfeiffer**')⁵⁵⁵ where the Court stated:

*"(the) principle of interpretation in conformity with Community law thus requires the...court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law to ensure that Directive...is fully effective".*⁵⁵⁶

Subsequently, the national court is required to do whatever lies within its' jurisdiction to give effect to the Directive and the rules which are founded and interpreted within the CJEU. An example of indirect effect being used in relation to the Directives can be found in **Churchill v Fitzgerald**.⁵⁵⁷ It was clear that the UK legislative regime under **Section 151 (8)** conflicted with the **Second Directive**, as it was deemed to have some insurance exclusion elements, which were prevented by the Directive. Aitkens LJ re-interpreted the Section by utilising the **Marleasing** approach and added to the wording of the provision to introduce a proportionality element, giving effect to the CJEU's previous ruling in **Candolin**. Dr Bevan stated that **Churchill**:

*"Provides helpful guidance on the modern approach to the purposive interpretation required under national law where this conflicts with Community law. It has also contributed its own fairly radical application of those principles, amending the relevant provision by the insertion of 47 new words, as if to illustrate in graphic terms just how far we have come since Marleasing".*⁵⁵⁸

⁵⁵⁴ Docksey C and Fitzpatrick B, "The Duty of National Courts to Interpret Provisions of National Law in Accordance with Community Law" (1991) 20 ILJ 113,119.

⁵⁵⁵ Pfeiffer v Deutsches Rotes Kreuz Kreisverband Waldshut eV (C-397/01) [2005] 1 C.M.L.R. 44 .

⁵⁵⁶ Ibid, [118].

⁵⁵⁷ Churchill Insurance Co Ltd v Fitzgerald [2013] 1 W.L.R. 1776.

⁵⁵⁸ Nicholas Bevan "Churchill Insurance Co Ltd v Fitzgerald and Wilkinson: personal injury - road traffic accidents – compensation" (2012) Journal of Personal Injury Law, 4, C223-C230, C226.

It is evident that **Churchill** provides a rather radical example as to the distance that Courts can go to ensure consistency between national provisions and Directives. The courts can amend the wordings of existing national provisions to ensure that they are compliant with EU law. Of course, there is only so far in which a Court can interpret and therefore indirect effect may not always be effective if the provision is so inconsistent that it cannot be worded sufficiently considering EU law.

Alternatively there is a potential for the Courts to use incidental horizontal direct effect to mitigate for the absence of horizontal direct effect. This was examined in the CJEU decision of *CIA Security International*,⁵⁵⁹ whereby the CJEU held that a private claimant could rely on the Member States' failure to comply with a directive in an action against the defendant,⁵⁶⁰ although this did not provide the defendant with any obligation bound from the Directive.⁵⁶¹ The relevance of this, however, for victims attempting to enforce their EU law rights in UK courts is unlikely, as the Motor Insurance Directives do provide responsibility for motor insurers to compensate directly, and no known case has examined the potential to use incidental direct effect in motor insurance scenarios. This means that it is unlikely that incidental direct effect could be used to mitigate for lack of horizontal direct effect.

UK Interpretation of the Directives

With the issues in relation to direct effect having been examined, it is important to consider how the UK Courts have interpreted EU law in relation to the issue of exclusion clauses. Few cases have come before the UK Courts in dispute of the UK's interpretation of EU law to challenge the use exclusion clauses, because the victim is rarely left without any form of compensation even if an exclusion clause is breached. The MIB will pay in those circumstances, unless it is not covered within their agreements, and therefore it is unlikely that the victim of the accident will challenge the rights of the insurer to repudiate liability.

⁵⁵⁹ *CIA Security International SA v Signalson SA* (C-194/94) [1996] E.C.R. I-2201, note this was not a case about motor insurance or concerned whether this could be used in motor insurance.

⁵⁶⁰ Paul Craig "The legal effect of Directives: policy, rules and exceptions" (2009) E.L. Rev. 34(3), 349-377, 365.

⁵⁶¹ *Ibid.*

In fact, only one case has come before UK Courts which has directly and comprehensively dealt with the EU law on exclusion clauses. In ***Bristol Alliance Partnership Ltd v Williams***⁵⁶², a driver purposely drove into a House of Fraser Store in Bristol which was compensated by the property insurer who then claimed under the laws of subrogation against the motor insurer. The motor insurer denied liability due to an exclusion clause in the motor policy which stated that the motor insurers will not pay for deliberately caused damage. This case was important for the property insurers as the MIB exclude payment for subrogated claims, therefore if they were denied compensation from the insurer, they would be unable to recover. As well as examining UK law on this issue which was discussed in the previous chapter, Ward LJ contemplated whether EU law prevented the motor insurer from repudiating liability, and further whether the UK was in breach of EU law by giving the MIB an enhanced role. Ward LJ stated that the crucial issue was whether the ***Bernáldez***⁵⁶³ decision should be interpreted as being of general application. This would compel a ***Marleasing***⁵⁶⁴ meaning to be given to ***Section 151(2) (a)***⁵⁶⁵ RTA, which states that for there to be a direct right against the insurer the claim must be *'within the terms of the policy'*, and read with ***Section 145*** RTA, which gives requirements in respect of policies.⁵⁶⁶ His Lordship further stated that if ***Bernáldez***⁵⁶⁷ was interpreted widely, which therefore restricts all exclusion clauses from being used by the insurer: *'then the way the Road Traffic Act combined with the way that the MIB scheme has always operated is not compliant with the Directives'*.⁵⁶⁸

⁵⁶² [2013] Q.B. 806.

⁵⁶³ *Bernáldez* (n 216).

⁵⁶⁴ *Marleasing* (n 422).

⁵⁶⁵ Section 151 (2) States.

Subsection (1) above applies to judgments relating 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 of this Act and either—

(a) it is a liability covered by the terms of the policy or security to which the certificate relates, and the judgment is obtained against any person who is insured by the policy or whose liability is covered by the security, as the case may be, or

(b) it is a liability, other than an excluded liability, which would be so covered if the policy insured all persons or, as the case may be, the security covered the liability of all persons, and the judgment is obtained against any person other than one who is insured by the policy or, as the case may be, whose liability is covered by the security.

⁵⁶⁶ Section 145 lists the requirements of insurance policies.

⁵⁶⁷ *Bernáldez* (n 216).

⁵⁶⁸ *Bristol Alliance*, (n 15), [65].

It is therefore important to examine how the UK Courts have interpreted EU law in this area and whether the EU Directives and case law have been given a general or narrow interpretation. Numerous cases have further come before UK Courts where judges have, *obiter*, contemplated the interpretation to be given to EU law concerning exclusion clauses. This Chapter will now examine cases which have interpreted EU Law to give it general application, it will then go onto examine the Bristol Alliance case and how it has attempted to restrict the effect of EU Law.

Giving General Effect to EU Law

Prior to ***Churchill v Wilkinson***⁵⁶⁹ being referred up to the CJEU, both the Queen's Bench Division and Court of Appeal examined EU Law and **Article 13** closely. In the Queen's Bench Division, Blair J stated:

*"I consider that in general terms the claimant was justified in his submission that, whatever the precise analysis of Candolin, the trend of these authorities is towards a strict interpretation of any exclusion from the right to compensation unless provided for by the terms of the Directives".*⁵⁷⁰

Blair J noted that the result of **Section 151 (8) RTA** was to exclude the victim from compensation which is impermissible under the Directives. The issue then went to the Court of Appeal and was heard before Waller LJ. Before referring the case to the CJEU, Waller LJ stated:

*"Article 12(1) would suggest that insurance is required to cover all ...passengers injured except those contemplated by...art.13 (1) ... Does art.12 (1) have the wide meaning suggested? In my view the judgments in the CJEU support the view that it does".*⁵⁷¹

Waller LJ further went on to examine the opinion of AG Lenz and the then ECJ decision in ***Bernáldez*** and stated:

"(AG Lenz) relied on the obligation to have in place compulsory insurance under...art.3 of the...Directive in taking the view that the

⁵⁶⁹ [2010] EWCA Civ 556.

⁵⁷⁰ [2009] EWHC 1297 (QB), 376, emphasis added.

⁵⁷¹ *Ibid*, [26].

*exclusion clauses contained in art. 13(1) were not an exhaustive list. That that was his view is apparent from his answers to Questions 1, 3, and 4...it is clear the court took the same view...if the reasoning in Bernáldez ...is followed, **the insurers cannot argue that art.13 (1) defines the only prohibited exclusion clauses**".*⁵⁷²

Waller LJ, therefore, believes the Directives are to be interpreted widely to prevent the insurer from relying on an exclusion clause. Waller LJ does not state that all exclusion clauses are prohibited, but that exclusion clauses cannot be utilised against passengers, (subject to **Article 13**) and the prohibited exclusion clauses contained within **Article 13 (1)** are not an exhaustive list due to the obligation to insure put in place by **Article 3** of the **First Directive**.

In **White v White**,⁵⁷³ the House of Lords examined the MIB Agreements and the definition of the term '*knew or ought to have known that the vehicle was uninsured*', an exclusion within **Clause 6** of the MIB agreements. This term seemed wider than the phrase '*knew that the vehicle was uninsured*' permitted within **Article 10** of the Directives. Lord Nicholls stated, '*The context is an exception to a general rule. The Court of Justice has stressed repeatedly that exceptions are to be construed strictly*'.⁵⁷⁴ Lord Nicholls acknowledged that there was some discrepancy and followed the dicta of the then ECJ in **Candolin** that derogations from the general rule were to be interpreted strictly. Although this case is based on MIB exclusion clauses rather than insurer exclusion clauses, it highlights that the Courts are willing to give the Directives a wide interpretation, and it is submitted that the Court in this instance would have certainly given **Article 13** the same interpretation if the issue had arisen.

Tugendhat J was next to widely interpret the Directives in **Bristol Alliance**.⁵⁷⁵ The property insurers in **Bristol Alliance** argued that the cases post-dating **Bernáldez**⁵⁷⁶ effusively restricted the validity of exclusion clauses towards third parties. Consequently, as the insurance policy included a term which was not

⁵⁷² Ibid, emphasis added.

⁵⁷³ [2001] 1 W.L.R. 481, [14].

⁵⁷⁴ Ibid.

⁵⁷⁵ Bristol Alliance (n 43).

⁵⁷⁶ Bernáldez (n 216).

permitted by the Directives, it was not compliant with the Directives. The Motor Insurers alternatively argued that **Bernáldez**⁵⁷⁷ is not to be interpreted as applying to exclusion clauses other than those specified exhaustively in **Article 13**. They further argued that the property insurers, who were claiming compensation from the motor insurers, were not victims which the Directives were intended to aid as they have not suffered direct loss or damage. It was further submitted by the motor insurers that **Bernáldez**⁵⁷⁸ only prohibited the one exclusion for intoxicated drivers and this could be shown because the exclusion was eventually codified in **Article 13** as being void against third parties.

These arguments, however, were rejected by Tugendhat J in **Bristol Alliance**. His Lordship stated that motor insurers should be classed as a victim, as they suffered loss, thereby removing limits to the definition. The learned judge further stated that: '*the reasoning of the Court of Justice in **Bernáldez** is clear, and is not confined to purported exclusion clauses relating to drivers who are intoxicated*'.⁵⁷⁹ Tugendhat J therefore stated that English law must be interpreted considering EU law and therefore an exclusion clause, which denied insurance liability in relation to deliberately caused damage, was not permitted. This judgment is significant, because it is the first time that a UK judge has expressly ruled that **Bernáldez** should be interpreted as preventing all exclusion clauses. Of course, Tugendhat J's decision is not binding, as it was only a High Court decision which was later overruled by Ward LJ in the Court of Appeal.

Another recent case to examine **Bernáldez**⁵⁸⁰ is **Delaney**.⁵⁸¹ Here, a passenger was carrying a substantial quantity of cannabis when he was injured in an accident. The insurers repudiated liability under **Section 152 RTA** due to a misstatement in the policy. The MIB refused to compensate the passenger due to an exclusion within the MIB's Uninsured Drivers Agreement which refused compensation when the accident occurred '*in course or furtherance of a crime*'. This provision was arguably direct conflict with **Article 10** of the **Sixth Directive** which substantially limited the exclusion clauses available to the Bureaux. The claimant argued that

⁵⁷⁷ Ibid

⁵⁷⁸ Ibid.

⁵⁷⁹ Bristol Alliance (n 43), [83].

⁵⁸⁰ Ibid.

⁵⁸¹ Delaney (n 534 and 535).

Article 10 and **Article 13** of the **Sixth Directive** together provide that there should be no gaps in the duty to compensate the victim.

Jay J examined the advisory opinion of AG Lenz in **Bernáldez**⁵⁸² and stated:

*“I have paid particular attention to the opinion of Advocate General Lenz because it appears to me to contain a **flawlessly coherent, logical and principled guide to the scheme of the Second Directive**...The only matter where there might be a scintilla of uncertainty is answered by an accurate reading of the Directive itself and subsequent CJEU jurisprudence. (The Directive) sets out a number of exclusion clauses...and it is an established principle of Community law that **these must be read restrictively**.... **it is a basic principle of Community law that derogations are to be construed restrictively...these specific derogations represent the limits of an insurers’ ability to avoid liability to the victim... there is no room for an alternative view**”.*⁵⁸³

Jay J further stated that the victim cannot be permitted to fall between two metaphorical stools whereby they are deprived of compensation. His Lordship stated that the insurer should pay and in the last resort the MIB must step up to compensate the victim. Jay J’s dictum follows closely to that of the ECJ in **Candolin**,⁵⁸⁴ that all derogations from the general rule should be read restrictively. **Delaney** was then appealed by the MIB to the Court of Appeal and was heard before Richards LJ, Kitchin LJ, and Sales LJ. In the Court of Appeal the MIB did not argue for a different interpretation of **Article 13** from the interpretation offered by Jay J. The learned judges nevertheless agreed with the opinion of Jay J and held that it was a general principle of EU law, specifically applied in the context of the Directives by the CJEU in its’ decision in **Candolin**, that derogations from a general rule are to be strictly construed.

⁵⁸² Bernáldez (n 216).

⁵⁸³ Delaney (n 539), [41], emphasis added.

⁵⁸⁴ Candolin (n 217).

Restricting EU law in Bristol Alliance

Despite numerous decisions where judges have given a wide interpretation to **Bernáldez**⁵⁸⁵, Ward LJ in **Bristol Alliance**⁵⁸⁶ took the opposite view, and overruled the previous judgment of Tugendhat J. The learned judge agreed with the motor insurer's argument that **Bernáldez** only applied to cases involving intoxicated drivers and held that, '*there is no justification for reading the Ruiz Bernáldez decision in such a way as to preclude the insurer relying on the exclusion clause*'.⁵⁸⁷ Ward LJ's decision was based on three rationales: First, that Member States are permitted discretion as to how they implement EU Law, second, that the incorporation of a comparable exclusion clause to that examined in the **Bernáldez** decision, into the Directives, is evidence that the decision should be interpreted narrowly. Third by relying on this restrictive interpretation of EU law by Collins J in **Singh v Solihull**.⁵⁸⁸ It is therefore important to examine these rationales to see whether Ward LJ was correct in relying upon them.

Permitting Member State Discretion

Ward LJ's interpretation of EU Law in **Bristol Alliance**⁵⁸⁹ is heavily reliant upon decisions within the UK which permit a wide degree of discretion when implementing the Directives. The first case to examine the extent of discretion is **Clarke v Kato**.⁵⁹⁰ This case concerned an accident which occurred within a car park, the case was sent to the House of Lords by the Court of Appeal (who did not acknowledge EU law in its' decision), to decide whether a car park fell within the meaning of the term 'road' under **Section 145 (3) (a) RTA**. It was submitted, *amicus curiae*, by the claimant that the UK could be in breach of the Directives.⁵⁹¹ Lord Clyde dismissed this argument and stated in relation to EU law:

*"It seems to me that while in this Directive it is certainly required that there be in each country an insurance against civil liability in respect of the use of motor vehicles, **recognition is being paid to the fact***

⁵⁸⁵ Bernáldez (n 216).

⁵⁸⁶ Bristol Alliance (n 15), [68].

⁵⁸⁷ Ibid, [68].

⁵⁸⁸ Singh v Solihull (n 335).

⁵⁸⁹ Bristol Alliance (n 15).

⁵⁹⁰ [1998] 1 W.L.R. 1647

⁵⁹¹ Ibid, 1656.

that there may be differences in the precise cover which national laws may impose in the different member states”.⁵⁹²

Lord Clyde further reinforces this point by relying on **Article 2** of the **Third Directive** which states:

*“Member states shall take the necessary steps to ensure that all compulsory insurance policies against civil liability arising out of the use of vehicles: cover, on the basis of a single premium... and guarantee, on the basis of the same single premium, in each member state, **the cover required by its law or the cover required by the law of the member state where the vehicle is normally based when that cover is higher**”.*⁵⁹³

Lord Clyde stated that from an interpretation of this provision, the scope or extent of the insurance cover obligatory in different Member States may be greater or smaller than the cover in other Member States. His Lordship further stated that the Member State must ensure that the greater cover is available in respect of those Member States where the greater cover is required by its domestic law. Accordingly, the victim will always be awarded the greatest amount of cover available and any provision allowing greater cover will be compliant with the Directives.

This was again examined in ***Axa Insurance UK plc v Norwich Union***⁵⁹⁴ by Smith J, who held that an employee, falling off a raised hoist, was not classed as being carried on or inside a vehicle, and therefore did not fall within compulsory insurance rules under **Section 145 (4A) RTA**. The judge rejected an argument by the employer’s insurers based on ***Bernáldez***⁵⁹⁵ that the Directives should protect the employee. Furthermore, by creating differences between the scope of cover than what the Directives and ***Bernáldez*** require, His Lordship stated the UK is in breach of the EU law.⁵⁹⁶ The learned judge examined the **Second** and **Third Directives**

⁵⁹² Ibid, 1657, emphasis added.

⁵⁹³ emphasis added.

⁵⁹⁴ [2007] EWHC 1046 (Comm).

⁵⁹⁵ *Bernáldez* (n 216).

⁵⁹⁶ *Axa Insurance UK plc v Norwich Union* [2007] EWHC 1046 (Comm), [24].

and relied on the case of **Withers v Delaney**⁵⁹⁷ which was an Irish case similar to facts in **Farrell**⁵⁹⁸ (where the claimant was sat in the back of a vehicle not designed with seating). The Court in **Withers v Delaney** held that: “*In the sphere defined by the First and Second Directive, Member States remain competent to determine the extent of passenger cover*”.⁵⁹⁹

Consequently, Smith J held that it must be recognised considering **Bernáldez**, that there are some restrictions on exclusion clauses within policies, creating uncertainty about how far this impinges upon the freedom of Member States to determine the extent of compulsory cover. The learned judge argued, however, that it cannot be accepted that this affects the approach of European law that Member States have the right to determine the extent of compulsory insurance. This was again considered and applied in **Singh v Solihull**⁶⁰⁰ which will be discussed in greater detail on pages 162-163. Collins J in **Singh v Solihull** examined the decision of Lord Clyde in **Clarke v Kato**, and stated:

*“The point that is being made... is that the... Member State... was entitled to provide for a greater or lesser...than other Member States but the Directives would be complied with provided...the drivers registered in... France would be entitled to the same protection ...as was required in France if that protection was greater than...required in Great Britain”.*⁶⁰¹

Collins J therefore argued that Member States are permitted to have a greater or lesser amount of coverage, provided that when a claim is made by an individual within another Member State, that obligation is the same as it would have been if the person claimed in the Member State in which they reside. It is proposed that the judgments in **Singh v Solihull**,⁶⁰² **Axa Insurance**,⁶⁰³ and **Clarke v Kato**⁶⁰⁴ are all correct in their reasoning; there is nothing in the Directives which prevent Member States from having different coverage than others. The Directives allow

⁵⁹⁷ [2002] I-8301.

⁵⁹⁸ Farrell (n 383).

⁵⁹⁹ Withers (n 600), [18].

⁶⁰⁰ Singh v Solihull (n 335).

⁶⁰¹ Clarke v Kato (n 593), [27].

⁶⁰² Ibid.

⁶⁰³ Axa Insurance (n 597).

⁶⁰⁴ Clarke (n 593).

Member States to have a certain degree of discretion as to the exact scope of cover. This is only if the same protection is achieved and the Member State does not go below the minimum requirement provided for by the Directive.

However, it is respectfully submitted that Ward LJ's reliance on these decisions to argue that **Bernáldez**⁶⁰⁵ is limited, is incorrect. The Directives and subsequent CJEU decisions, (especially **Candolin**,⁶⁰⁶ due to the Courts' strict interpretation of derogations) are clear that Member States have very little discretion in relation to exclusion clauses. This is evident from Jay J's decision in **Delaney**,⁶⁰⁷ where the issue as to whether the UK's breach of EU law in relation to the MIB agreements and **Article 10** (which is similar to **Article 13** as it provides an instance where the MIB cannot deny liability and it is questioned whether this is exhaustive⁶⁰⁸) was '*sufficiently serious*' to compel **Francovich** damages. Jay J stated that: '*the present case is a paradigm of a little or no margin of discretion type of case*'.⁶⁰⁹ Although this statement refers to **Article 10**, this would apply to **Article 13** also. In fact, it can be inferred from the judge's conclusion in the same paragraph that both **Article 13** and **Article 10** are clear that no exclusion clauses can be used. Moreover, the above cases all examine other areas of the Directives, and have very little to do with the validity of exclusion clauses.

Further, it is proposed that whilst the Directives in general do allow some discretion as to their implementation, this discretion is only permitted if the minimum amount of cover is adhered to. Consequently, there is nothing to prevent a Member State from giving greater amounts of cover than is prescribed by the Directives, as long as the cover does not fall below the minimum required in the Directives. In relation to exclusion clauses, this could mean that a minimal amount of discretion could be used whereby the Member States can prevent an exclusion clause from being used in relation to stolen vehicles (a permitted exclusion in the Directive).

It is therefore submitted that Ward LJ's reliance on discretion given to Member States is incorrect because **Article 13** is clear in that it does not permit any more

⁶⁰⁵ Bernáldez (n 216).

⁶⁰⁶ Candolin (n 217).

⁶⁰⁷ Delaney (n 539).

⁶⁰⁸ See page 118.

⁶⁰⁹ Delaney (n 539), [108].

than minimal discretion. Furthermore, because any discretion that can be used cannot allow the Member State to have lower than the minimum prescribed cover.

Bernáldez's insertion into Article 13

Ward LJ⁶¹⁰ accepted a submission by the motor insurers that by incorporating the exclusions used in both **Bernáldez**⁶¹¹ and **Candolin**⁶¹² (in relation to intoxicated drivers) within the **Fifth Directive**, other exclusion clauses could be permitted. Ward LJ did not discuss this point directly, however, it can be inferred that by his general acceptance and failure to dispute the submission, that Ward LJ was supportive of the argument. A similar argument was considered by Waller LJ in **Churchill v Wilkinson**,⁶¹³ who stated:

*“Article 12(1) (in relation to compulsory passenger cover) would suggest that insurance is required to cover all passengers injured except those contemplated by the second paragraph of art.13(1) i.e. those where the insurer can prove that the passenger knew the vehicle was stolen. If its effect is as wide and straightforward as that then much of art.13 would seem to be for the avoidance of doubt. For example art.13(3) prohibiting the exclusion of a passenger injured where he knew the driver was intoxicated and art.13(1)(b) and (c) prohibiting certain exclusion clauses would not seem to be strictly necessary”.*⁶¹⁴

This is an interesting and powerful point made by Waller LJ. If **Bernáldez**⁶¹⁵ prohibited all exclusion clauses then it can be questioned as to why the EU legislature decided to continue to explicitly prohibit certain exclusion clauses within **Article 13**. Moreover, the legislature later prohibited exclusion clauses relating to intoxication, analogous to the exclusion in **Bernáldez**. Of course, the general rule in relation to lists of exclusion clauses is that anything absent from that list is valid. Consequently, it certainly would have been clearer, if the EU legislature stated that

⁶¹⁰ Bristol Alliance (n 15).

⁶¹¹ Bernáldez (n 216).

⁶¹² Candolin (n 217).

⁶¹³ This was before the judgments from the CJEU and Aitkens J see *Churchill v Wilkinson and Evans v Equity Claims Ltd* [2010] P.I.Q.R. 15.

⁶¹⁴ *Ibid*, [22].

⁶¹⁵ Bernáldez (n 216).

all exclusion clauses are void towards third parties, rather than naming a few void exclusion clauses.

It is questionable whether the EU's original intention through the **Second Directive** was to allow some exclusion clauses, and that the ECJ in **Bernáldez** decided to extend this due to the introduction of later Directives, which included greater protection for victims. Although the action of the EU legislature is perhaps confusing, it is submitted that this still is a weak premise to use in determining that **Bernáldez**⁶¹⁶ is limited. It is respectfully submitted that Ward LJ should have examined the preparatory documents to the Directives, which show the difficulty in making an exhaustive list.

Additionally, Ward LJ completely overlooks the dictum in paragraph 20 of **Bernáldez**⁶¹⁷ where the Court does not limit its decision to intoxicated drivers, but expands it to all exclusion clauses. Moreover, Ward LJ could have expanded his analysis to the ECJ decisions **Candolin**⁶¹⁸, **Finanger**⁶¹⁹, and **Farrell**, whereby the ECJ explicitly stated that all exclusion clauses are to be viewed restrictively. The honourable judge further ignores arguments made by the property insurers based on the **Churchill**⁶²⁰ decision. The CJEU in **Churchill**⁶²¹ confirmed that a statutory provision which would effectively deny the victim compensation was to be ineffective against third party claimants, even though such a measure was not contemplated nor limited expressly by **Article 13**. This case alongside the ECJ's decision in **Farrell v Whitty**⁶²² (which found that a statutory exclusion relating to a passenger sat in a vehicle not designed for seating is void), shows that although the **Bernáldez**⁶²³ exclusion was expressly inserted into **Article 13**, this does not restrict the application of **Article 13** to all other exclusion clauses.

⁶¹⁶ Ibid.

⁶¹⁷ Ibid.

⁶¹⁸ Candolin (n 217).

⁶¹⁹ Finanger (n 461).

⁶²⁰ Churchill (n 442).

⁶²¹ Ibid

⁶²² Farrell (n 383).

⁶²³ Bernáldez (n 216).

Reliance on Singh v Solihull MBC

A major influence of the decision from Ward LJ was the decision of Collins J in **Singh v Solihull**⁶²⁴ which examined whether the driver's contravention of an exclusion clause confer criminal liability on the driver for having no insurance. The case concerned a taxi driver who was prosecuted due to an undercover operation which caught him being paid for 'public hire', despite having exclusion clause in the policy of insurance which prevented the vehicle from being used as a taxi. This meant that the driver was driving without valid insurance which is illegal under **Section 143 RTA**.⁶²⁵ The taxi driver argued that as the insurer would have been obliged to compensate an innocent third party victim, due to the prevention of the reliance of exclusion clauses in the Directives, he should not be prosecuted for driving without insurance. The Court held that the Directives are not concerned with the criminal responsibility of the driver in relation to whether he has failed to comply with the compulsory insurance laws of the Member State in question. Collins J further stated:

*"The purpose...behind the directives is to ensure that innocent victims of road traffic accidents are compensated... if one takes what it (Bernáldez) says...in its literal way, it means that no exclusion clause in a contract of insurance would be able to be relied on in relation to an innocent victim".*⁶²⁶

Collins J took a very negative view of the Directives, and argued that it is immaterial whether the insurer or the Bureaux compensates as long as the victim is guaranteed compensation, therefore: *'the Court (in Bernáldez) need not have extended the application of Art.3 in the way that it did'*.⁶²⁷ Collins J then went a step further and relied on the decision of Gibson J in **Silverton v Goodall**,⁶²⁸ concerning the legality of a clause in the MIB agreement. Gibson J briefly mentioned that the UK's overall motor insurance regime was currently complying with EU law. Collins J in **Singh v Solihull**⁶²⁹ followed **Silverton v Goodall** and stated that it supports

⁶²⁴ Singh v Solihull (n 335)

⁶²⁵ Section 143 RTA 1988.

⁶²⁶ Ibid, 1290.

⁶²⁷ Ibid.

⁶²⁸ Silverton v Goodall and Motor Insurers Bureau [1997] P.I.Q.R. 451.

⁶²⁹ Singh v Solihull (n 335).

the proposition that *'the decision in Bernáldez does not have the wide effect that is suggested'*.⁶³⁰

This, with respect, seems to be contradictory from the learned judge in **Singh v Solihull**, who appears to suggest that the **Bernáldez** decision has gone too far in its' extension of **Article 3** to prevent the Bureaux from picking up claims when an exclusion clause is used, but then goes on to suggest that **Bernáldez** may not have the wide effect as is suggested.

Collins J's reliance on the **Silverton v Goodall** can also be criticised, as it occurred only a year after **Bernáldez** and before any of the other main CJEU rulings. Moreover, the case had little relevance to exclusion clauses, and only mentioned the key ECJ **Bernáldez** decision, in passing, once. Consequently, Collins J in **Singh v Solihull**⁶³¹ should have taken the **Silverton v Goodall**⁶³² case lightly and read it alongside subsequent clarifying CJEU decisions.⁶³³ As Dr Bevan stated, *'It behoves any national court to interpret a Directive by considering first any relevant rulings by the Court of Justice, as opposed to imposing an inconsistent interpretation ... as appears to have happened in EUI'*.⁶³⁴

It is proposed that despite the errors made by Collins J, **Singh v Solihull**⁶³⁵ was correctly decided, because it is evident that the interpretation of the Directives do not affect the criminal liability of the driver, the Directives are only concerned with compensation of victims.⁶³⁶ Essentially removing criminal liability of the driver when they breach an exclusion would make restricting insurance policies pointless, as there would be no deterrence against breaching an exclusion. It is notable, however, that Collins J's remarks about **Bernáldez**⁶³⁷ are *obiter* and therefore although persuasive, were not binding on the Court. Moreover, it is respectfully submitted that his lordship's line of reasoning based on the **Silverton v Goodall**

⁶³⁰ Ibid, 1293.

⁶³¹ Ibid.

⁶³² Silverton (n 631).

⁶³³ Bernáldez (n 216).

⁶³⁴ Nicholas Bevan "EUI Limited v Bristol Alliance Ltd Partnership: road traffic accidents - motor insurance - damage to property (CA (Civ), Ward L.J., McFarlane L.J., Dame Janet Smith, October 11, 2012, [2012] EWCA Civ 1267)", (2013) J.P.I. Law, 1, C24-C30, C27.

⁶³⁵ Singh v Solihull (n 335).

⁶³⁶ This was submitted in Nicholas Bevan, (n 459)

⁶³⁷ Bernáldez (n 216).

case is flawed. The contradictory reasoning of Collins J makes ***Singh v Solihull***⁶³⁸ an unreliable case to follow.

It is therefore submitted that Ward LJ's reasoning to interpret EU law narrowly is incorrect. The three premises utilised by Ward LJ are weak, and the learned judge misinterpreted EU Law. Academic authors agree that Ward LJ's interpretation of EU law is fundamentally wrong, with Dr Bevan stating:

“In Bristol Alliance, it seems that whilst the Court of Appeal paid lip service to the importance of Bernáldez, it went on to disregard its implication...leaving us with an unsatisfactory Court of Appeal precedent that appears to have failed to apply the correct Community law”.⁶³⁹

Dr Papettas agreed that Ward LJ was incorrect in his interpretation of EU law, and stated that an insurer could not avoid liability when a policy was in force. Dr Papettas stated, however that finding this a difficult position to reach was ‘understandable’.⁶⁴⁰ Furthermore, Hemsworth argues that ***Bristol Alliance***⁶⁴¹ rests on ‘insecure foundations’ and this warrants further consideration by future courts.⁶⁴²

It is arguable, however, that this case mattered little to the actual victim of the accident, and satisfied the Directive's overall aim of compensating the innocent victim of the accident. The House of Fraser store (the actual victim) in this case received compensation from the property insurer for damage caused, but the property insurer could not recover from the motor insurer. It is proposed, however, that even though damages were paid to the victim, the precedent that this case sets could leave future victims without compensation (this will be examined in the next Chapter), which is something that the Directives have intended to avoid. It further causes significant confusion for later third party claimants as to where their claim should be made, the insurer or the MIB.

⁶³⁸ *Singh v Solihull* (n 335).

⁶³⁹ *Ibid*, 156.

⁶⁴⁰ Papettas J (n 22), 204.

⁶⁴¹ *Bristol Alliance* (n 15).

⁶⁴² Margaret Hemsworth (n 22), 361.

The author therefore agrees with both Dr Papettas and Dr Bevan that the ***Bristol Alliance***⁶⁴³ case is incorrect and sets a worrying precedent. It is doubtless that the Directives and subsequent case law impose strict rules in relation to exclusion clauses, the CJEU has been clear that exclusion clauses cannot be utilised by an insurer to repudiate liability towards a third party and this is not limited to those in the Directive. Ward LJ sought to limit these exclusion clauses through the three rationales outlined above and it has been proven that all three are incorrect. Ward LJ's decision, however, is the only authoritative decision on this issue as all other comments are either *obiter* or from a lower court.

Does the role of the MIB ensure the UK's compliance with EU Law?

It should therefore be clear from the previous paragraph that the UK is currently infringing EU law. As stated by Ward LJ, a general or wide interpretation of EU law would mean that the UK is not fulfilling its' obligation under the Directives and CJEU decisions. One questionable issue is whether, despite the illegality of exclusion clauses, the role of the MIB in the UK ensures that the UK is compliant with EU Law. This Chapter has already examined this issue finding that EU judges (see ***Csonka***⁶⁴⁴ and ***Churchill***⁶⁴⁵) overwhelmingly believe that the insurer cannot transfer liability to the Bureau when an exclusion clause is breached. It seems, however, that UK judges have a different opinion. Ward LJ in ***Bristol Alliance*** stated:

“The Act (RTA) coupled with the MIB arrangements satisfy the aim and the spirit of the directive to ‘enable third party victims of accidents caused by vehicles to be compensated for all damage to property and personal injuries sustained by them’”.⁶⁴⁶

Ward LJ was of this opinion because of his interpretation of the **Bernáldez** case. Moreover, Sir Ralph Gibson in ***Silverton v Goodall***,⁶⁴⁷ a case concerning the legality of Clause 5 of the MIB Uninsured Drivers Agreement, stated:

⁶⁴³ *Bristol Alliance* (n 15).

⁶⁴⁴ *Csonka* (n 443).

⁶⁴⁵ *Churchill* (n 442).

⁶⁴⁶ *Bristol Alliance* (n 15), [68].

⁶⁴⁷ *Silverton* (n 631).

“The structure of our statute law under the Act of 1988, together with the terms of the MIB Agreements, provide, in my judgment, laws, regulations and administrative provisions which satisfy the requirements of the Directives”.⁶⁴⁸

This was a similar argument made in **Clarke v Kato**⁶⁴⁹, where Lord Clyde stated that because no action had been taken by the European Commission to challenge UK law in relation to motor insurance, despite it being scrutinised, the UK can be deemed compliant with the Directives. However, possibly the most surprising dicta relating this issue comes from Jay J in **Delaney v Secretary of State for Transport**. As stated earlier in this Chapter,⁶⁵⁰ Jay J showed certainty that the Directives do not permit exclusion clauses to be used against third parties and that there was ‘*no room for an alternative view*’.⁶⁵¹ Jay J then goes on to state, however, that:

“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 United Kingdom in breach of its obligations under the Directives”.⁶⁵²

Jay J further relies on the opinion of AG Lenz in **Bernáldez** and states:

*“The third point I derive from these paragraphs of Advocate General Lenz’s opinion is that, although the scheme of the Second Directive is such that the insurer (if it exists) and not the national body should pay compensation, provided 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**”*.⁶⁵³

These are unforeseen comments made by His Lordship, who unmistakably suggests that the UK is complying with the Directives due to the role of the MIB.

⁶⁴⁸ Ibid, 463.

⁶⁴⁹ Clarke v Kato (n 593).

⁶⁵⁰ On page 155.

⁶⁵¹ Delaney (n 539), [21].

⁶⁵² Ibid, emphasis added.

⁶⁵³ Ibid, [39], emphasis added.

This follows the views of AG Lenz in **Bernáldez** and Ward LJ in **Bristol Alliance**, that if complete protection is provided for the innocent victim, it is irrelevant who pays compensation. Jay J seemingly ignores later dicta by CJEU judges, which contradict the remarks made by Ward LJ.

Furthermore, it is very difficult to consummate Jay J's comment here with his previous comments on exclusion clauses. Ward LJ suggested that if the **Bernáldez** case was to be interpreted as being of general effect then the UK regime would not be compliant. Whereas Jay J argues the complete opposite that **Bernáldez** is of general effect but the UK regime is still compliant. These two cases are in direct conflict with each other over EU law. Jay J's decision alongside Ward LJ's decision shows a reluctance of the Court to find that the UK is not compliant with EU law. The reason for this reluctance is unclear; potentially there is an absence of complaint about the current system from third party victims, with the third party likely to be paid compensation.

Alternatively, it is possible that insurers continue to argue that exclusion clauses continue to be vital to assess and rate risks, as can be seen in Cassel Committee evidence. The author respectfully submits, however, that Jay J is incorrect, there can be no doubt that the UK is currently not in compliance with EU law. The **Csonka**, **Churchill**, and **Fidelidade** decisions are clear that the insurer compensates when exclusion is breached and not the Bureaux. Moreover, although some believe **Csonka** is not as wide as has been previously suggested,⁶⁵⁴ the theme of not permitting exclusion clauses runs throughout the CJEU case law up to the very recent **Fidelidade** decision. The main aim of the Directives is to minimise inconsistency amongst different Member States, by allowing the MIB to have an enhanced role. It matters little in terms of compliance that the UK attempts to guarantee compensation. EU reluctance to permit Bureaux to pay when an exclusion clause is breached can also be found in the *Travaux Préparatoires* of the Directives, where the original proposal to allow the Bureaux to compensate was removed due to potential inconsistencies and uncertainty.

Post Delaney and EUI

⁶⁵⁴ See pages 170-171.

It is notable, however, that whilst **Bristol Alliance** is binding without being overruled, lower courts have attempted to work around Ward LJ's interpretation of the Directives, in cases where the accident fell outside the terms of the policy. The Birmingham County Court case of **Allen v Mohammed**⁶⁵⁵ concerned a vehicle which knocked a cyclist off his bike. The vehicle was not being driven by the insured, and the insurance policy excluded anyone apart from the insured from driving. As well as examining UK law in relation to this issue, HHJ Tindal referred to the substantial dicta from Jay J in **Delaney**, as well as from **Csonka**, and stated:

*“it is clear from Csonka, and the judgment of Jay J and (more implicitly Richards LJ) in Delaney, that the scheme envisaged by what was Art.1(4) Directive 84/5 (i.e. the MIB Scheme) was not intended to apply where there is an insurance policy in existence”.*⁶⁵⁶

The judge further stated that it was, ‘*not the point*’,⁶⁵⁷ that the **UDA** would cover the cost of the injuries suffered by the victim, as this would run flatly against the observations of the ECJ in **Csonka**. This, therefore, directly contradicts the approach of Jay J in **Delaney** as noted on page 166 above. However, as this was a case from the County Court, its authoritativeness is limited.

The idea that the MIB would compensate was further examined by Gloster LJ in **Cameron v Husain**.⁶⁵⁸ Here, the insurer argued that the availability of an alternative remedy, namely under the **MIB UtDA**, should lead the Court to not use its discretion through **Section 151**. Gloster LJ in this case declined by stating:

*“it cannot be just to deprive her of her remedy, simply by the courts’ refusal to exercise a procedural power **on the grounds of an alternate remedy...the claimant might well regard a claim under the UTDA as an inferior remedy to a court action for damages and under Section 151**”.*⁶⁵⁹

Although Gloster LJ did not justify this through EU law, it is suggested that this follows an approach very much based on EU law. Whilst this case involved the

⁶⁵⁵ Mr J Allen v Mrs A Mohammed, Allianz Insurance [2017] Lloyd's Rep. I.R. 73.

⁶⁵⁶ Ibid, [36].

⁶⁵⁷ Ibid, [38].

⁶⁵⁸ Cameron v Hussain [2017] EWCA Civ 366.

⁶⁵⁹ Ibid, [57].

deprivation of a remedy, the honourable Judge implies that the Agreements are inferior remedies, moreover, that the Court cannot refuse to exercise a procedural power (to allow the claim under UK law) despite the existence of an alternate remedy.

The decision shows the beginning of judicial scepticism of Ward LJ's dicta from **Bristol Alliance**. Although Gloster LJ implies reluctance to follow the decision of Ward LJ and Jay J, her ladyship did not expressly overrule them.

However, these cases have been contradicted by the Court of Appeal in **Sahin**⁶⁶⁰ concerning £100,000 of damage to a vehicle after a collision with a vehicle which was identified but the driver was unidentified. The vehicle was owned by a company who hired the car to the Ms Havard, who then allowed an unidentified driver to use the vehicle, with the Ms Havard knowing they were uninsured. The third party victim brought a claim against Ms Havard and then against her insurer. The High Court judge stated that there were prominent questions: First, whether Ms Havard's liability to the claimant was a liability which was statutorily required to be covered pursuant to **Section 145 RTA 1988**, and second, whether Ms Havard's liability was in fact covered by the terms of the insurance policy. Citing **Bernáldez** and **Csonka**, the appellants argued that EU law required this liability to be covered by the insurer rather than the Bureau, as there was an insurance policy in existence in relation to Ms Havard. Longmore LJ, in relation to EU Law, followed Ward LJ's decision in **Bristol Alliance** closely and re-affirmed the statement that:

*“the scheme of the 1988 Act, coupled with the MIB arrangements, satisfied both the aim and spirit of the Directive and enabled the third party victims of accidents to be compensated for all damage to property and personal injuries sustained by them”.*⁶⁶¹

The honourable judge further relied on the cases cited by Ward LJ in **Bristol Alliance** including **Singh v Solihull** and **Norwich Union v Axa** to reinforce this point. Longmore LJ further stated that there is no reason to interpret **Section 145**

⁶⁶⁰ [2016] EWCA Civ 1202.

⁶⁶¹ Ibid, [23].

separately from the MIB Agreements and ignore the result that the claimant is compensated by the **UDA**, which, in turn, satisfies the Directive's objectives.⁶⁶²

This is surprising from Longmore LJ, especially because of his Lordships' use of EU law. Longmore LJ utilises *Evans v Secretary of State* from 2003 in support of Ward LJ's decision in *Bristol Alliance*, rather than the later *Csonka* decision, which occurred post *Bristol Alliance*, and which undermines the argument made by Ward LJ. The *Csonka* decision clarifies that where an insurer can be found, they are responsible for paying any claim, not the Bureaux, it is irrelevant if the accident fell outside the policy.

The rationale behind the Courts' judgment in this case is unclear. It is evident that the Court were dissatisfied with the £100,000 claim which they deemed '*rather surprising*',⁶⁶³ although this should not explain the Courts' reluctance to apply clear EU law. Alternatively, it could be due to the reluctance of the Court to overrule a judgment made previously, in favour of a European Court decision on a slightly different issue. Despite not being mentioned in the decision, it is proposed that the dictum from Jay J in *Delaney* may have been persuasive. Although Jay J found a breach of EU law in relation to the **UDA**, his Lordship implied that the MIB's operation in the UK in relation to exclusion clauses ensured UK compliance.

The claimants then applied to appeal the Court of Appeal judgment to the Supreme Court, however, this was denied and consequently the application to appeal went directly to the Supreme Court, which was heard by Lord Mance, Lord Sumption, and Lord Carnwarth. Their Lordships, however, denied the application to appeal, for three reasons, two of which were related to EU Law. First, '*The Motor Insurance Bureau provided appropriate protection in the present situation as contemplated by Article 2(1) of the Second Motor Directive 84/5/EEC*',⁶⁶⁴ and second, '*there is no relevant point of EU law which is unclear or which requires a reference to the CJEU*'.⁶⁶⁵ These reasons are, with respect, surprising. The first reason is identical to the dictum of Ward LJ, Longmore LJ, and to some extent Jay J, that the role of

⁶⁶² Ibid.

⁶⁶³ Ibid, [1].

⁶⁶⁴ Supreme Court, Application to appeal refused in *Sahin v Riverstone Insurance UK Limited* (Originally known as Brit insurance) 10th April 2017.

⁶⁶⁵ Ibid.

the MIB prevents the UK from breaching EU law by paying compensation when an exclusion is breached.

It is submitted that although this may satisfy one of the Directive's main objectives, it does not satisfy the need for consistency across Member States which was another key objective. The second reason given by the Supreme Court is difficult, because although the Directives and subsequent cases are clear, it is rather obvious that EU law does not permit exclusion clauses. UK judges have evidently struggled with this as can be seen from inconsistent interpretation.

However, it is likely that the Supreme Court were considering Brexit when making this decision. The Supreme Court as the final appeal Court in the UK, would need to send a preliminary ruling to the CJEU as to the interpretation of the Directives and *Bernáldez*.⁶⁶⁶ The average waiting time for the CJEU to hear a case is up to 16 months,⁶⁶⁷ and therefore it is likely that Brexit would have almost been completed and therefore a possibility that EU Law is not relevant. However, as will be stated later in this chapter, this would be untimely as there is potential that the UK would need to continue to comply with the Directives due to the continuance of cross border travel.

The courts' inconsistency in interpreting EU law is evident in the judgment in the recent High Court case of *Wastell v Woodward*.⁶⁶⁸ The case involved an injury to a burger van owner crossing a road after affixing a sign, killing a motor cyclist. The insurer attempted to repudiate liability,⁶⁶⁹ by arguing that this was a liability will fell completely outside the *RTA 1988*. Furthermore, the use of the vehicle (business use) did not fall within the scope of the policy. The judge utilised *Section 145 RTA* to dismiss the validity of the exclusion against the third party, interestingly neither EU law nor Ward LJ's or Longmore LJ's interpretation were examined in the decision. It is unclear as to why the Judge did not examine either, however, it is

⁶⁶⁶ Unless they argue that this would be unnecessary since the answer is already clear or the question has already been asked, see *CILFIT v Ministry of Health* Case 283/81 [1983] 1 C.M.L.R. 472.

⁶⁶⁷ See Court of Justice of the European Union Press Release No 17/17, "Statistics concerning judicial activity in 2016: the duration of proceedings continues its downward trend, to the benefit of citizens " (Luxembourg, 17 February 2017) <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-02/cp170017en.pdf>> [Accessed 22nd August 2017].

⁶⁶⁸ *Wastell* (n 332).

⁶⁶⁹ They would not have been liable under Article 75 as it was arguably a liability falling outside of the *RTA 1988*.

submitted that it was not argued because of the little difference it would have made, as the insurer would continue to pay as an **Article 79** insurer, and therefore focused more on the issue of the accident falling outside the Act.

Is the UK Open to State Liability?

As stated previously on pages 146-147, individuals can enforce their European Law rights through the principles of direct and indirect effect. However, when this fails because it is impossible to reconcile national law with EU rules, an individual may be able to sue the state directly for its' breach of EU Law in either the national or European court. The conditions for state liability which must be fulfilled were given in **Francovich**⁶⁷⁰ and then further explored in **Brasserie**,⁶⁷¹ the conditions for state liability are: the rule of law infringed is intended to confer rights on individuals; the breach is sufficiently serious and there is a direct causal link between the breach and the damage.

There can be little doubt that the Directives confer rights upon individuals,⁶⁷² and the third causation criteria would also be satisfied, as there is likely to be a causal link between the non-implementation of EU Law and the damage caused to the claimant (although this will be determined depending on the facts of the case). The test for the second criteria is slightly more difficult, because as previously stated, UK courts have not found a breach of EU law in relation to exclusion clauses. Therefore, unless a rapid change in approach by UK courts is undertaken, the claimant would need to apply for a referral up to the CJEU. The meaning of 'sufficiently serious' was examined in **Robins**,⁶⁷³ where the CJEU stated:

*“The condition requiring a sufficiently serious breach of Community law implies manifest and grave disregard by the Member State for the limits set on its discretion”.*⁶⁷⁴

Lord Clyde gave a non-exhaustive list of factors which can be considered when defining whether a breach is sufficiently serious. These included: the importance of the principle, the clarity and precision of the rule breached; the degree of excuse

⁶⁷⁰ Francovich (n 469).

⁶⁷¹ Brasserie du Pecheur SA v Germany (C-46/93) [1996] Q.B. 404.

⁶⁷² See Delaney where the Court found that the Directives do confer rights upon individuals.

⁶⁷³ Robins v Secretary of State for Work and Pensions (C-278/05) [2007] 2 C.M.L.R. 13.

⁶⁷⁴ Ibid, [70].

available an error of law, the existence of any relevant judgment on the point; of the mind of the infringer, and whether the infringer was acting intentionally or involuntarily. It would, of course, be in the claimant's favour that the UK has already been successfully sued for breach of the Directives involving **Article 13** and **Article 10** in *Delaney*. This would therefore remove the government's excuse. In relation to the seriousness of the Secretary of State for Transport's breach of EU law, Jay J in *Delaney* stated that the protection of traffic accident victims was '*a principle of second-order importance which is worthy of recognition*'.⁶⁷⁵ Jay J further stated that there was very little margin of discretion open to Member States when implementing **Article 13** or **Article 10**.

In relation to the clarity of provisions, the learned judge further stated that the *Bernáldez* decision is clear, no exclusion clauses are permitted against third parties and this was '*self-evident*'. Jay J stated that, '*my approach has been that the language of the Second Directive —even unadorned by authority—was and is clear enough*'.⁶⁷⁶ It is submitted that the UK may have had some excuse when originally implementing the **RTA 1988** as it was relatively unclear whether the Directives prohibited the use of exclusion clauses and it was clear that the UK, at the time, were under the impression that they did not.⁶⁷⁷ However, subsequent decisions such as *Bernáldez* and *Candolin* clarified beyond doubt that exclusion clauses cannot be used. Consequently, the UK cannot state that the provisions are unclear, although an attempt could be made to show that the Courts have been confused on this issue. However, it may be possible for the UK to argue that they are reliant on numerous decisions, such as Ward LJ in *Bristol Alliance*, that have come before UK courts which have stated that the UK follows EU law.

Of course, it is also important to note that when the Supreme Court is requested to examine this issue and fails to interpret the Directives properly, it is possible for an individual to gain damages against the UK based on that Courts failure under *Kobler*⁶⁷⁸. This could be particularly relevant in the Supreme Courts' mis-interpretation of EU law by essentially reaffirming the judgment in *Sahin*. The

⁶⁷⁵ *Delaney* (n 539), [106].

⁶⁷⁶ *Ibid*, [112].

⁶⁷⁷ See the House of Lords Report found earlier in this Chapter where the UK MIB believed that the UK would have no problem with complying with the proposed and eventually enacted Article 13.

⁶⁷⁸ See *Kobler v Austria* (Case C-224/01) [2004] Q.B. 848.

requirements for **Kobler** liability are the same as in state liability,⁶⁷⁹ with the added requirement of it being the court of last resort⁶⁸⁰ (which the Supreme Court clearly is). It is notable, however, that the requirement in relation to seriousness of the breach is particularly difficult to meet, as noted in by the CJEU in **Traghetti**⁶⁸¹ ‘*State liability can be incurred only in the exceptional case where the national court adjudicating at last instance has manifestly infringed the applicable law.*’⁶⁸² There is, in this authors view, a manifest infringement here by the Supreme Court, as a factor⁶⁸³ in determining this is if there is a failure to refer a case to the CJEU for preliminary reference which is required under **Article 267 TFEU**⁶⁸⁴, if the answer is unclear. However, **Kobler** liability is difficult to satisfy, not only because of the requirement of manifest infringement, but also because the determination as to whether the Supreme Court has manifestly infringed EU law would ultimately fall to a national court⁶⁸⁵ which would find it difficult to essentially rule against a decision of the Supreme Court.

In terms of the state’s liability for its’ own legislative acts, it is difficult to understand the exact behaviour of the UK and the state of mind of the legislature without examining documents and internal consultations that it may have had. It would be difficult to find any excuse in the UK’s disregard and failure to act in compliance with EU law in this instance, as there are several EU cases which have consistently clarified that exclusion clauses cannot be utilised in any situation. In fact, it is submitted that the UK Government should take warning from the decision in **Finanger**⁶⁸⁶ whereby the Norwegian Government was obliged to pay substantial **Francovich** damages to a victim of a road accident because of their statutory provision allowing the insurer to repudiate liability in relation to intoxicate drivers. The Norwegian Supreme Court in that case held that there was ‘*no justification*’ for the Norwegian Government to allow the denial of compensation and therefore held

⁶⁷⁹ Ibid, [52]. The conferment of rights on individuals would likely be met (see for example the Delaney (n 539) judgment previously) and there is evidently causation between the loss and the damage.

⁶⁸⁰ Ibid [34]

⁶⁸¹ *Traghetti del Mediterraneo SpA (In Liquidation) v Italy* (C-173/03) [2006] 3 C.M.L.R. 19

⁶⁸² Ibid [32].

⁶⁸³ Ibid.

⁶⁸⁴ (n 538).

⁶⁸⁵ A preliminary reference would likely be sent to the EU which would then require application by the national court. A discussion of this can be found in Helen Scott and N.W.Barber, ‘State liability under Francovich for decisions of national courts’ (2004) L.Q.R. 120(Jul), 403-406,405.

⁶⁸⁶ *Finanger v Norway* (n 468).

them liable.⁶⁸⁷ Hence, it is submitted that it is very possible that the UK could be eventually sued for their breach of the Directives in relation to exclusion clauses.

Judicial Review

Another route that could be taken against the UK and the MIB, which, unlike **Francovich**, does not confer damages, is Judicial Review. This action requests that the Court sets aside incompliant national law, in favour of EU law. As stated by the Grand Chamber in **Unibet**.⁶⁸⁸

*“It is for the [national court] to ensure that the examination of the compatibility of [national] law with Community law takes place irrespective of the assessment of the merits of the case with regard to the requirements for damage and a causal link in the claim for damages”.*⁶⁸⁹

Consequently, both causation and damage do not need to be proven for Judicial Review, and this is an easier route to take. At time of writing, a Judicial Review is underway in **R (on the application of Road Peace) v Secretary of State for Transport and the MIB**.⁶⁹⁰ The Judicial Review concerns both the MIB Agreements⁶⁹¹ and the **RTA 1988**. In their skeleton arguments,⁶⁹² the claimants submitted several grounds in arguing that the UK were breaching the Directives. In relation to exclusion clauses, the claimants argue on grounds 9.2 and 9.4 that the UK: *‘unlawfully permit insurers to include limitations and exclusion clauses in their policies which are not permitted by the Directive’*.⁶⁹³ The claimants relied heavily on the EU decisions **Evans** and **Csonka** cases to make this point.

The MIB and SoSFT argued that the UK is not in contravention of EU law as explained by Ward LJ in **Bristol Alliance** and through a narrower interpretation of the CJEU decisions in **Bernáldez** and **Csonka**. They further utilised the argument which is often used, which was that third parties remain protected, notwithstanding

⁶⁸⁷ Ibid, [91].

⁶⁸⁸ Unibet (London) Ltd v. Justitiekanslern (C-432/05) [2007] ECR I-2271

⁶⁸⁹ Ibid, [59].

⁶⁹⁰ CO/4618/2015 (High Court)

⁶⁹¹ This will be examined in Chapter Seven.

⁶⁹² See R on the application of Road Peace Claimant v Secretary of State for Transport and Motor Insurers Bureau, Claimant’s Skeleton Argument.

⁶⁹³ Ibid, 16.

the existence of any such exclusion clause in the insurers' contract with the policyholder.⁶⁹⁴

As the Judicial Review is ongoing at the time of writing, it is uncertain as to whether the Judicial Review will succeed and subsequently the UK will be forced to alter the **RTA 1988**. However, it is submitted that the very recently decided case of **Sahin**⁶⁹⁵ in the Court of Appeal and the Supreme Courts' rejection of an appeal, makes it much more difficult for the High Court to decide against the government, as the case clearly supports the SoSFT view. However, considering the recent **Fidelidade**⁶⁹⁶ case, which re-affirms the **Csonka** decision and gives it a broader interpretation, the decision of the High Court may now go in the claimant's favour.

Post Brexit

On June 23rd, 2016, the UK voted to leave the EU. The UK later invoked **Article 50** of the TFEU ⁶⁹⁷ on March 29th, 2017 which signalled the beginning of a two-year process of negotiation before the UK leaves.⁶⁹⁸ As stated previously on page 146, EU Law continues to apply in the UK within these two years, but it is uncertain as to whether it will continue to apply post-Brexit, although it is apparent that the government's position is that the UK will leave the Single Market. Consequently, the UK will not be under the jurisdiction of the EU legislature or CJEU.

There is further possibility that current directives and CJEU decisions will become redundant. However, as noted in the Government's white paper:

*“we will introduce the Great Repeal Bill to remove the European Communities Act 1972 from the statute book and convert the ‘acquis’ – the body of existing EU law – into domestic law”.*⁶⁹⁹

This, however, was qualified by stating that, *‘wherever practical and appropriate, the same rules and laws will apply on the day after we leave the EU as they did*

⁶⁹⁴ R on the application of Road Peace Claimant v Secretary of State for Transport and Motor Insurers Bureau CO/4681/2015, Defendant's skeleton, [41].

⁶⁹⁵ Sahin (n 208)

⁶⁹⁶ Fidelidade (n 452)

⁶⁹⁷ Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, p. 47–390.

⁶⁹⁸ Although this can be extended if all Member States agree, see Ibid.

⁶⁹⁹ UK Government “The United Kingdom's exit from and new partnership with the European Union” Cm 9417 February 2017, [1.1].

before'.⁷⁰⁰ It must be remembered that because the Directives are not directly applicable, the Government has transposed them into UK law already, although it is apparent that the significant case law from the European courts has not been implemented.⁷⁰¹ The Government could repeal their implementation of the Directives post Brexit without fear of *Francovich* action. However, due to a two-year limitation period on claims, EU law need to be used in relation to accidents that occurred before Brexit.

In relation to case law, it is likely that the UK will implement CJEU decisions which have already occurred and will introduce them into UK law as equivalent to Supreme Court decisions.⁷⁰² However, a significant difficulty with motor insurance and exclusion clauses is with the interpretation of *Bernáldez*. As stated previously, Ward LJ in *Bristol Alliance* and Longmore LJ in *Sahin* took narrow approaches to *Bernáldez*. Because the Government has not amended the list of prohibited exclusion clauses in *Section 148*, its' intention continues to be that all other exclusion clauses are valid, and therefore a Ward LJ approach to exclusion clauses is most likely to be preferable. With this confusion, it is likely that the government will either clarify the *RTA 1988*, or there will be significant case law questioning the interpretation of *Bernáldez*.⁷⁰³

It is evident that the Government does not view parts of the Directives favourably, first by their non-implementation, and second, through a Telegraph blog⁷⁰⁴ written by the foreign minister Boris Johnson on the *Vnuk* decision. Boris was critical of the CJEU's decision and the potential scope for needing to insure different vehicle types such as 'golf buggies' or 'grannies' bath chairs'.⁷⁰⁵ Whether this was Brexit rhetoric is uncertain, however, it emphasises some genuine unease of motor insurance legislation within the government. Boris' article was argued to be 'lazy and deliberately uninformed' due to the absence of understanding of derogations

⁷⁰⁰ Ibid.

⁷⁰¹ Although courts must acknowledge them through indirect effect.

⁷⁰² James Marson et al (n 31), 14.

⁷⁰³ Ibid, 16.

⁷⁰⁴ Boris Johnson "Compulsory motor insurance for lawnmowers, golf buggies and mini quad bikes? Thank god we voted to leave the EU" The Telegraph 1st January 2017 <http://www.telegraph.co.uk/news/2017/01/01/compulsory-motor-insurance-lawnmowers-golf-buggies-mini-quad/>. [Accessed 29th March 2017].

⁷⁰⁵ Ibid.

contained within the Directives.⁷⁰⁶ If deemed too protectionist therefore, the UK's implementation of Directives could be altered.

It must be remembered, however, that despite Brexit, the UK will not halt travel across the EU⁷⁰⁷ and therefore that harmonisation would need to continue. If the UK decided to remove high-level protection to third parties, it could revert to a Green Card Scheme, this, as argued previously on page 102, would lead to queues at the border due to needing to check every green card to ensure that adequate insurance is in place. It is submitted that it is unlikely that the EU would force reversion to the Green Card Scheme if exclusion clauses were permitted as long as the MIB would pay, however, if the MIB's agreements conferred less protection then this could cause reversion to the Green Card Scheme.

Conclusion

In this Chapter, we have examined the ways in which the UK has interpreted and applied EU law harmonisation of exclusion clauses, and have found that the UK's interpretation is inconsistent. The ***Bristol Alliance*** case, in its narrow interpretation of the Directives, conflicts with the *obiter* remarks of other UK judges and is based on insecure foundations. It is respectfully submitted that the three rationales utilised by Ward LJ are weak. However the confirmation of his Lordship's judgment by the Court of Appeal, and Supreme Court means that it is unlikely that it will be successfully challenged. Moreover, even if a challenge is successful against the UK for breach of EU law, there is, depending on the future relationship between the UK and EU, potential for the UK to reverse any alterations it would make to comply with the EU's approach.

Consequently this Chapter has contributed to the thesis through finding that, despite the judgments in both ***Bristol Alliance*** and ***Sahin***, the UK is not complying adequately with EU Law, in both legislation and case law. However, the enforcement of EU law rights (through liability or direct/indirect effect) in this area is difficult, as the courts are determining that national law is fully compliant. Consequently, despite there being, in this authors' view, a major difference

⁷⁰⁶ Matthew Channon and Robert Merkin (n 24)

⁷⁰⁷ Ibid.

between national and EU law here, the answer as to whether exclusion clauses are valid in the UK remains the same.

Because exclusion clauses can currently be used due to the narrow interpretation of EU law, it is important to examine whether there are any alternative routes in which victims could take to prevent an insurer from relying on a clause. Such as through legislation which is not aimed at motor insurance exclusion clauses, but nevertheless affects them.

Chapter Six: Regulation of Exclusion clauses beyond the Road Traffic Act

Introduction

Although the most significant prevention of reliance on exclusion clauses against third parties falls within the *RTA 1988* under *Section 148*, this is certainly not the only legislative intervention which could affect exclusion clauses. It is notable that other Acts and instruments could also have a significant effect on third party claims in motor insurance. Although these are primarily aimed at protecting either a first party business or consumer, these could have some secondary effect on third party claims also. Consequently, in determining the extent to which exclusion clauses are valid, it is important to examine these Acts and instruments.

This chapter will examine the statutory and non-statutory provisions which regulate exclusion clauses generally in both contract and insurance contracts. It will begin by examining unfair terms in consumer contracts, which although are not aimed primarily at insurance contracts, may have some effect on third party insurance claims. Consequently, the *Consumer Rights Act 2015* (henceforth 'CRA') will be examined. Then this chapter will examine the *Insurance Conduct of Business Sourcebook* to see if this has any effect. Finally, *CIDRA 2012* and the *Insurance Act 2015* to see if these Acts also have an effect on the validity of exclusion clauses towards third parties.

Regulation of General Consumer Contracts

A Short History

The regulation of unfair terms in consumer contracts has a fascinating history, especially regarding insurance policies. Regulation of general consumer contracts began with the *Unfair Contract Terms Act* (henceforth 'UCTA') *1977*, which prevented reliance on unfair exclusion clauses by traders. However, due to insurance lobbying,⁷⁰⁸ insurers were exempted from the Act.⁷⁰⁹ This is because exclusion clauses are generally concerned with insurer risk, therefore it was argued

⁷⁰⁸ See Professor Robert Merkin, "Unfair Terms in Insurance Contracts: A Solution in Search of a Problem", (2012) the Insurance Law Journal 23 (3), 272.

⁷⁰⁹ Schedule 1 Para 1 (a).

vehemently by the insurance industry that any attempt to regulate those ‘core’ terms would be to rewrite the basis on which the premium had been set.⁷¹⁰ The insurance industry made a similar argument previously when the **RTAs** were originally introduced in the 1930s.

Nonetheless, the insurance industry and Lloyds’ of London recognised that there was a problem with insurers’ use of unfair terms generally. Consequently, the Insurance Ombudsman Bureau (henceforth ‘*IOB*’) was formed to ensure that the ‘*statements of good practice*’, previously adopted by insurers, were adhered to.⁷¹¹ The statements were only relevant on members of the Association of British Insurers and it was untested as to whether they were ‘*legally binding*’. The Financial Ombudsman Service (henceforth ‘*FOS*’) was introduced with the **Financial Services and Markets Act 2000** (henceforth ‘*FSMA*’), and was given the authority to deal with relatively minor consumer complaints regarding exclusion clauses as well as other issues, using what is now referred to as the Insurance Conduct of Business Sourcebook (henceforth ‘*ICOBS*’).⁷¹²

In 1999, the **Unfair Terms in Consumer Contracts Regulations 1999** (henceforth ‘*UTCCR 1999*’) were introduced in the UK to implement the EU 1993 **Unfair Consumer Contract Terms Directive** (henceforth ‘*UCCTD 1993*’)⁷¹³ into domestic law. These regulations also applied to unfair terms in consumer insurance contracts and required exclusion clauses to be fair and ‘*transparent*’.⁷¹⁴ The **UTCCR**, however, continued to significantly reduce the right to claim unfairness as it exempted terms which, ‘*clearly define or circumscribe the insured risk and the insurers’ liability*’.⁷¹⁵ This Chapter will now examine the successor of the **UCTA 1977**, the recently introduced **CRA 2015** and then the **ICOBS**.

Consumer Rights Act 2015

The **Consumer Rights Act 2015** (henceforth ‘*CRA 2015*’ or ‘*the Act*’) was introduced to, ‘*amend the law relating to the rights of consumers and protection of*

⁷¹⁰ Professor Robert Merkin, *Merkin and Colinaux’s Law of Insurance* (n 3), [3-024].

⁷¹¹ *Ibid.*

⁷¹² The exclusion provisions will be examined shortly.

⁷¹³ 93/13/EEC.

⁷¹⁴ These requirements have essentially stayed the same and will be examined under the Consumer Rights Act

⁷¹⁵ This will be discussed in relation to CRA 2015.

their interests'.⁷¹⁶ The Act consolidated and replaced the EU **UCCTR 1999** and the **Unfair Contract Terms Act 1977** (henceforth '**UCTA**') due to significant disparities between the legislation in relation to consumer contracts. It further modified **UCTA** in relation to business to business. The Act is only relevant to contracts between a '**Trader**', meaning a, '*person acting for purposes relating to that person's trade, business...or profession, whether acting personally...name or on the trader's behalf*' (**Section 2 (2) CRA**) and a '**consumer**', a natural person acting outside of that capacity (**Section 2 (3) CRA**). An insurer comes under the definition of the term '**trader**' within the Act as a, '*service provider*'. Consequently, motor insurance policies between an insurer and consumer are covered under the Act, however business motor insurance policies are not, although, businesses can refer to other forms of intervention both statutory and non-statutory.⁷¹⁷ It is clear from the preamble of the Act (as noted above), that it is not aimed at the protection of third parties; and it is not altogether clear whether third parties could rely on this legislation. It is unlikely that a third party can argue for the unfairness of claims outright and they are unable to utilise the **Contract (Rights of Third Parties) Act 1999**⁷¹⁸ which states that a third party can rely on a contract term which confers a benefit to them. However, this would clearly not apply here as the third party would be attempting to avoid a detriment from a term rather than seek a benefit.

One solution, however, may be in **Section 71** of the **CRA** which states that: '*The Court must consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it*', whether the Court would be willing to utilise this provision to strike out a clause under the CRA is again unclear. O'Brien implies that this will not be available to third parties by stating in relation **Section 71**, '*any unfair term will not be binding on a consumer*',⁷¹⁹ this follows from the general scheme of the Act which is aimed primarily at consumer rather than third party protection. However, it is submitted that the Court may be willing to use this provision for blatantly unfair terms in both first or third party claims. It would be inequitable for there to be disparity between

⁷¹⁶ CRA 2015.

⁷¹⁷ See later in this Chapter ICOBS and Insurance Act 2015 which can be relied upon by businesses.

⁷¹⁸ Section One.

⁷¹⁹ O'Brien E, "The UK Consumer Rights Act 2015: Unfair Contract Terms Considered", (2015) *Comp. & Risk*, 4(6), 12-14, 13.

consumers and third party rights, especially as a third party would not have signed up for the term in the first place. Moreover, as first and third party coverage is part of the same policy, insurers may take more care within the policy to comply.

If the third party could rely on unfair terms it is important to examine exactly what the **CRA 2015** deems as ‘*unfair*’, which is dealt with in Part II of the **CRA**. If a term is regarded as ‘*unfair*’ it can be challenged in the Courts and subsequently deemed unenforceable (see **Section 62 CRA**), although this does not cancel the contract, policy and any of the obligations arising from it.

Due to the need for a ‘*case by case*’ approach, ‘*unfair*’ is necessarily a somewhat uncertain, vague, and subjective term. The Act states that a term is unfair if:

*“contrary to the requirement of good faith, it causes a **significant imbalance** in the parties’ rights and obligations under the contract to the detriment of the consumer...taking into account the nature of the subject matter of the contract, and...by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends”.*⁷²⁰

The requirement of good faith, according to the Competition and Markets Authority (henceforth ‘**CMA**’), entails a general principle of ‘*fair and open dealing*’.⁷²¹ Contracts should be drafted to respect the legitimate interests of consumers and the CMA goes as far as to refer to, ‘*good standards of commercial morality and practice*’.⁷²² This issue of commercial morality is relevant particularly to clauses in motor insurance policies which are no longer used, but which were seemingly prevalent in the 1930’s, clauses which excluded ‘*jews*’ or ‘*foreigners*’ and other controversial exclusion clauses relating to characteristics or professions of drivers which had no relation to the risk, would almost certainly be declared as immoral at

⁷²⁰ CRA 2015.

⁷²¹ Competition and Markets Authority “Unfair Contract Terms Guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015” 31st July 2015: CMA 37, [2.4].

⁷²² Addleshaw Goddard “Consumer Rights Act: guidance on unfair terms” <https://www.addleshawgoddard.com/globalassets/specialisms/financial-regulation/consumer-rights-act-guidance.pdf>. [Accessed 20th July 2017]

present day. Of course, it is unlikely that these clauses would ever be used in a modern policy.

Moreover, as was stated by Lord Bingham in *Director-General of Fair Trading v First National Bank plc*,⁷²³ the trader should not, '*whether deliberately or unconsciously, take advantage of the consumers necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract (or) weak bargaining position*'.⁷²⁴ The definition of an 'average' consumer has been of interest and discussion amongst an extensive corpus of EU law, however, the definition which is most used and contained within the **CRA** is someone, '*who is reasonably well informed and observant and circumspect*'.⁷²⁵ This, however, does not signify that the 'trader' should ignore vulnerable consumers, who have '*educational, intellectual, cultural, social or linguistic limitations*'.⁷²⁶ Demonstrating that the consumer's situation should be considered when examining whether a significant imbalance has occurred, and consequently whether the insurer has acted in good faith. It is evident that policies and exclusion clauses must be adapted to meet the needs of the individual consumer. Meaning that it should consider any potential limitations in understanding, or should be constructed at a level which would be understood by all consumers. This is particularly the case in Motor Insurance as with over 30 million policies being issued to almost half of the population, with the clear majority likely to be unfamiliar with the exact nature and effects of the terms contained within motor insurance policies.

It is also a separate and distinct requirement that a written term of a consumer contract is transparent. This will be met under **Section 68 CRA**, if the term uses, '*plain and intelligible language and is legible*'. There is, of course, more to this definition, and as stated in the Competition and Markets Authority Guidance:

⁷²³ [2002] 1 AC 481.

⁷²⁴ Ibid, [17].

⁷²⁵ For a greater discussion on the meaning of 'consumer' see, See Mak V, "Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights Directive" TISCO Working Paper Series on Banking, Finance and Services, No. 04/2010, 1. [Accessed 14th June 2017]

⁷²⁶ Samuels A, "The Consumer Rights Act 2015", (2016) J.B.L. 3, 159-185.

*“Obligations...should be set out fully, and in a way that is not only comprehensible but puts the consumer into a position where he or she can understand their practical significance”.*⁷²⁷

Again, this depends on the individual consumer’s understanding and limitations, and therefore adapting the policy and exclusion clauses based on this. However, as noted in the insurance case of **Bankers Insurance Company Limited v South**⁷²⁸ this does not mean that the insured can ignore their own responsibilities. The case concerned whether the term ‘*waterborne craft*’ was in plain intelligible language in terms of it incorporating the term ‘*jet-ski*’. Having examined numerous definitions of the term, the Court held that it was transparent and ‘*would be so understood by any reasonable insured who troubled to read the policy wording*’.⁷²⁹ The Court further stated that:

*“(The insured) could have read the policy wording which I have found was available and could have asked (the insurer) whether it covered jet skis if he was in any doubt or even if he couldn't be bothered to read all the wording”.*⁷³⁰

This emphasises that whilst there is a significant amount of responsibility on the insurer to ensure that terms are transparent, there is also a degree of responsibility on the insured to read the policy, but also to ask questions if there is a term which they are struggling to comprehend. It is also important to note that, in relation to the relationship between transparency and fairness, both terms are regarded as separate to one and other,⁷³¹ however, the fairness test is more likely to be met when the term is transparent but this is not guaranteed.

Core Terms

One term which does not need to be assessed for fairness can be found under **Section 64 (1)**, which is a term that ‘*specifies the main subject-matter of the contract*’. These ‘*core terms*’ fall outside needing to comply with the fairness

⁷²⁷ Competitions and Markets Authority “*Unfair Contract Terms Guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015*”, 31st July 2015: CMA 37, [2.4].

⁷²⁸ [2003] EWHC 380.

⁷²⁹ Ibid, [23].

⁷³⁰ Ibid, [24].

⁷³¹ Ibid.

requirement although this does not automatically make them immune from attack as they must be deemed ‘*transparent*’ and ‘*prominent*’ (**Section 64 (2) CRA**). The difficulty here, therefore, is in determining which terms fall within the ‘*subject matter*’ of the contract, as stated by Professor Merkin, the distinction between core and ancillary terms is particularly acute when the term is an exclusion from cover in an insurance policy.⁷³² Moreover, the term ‘*transparent*’, which is analogous to the term ‘*fairness*’, is open to interpretation.

As stated by the CMA, ‘*core terms*’ are the, ‘*very essence of the contractual relationship*’⁷³³ and, ‘*must be understood as being those that lay down the essential obligations of the contract*’.⁷³⁴ This provides some clarity as to determining ‘*core terms*’, but continues to leave open the question as to the definition of ‘*essential obligations*’. The answer, in insurance contracts, seemingly lies in the **1993 EU Unfair Terms Directive**⁷³⁵ at **Recital 19**, which states:

*“In insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurers’ liability shall not be subject to such assessment (of fairness) since these restrictions are taken into account in calculating the premium paid by the consumer”.*⁷³⁶

Consequently, exclusion clauses included in motor insurance policies, which have a clear effect in defining the insured risk, therefore impacting on calculating the insured’s premium, will not be assessed for fairness if they are ‘*transparent*’ and ‘*prominent*’. As stated in previous chapters, the majority of terms which are used in calculating the premium involve the insured’s ‘*use*’ of the vehicle such as for ‘*social domestic or pleasure purposes*’. Of course, it is unlikely that the term which limits use to ‘*business use*’, would fall within this Act due to the Act’s clear limitation to consumer contracts.

However, it is important to note that, the overall issue as to whether ‘*risk clauses*’ fall within ‘*core terms*’ is not entirely certain, as noted using the word ‘*potentially*’ in

⁷³² Professor Merkin (n 23), 6.

⁷³³ CMA (n 724).

⁷³⁴ Ibid.

⁷³⁵ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

⁷³⁶ emphasis added.

Professor Merkin's book.⁷³⁷ However, as explained at the beginning of this chapter, from the legislature's decision to exclude insurance contracts from the **1977 UCTA**, there is a general unwillingness to interfere in terms which are used to assess insurance risk. Consequently, it is submitted that these 'risk' terms do fall within the 'core exclusion' provisions of the **CRA 2015**.

Again, however, it is important to note that these will not be assessed for fairness if they are 'transparent' and 'prominent'. As stated by the **CRA 2015**, a term is 'prominent' if it is brought to the consumer's attention in such a way that an average consumer would be aware of it. The CMA further states that awareness should be taken to, 'denote awareness of it for practical purposes, so that he or she (the consumer) can make an informed purchasing decision'.⁷³⁸ Moreover:

"Terms need to be brought to the consumer's attention prior to the conclusion of the contract in a way that is likely to enable the average consumer to understand and appreciate the essential features of the bargain when making purchasing decisions".⁷³⁹

Similar to previous definitions within the **CRA 2015**, several factors are considered when determining prominence, including the consumer's expectations, its relationship with other terms, and information given to the consumer pre-contract.⁷⁴⁰ It is submitted that exclusion clauses relating to 'use' of the vehicle will meet the prominence requirements in the majority of policies made by respectable insurers, as they are careful to ensure that these terms are at the forefront of the average motor insurance policy and within the proposal forms. Moreover, as stated regarding transparency, consumers are expected to have at least read the policy and therefore, if the exclusion is brought to the attention of the consumer then this requirement is likely to be met.

Overall, due to limited case law and interpretation of this Act, especially in relation to insurance and third parties, it is difficult to see exactly what effect this Act will have. The Act has clarified many issues involving key definitions; however, further clarification is needed in relation to core terms and its application to motor

⁷³⁷ Professor Merkin (n 23).

⁷³⁸ CMA, (n 724), [3.23].

⁷³⁹ Ibid.

⁷⁴⁰ Ibid.

insurance policies. The significance of this Act, however, should not be underestimated by the insurance industry as it bestows significant responsibility on the insurer.

Consumer Insurance Contracts

Insurance Conduct of Business Sourcebook (ICOBS) and the Financial Ombudsman Service

ICOBS replaced the previous Statements of Insurance Practice and is currently managed by the Financial Conduct Authority (henceforth 'FCA') under the authority of the **FSMA 2000**. As confirmed by the FCA's predecessor (the Financial Services Authority), '*insurers' conduct must towards third parties must comply with...the claims handling rules in chapter 8 of...ICOBS*'.⁷⁴¹ Consequently, insurers are obliged to comply with **ICOBS** towards both consumers and third parties.

If there is failure of an insurer to meet its obligations contained within the sourcebook and a complaint is made by the consumer, the insurer is likely to face disciplinary action by the FOS. The FOS does not deal with claims by third parties, and therefore could not rule against an insurer for repudiating third party claims where the Sourcebook is breached. Consequently, it is only if a consumer brings an action against the FOS in which relief can be sought. As a motor insurance policy will have a first party, **ICOBS** could still act as a deterrent to prevent insurers from breaching it in policies which have both first and third parties.

The FOS will decide whether to uphold the complaint based on what is reasonable and fair in the circumstances and can award damages to the complainant.⁷⁴² Moreover, the sourcebook is binding upon the insurers and a civil action by the insured potentially exists for breach.⁷⁴³ This therefore, can lead to reputation damage and consequently loss of shareholder confidence, which is arguably more important for the insurer than any savings it could make by repudiating claims.⁷⁴⁴ Moreover, as argued by the UK Law Commission, there is potential for the insurers

⁷⁴¹ Cited in House of Lords by Lord Dubs, 1st February 2012, Col 1599 (Hansard).

⁷⁴² This phrase is always cited in FOS judgments.

⁷⁴³ *Parker and Parker v The National Farmers Union Mutual Insurance Society Limited* [2012] EWHC 2156 (Comm) [196].

⁷⁴⁴ Fisher D, "Third Party Assistance: Or Should I say capture?" (2011) J.P.I Law, 4. 245-248, 248.

to breach their statutory duty of good faith if they refuse to comply with the code, although this is questionable.

In relation to exclusion clauses the approach taken by the FOS is different to the approach that is taken in the Courts. It does not question the classification of a term, as a condition precedent, an innominate term, or a warranty, and then apply the appropriate consequences of breach.⁷⁴⁵ Alternatively, it examines the potential effect of use of a clause and the effect it thinks it should have on the breach and then whether the complainant qualifies for the extra protection as a consumer that **ICOB**S provides.⁷⁴⁶

The key provisions within the Sourcebook in relation to exclusion clauses is contained in **ICOB**S 8.1 which states that the insurer must, '*handle claims promptly and fairly*' (**ICOB**S 8.1.1 (1)) and further must not '*unreasonably reject a claim (including by terminating or avoiding a policy)*' (**ICOB**S 8.1.1 (3)). **ICOB**S 8.1.2 states that the rejection of a claim is unreasonable, *inter alia*, '*for breach of warranty or condition unless the circumstances of the claim are connected to the breach*' unless, '*the warranty is material to the risk and was drawn to the customer's attention before the conclusion of the contract*' (**ICOB**S 8.1.2 (3) (C)). Causation between the claim and breach of the exclusion is best practice within the insurance industry. Consequently, it is unlikely that any reputable insurer would seek to rely on a defence unrelated to the claim. However, this rule aims to ensure that a high standard of protection is enforced across all insurers as it is clear especially from early cases that some insurers in motor claims were relying on exclusion clauses unrelated to accident cause.

Although there is clearly potential for the FOS to provide the necessary safeguard to third party claims, there are very significant limitations. For example, the FOS cannot cross-examine witnesses,⁷⁴⁷ and cannot tell the courts how to resolve a dispute.

⁷⁴⁵ Judith Summer, *Insurance and the Financial Ombudsman Service*, (Informa Publishing, 2010), [14.13].

⁷⁴⁶ *Ibid.*

⁷⁴⁷ DISP 3.3.4 R (10).

Consumer Insurance (Disclosure and Representations) Act 2012

CIDRA was introduced in 2012 after the UK Law Commission introduced a programme of Consultations to examine various areas of insurance law both in relation to consumer and business insurance. The Act was not directly addressed to third party claims, however, particularly in relation to '*Basis of the Contract Clauses*', the Act may have some relevance to motor insurance.

Basis of the Contract Clauses Generally

The most controversial exclusion clause used by an insurer in any insurance policy is the, '*basis of the contract clause*', historically used in both first and third party claims to repudiate liability. The basis clause turns any error made in a policy proposal form⁷⁴⁸ into a warranty contained within the contract. An example of a '*basis of the contract*' clause, which was commonly inserted into an insurance proposal form was: '*I declare that the particulars and statements made by me above are true, and I agree that they shall be the basis of the contract between me and the – Company*'.⁷⁴⁹ It is clear, however, that as stated by Lord Wright in ***Provincial Insurance Co v Morgan***,⁷⁵⁰ these clauses come in many variations.

Basis of the Contract in Motor Insurance

Dawson's v Bonnin⁷⁵¹ is the most important case in relation to these clauses in all areas of insurance. In this case, a proposal form submitted by Dawson's Ltd, contained the following incorrect answers. Condition 4 of the policy held that:

"Material misstatement or concealment of any circumstances by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void".

The insurer therefore repudiated liability to the insured when a fire broke out at a garage, destroying the insured's vehicle. The insured argued that as the incorrect answer to the proposal question was immaterial, and it was unlikely that it would have affected the insurers' premium, they were entitled to be compensated. The

⁷⁴⁸ A form completed by a person seeking insurance, giving relevant details to allow the insurer to determine the risk and premium.

⁷⁴⁹ Hasson R.A, "The "basis of the contract clause" In Insurance Law", (1971) M.L.R., 34 (1), 29.

⁷⁵⁰ [1933] A.C. 240, 251.

⁷⁵¹ [1922] 2 A.C. 413

insurers alternatively argued that the statement of the usual place to be garaged was a warranty in the sense in which that term is used with reference to contracts of insurance, and that if it was not correct the action must fail, whether the statement was material or not. The House of Lords held, on a majority of three to two, that it was irrelevant whether the incorrect statement made was material. Viscount Haldane stated:

*“If the respondents can show that they contracted to get an accurate answer to this question, and to make the validity of the policy conditional on that answer being accurate, whether the answer was of material importance or not, the fulfilment of this contract is a condition of the appellants being able to recover”.*⁷⁵²

This is a significant decision, as it shows that materiality is irrelevant when it comes to misstatements in the proposal form if a ‘*basis of the contract*’ clause is present. Meaning, that insurers could avoid paying a claim, even due to a minor error, which would not have affected the granting of insurance, or if the error slightly reduced the premium.

The Court in ***Provincial Insurance Company, Limited Appellants v Morgan and Another***⁷⁵³ circumvented the use of these clauses. Here, a question in the proposal form asked the insured to, ‘*State (a) the purposes in full for which the vehicle will be used; and (b) the nature of the goods to be carried*’.⁷⁵⁴ The insured answered with ‘*delivery of coal*’.⁷⁵⁵ Similar to previous cases, the policy had a ‘*basis of the contract*’ clause which was subsequently used by the insurer to deny payment as the insured also used the lorry to carry timber. However, in this case the judges in the House of Lords found in favour of the insured, because the statements made were only statements of intention, and were not meant to be definitive.

Very few cases exist where the insurer repudiates liability based on these clauses against a third party claim. A case which exists in relation to the use of these clauses against third parties is ***Sivers v Mainwaring***,⁷⁵⁶ involving an accident

⁷⁵² Ibid, 421.

⁷⁵³ [1933] A.C. 240.

⁷⁵⁴ Ibid.

⁷⁵⁵ Ibid.

⁷⁵⁶ Reported in the Times, 23rd March (1932).

where a lorry injured a motorcyclist, the insurer refused to indemnify the lorry company due to the unsafe condition of the vehicle, hence potentially leaving the third party at risk of gaining no compensation.⁷⁵⁷ Moreover, a basis clause was contained in the proposal form and was also used by the insurer because the company withheld information in the proposal form in a '*previous convictions*' question. The company failed to inform the insurers that two drivers had been previously convicted for the very minor offence of having '*noisy silencers*'. During pleadings, the insurers said that the defence of the use of basis clauses had been put before a Committee at Lloyds of London by the insurers, which was subsequently granted. This was greeted with surprise by the judge, Mr Justice Horridge. The Judge stated that, '*this is as wretched a point as I have had to deal with and it is not the way, from my experience, that Lloyds' underwriters treat these matters*'.⁷⁵⁸ The Judge further stated that he would take care to let the public know what sort of defence was being used against them. After the Judge's comment, the insurers again consulted the Lloyds Committee and withdrew the defence. Consequently, the insurer paid for all losses resulting from the accident including to the injured third party.

The **RTA 1934** then significantly amended the law in relation to third party rights and **Section 10 (3)** stated:

*"No sum shall be payable by an insurer under the foregoing provisions of the section, if, in an action commenced before or within three months after the commencement of the proceedings...he has obtained a declaration, that **apart from any provision contained within the policy**, he is entitled to avoid it on the ground that it was obtained by non-disclosure of a **material fact**".*⁷⁵⁹

Shawcross interpreted this provision and the phrase, '*apart from any provision contained within the policy*' as meaning that basis of the contract clauses could not be used against third parties.⁷⁶⁰ Moreover, whereas this provision requires

⁷⁵⁷ Although it is unclear in this case as to whether the third party would have claimed against the company or driver.

⁷⁵⁸ *Sivers v Mainwaring* (n 760).

⁷⁵⁹ emphasis added.

⁷⁶⁰ Shawcross (n 74), 305.

materiality in cases of misrepresentation, basis clauses do not require materiality, meaning, it seems that these clauses do not fall within these parameters. It is submitted that this is a strong argument to make, although it is not altogether clear whether the intention of the provision was to prohibit these clauses. If Parliament intended to prohibit the use of basis clauses against third parties, it would have done so either in clearer express terms in **Section 10** or within **Section 12** alongside other prohibited exclusion clauses.

Additionally, it is arguable that '*basis clauses*' are contained within the proposal form and not the policy, although the proposal form is considered part of the policy. Insurers have not challenged the interpretation of this provision, because of judicial consternation related to basis clauses. In fact, insurers have agreed to not use these clauses within their proposal forms at all, although recent cases exist which show that insurers have continued to use these clauses in some situations.⁷⁶¹ It is notable that insurers were unlikely to challenge the prohibition of basis clause from the **RTA 1934**, because of limited practical importance due to the MIB requiring the insurer to pay under **Article 79**.⁷⁶² Moreover, were these clauses to be used and subsequently challenged under EU Law then it is possible that they would be struck out by the Courts due to breach of **Article 13** of the **Sixth Directive**.⁷⁶³

Importantly, however, this issue was laid to rest, at least prospectively, in both the **CIDRA 2012** as well as the **Insurance Act 2015**. These Acts are a consequence of the English and Scottish Law Commission's consultation on insurance law, the Commissions, and majority of consultees agreed that these clauses should be prohibited. Consequently, **CIDRA 2012** was introduced, and **Section 6** states that in a Consumer Insurance contract, a representation in a proposal form '*is not capable of being converted into a warranty by means of any provision*'. This seemingly applies to both first and third party contracts. Having examined CIDRA, it is further important to examine the effect of the **Insurance Act 2015**, whereas **CIDRA** applies only to consumer insurance, the **Insurance Act 2015** applies to business (and occasionally consumer insurance, whether a provision relates to consumer insurance is expressly noted in the Act).

⁷⁶¹ Unipac v Aegon (1996) SLT 1197.

⁷⁶² For Article 79 see page 213.

⁷⁶³ The proposal form is deemed to be part of the policy.

The Insurance Act 2015

In 2015, after nine years of UK Law Commission consultations, the **Insurance Act 2015** was introduced, applying to both consumer and business insurance contracts (unless stated within the Act). Previous insurance law was governed by the **Marine Insurance Act 1906** and subsequent interpreting cases. Although this Act only governed marine insurance, the common law relating to general insurance contracts (including motor insurance) utilised most of its principles. The **Insurance Act 2015** is a significant step in insurance law, as it provides the first major alteration in over a century. However, the **Insurance Act's** effect on motor insurance, especially in relation to third party claims, is not entirely clear and there have been no decided cases on this point. Professor Merkin and Dr Gurzes argue, that if interpreted broadly, the warranty and exclusion provisions of the **Insurance Act** in **Sections 9 to 11**, could affect liability to third parties.⁷⁶⁴ This chapter will now examine the **Insurance Act's** effect on basis clauses, warranties, and exclusion clauses in motor insurance policies, in relation to third party claims.

Basis Clauses

The Insurance Act 2015 followed **CIDRA**, and consequently removed basis clauses altogether, by prohibiting their use in business insurance contracts (**Section 9 (2)**). Consequently, the use of '*basis clauses*' to repudiate claims is now prohibited in all insurance contracts, and the insurer cannot rely on such a clause in a proposal form, contract, or accompanying document in relation to both first and third parties. This means that although it was questionable as to whether these clauses could be used since the **1934 RTA** in motor insurance policies, there is now at least certainty in this area in relation to pre-contractual statements and basis clauses.

General Warranties and Description of Risk

Although the **Insurance Act** and **CIDRA** prevented the insurer from converting the insureds' pre-contractual statements into a warranty through its prohibition of basis clauses, this did not prevent the insurer from relying on specific warranties in

⁷⁶⁴ The authors were examining the 'loss of a particular kind' provision when making this argument see Professor Robert Merkin and Ozlem Gurses, "Insurance contracts after the Insurance Act 2015" (2016) L.Q.R, 132(Jul), 445-469, 464.

policies so that they are treated as continuing warranties.⁷⁶⁵ **Section 10 Insurance Act** states that any rule of law which allows an insurer to discharge their liability under the contract is abolished. However:

“An insurer has no liability under a contract of insurance in respect of any loss occurring or attributable to something happening, after a warranty is breached but before the breach has been remedied”

It is notable that under **Section 10 (3)**, the insurer will not be discharged from liability: if there is a change of circumstance and the warranty ceases to be applicable due to circumstance of the contract (**Section 10 (3) (a)**), compliance with the warranty is rendered unlawful (**Section 10 (3) (b)**) or, if the insurer waives the breach of warranty (**Section 10 (3) (c)**).

Defining Warranties

It is submitted that it is unlikely that the alteration of the law on warranties is going to have a substantial effect on motor insurance. This is because, in the majority of circumstances, the courts have interpreted ‘warranties’ as ‘descriptions of risk’ within the confines of motor insurance policies. This alteration in definition, restricts the remedy open to the insurer.

An example of this arose in **Farr v Motor Traders**.⁷⁶⁶ Here, the insured was the owner of two taxi-cabs. In the policies’ proposal, the insured stated that each cab was to be driven in one shift per 24 hours, which, at the time was deemed to be true. However, this was later broken as another driver was permitted to take the taxi-cab, which was subsequently damaged. The insurer therefore argued that as this was a warranty, as soon as it was breached, the policy ended. Whereas the insured argued that it was merely a ‘description of risk’. Bankes LJ summed up the differences in consequences between the two:

“(the) question is whether we are to construe the...answer ...as a warranty, the effect of which would be that ...when the cab was driven in two shifts per day, the policy came to an end; or whether we are to construe them...as words descriptive of the risk, indicating

⁷⁶⁵ Professor Merkin (n 23), [2-97].

⁷⁶⁶ Farr (n 112).

*that whilst the cab is driven in one shift per 24 hours, the risk will be covered, but that if in any one day of 24 hours the cab is driven in more than one shift, the risk will no longer be covered...until the owner resumes the practice of driving the cab in one shift only”.*⁷⁶⁷

Consequently, the Court needed to decide whether to merely ‘suspend’ the policy or bring it to an end. Bankes LJ preferred the former and stated that the term was a ‘description of risk’ due to the nature of the promise made.⁷⁶⁸ The honourable judge found that the answer to the insurer’s question was true when the policy was made, and remained true for the majority of time whilst the vehicle was on risk.⁷⁶⁹

In **Roberts v Anglo Saxon**,⁷⁷⁰ a clause was inserted into the policy which stated that the vehicle was: ‘*Warranted (to be) used only for the following purposes: commercial travelling*’. At the time of the accident, the vehicle was not being used for commercial purposes. Scrutton LJ in finding that this was a warranty, examined the term carefully and stated that the term ‘warranted’ does not automatically mean that the term was a warranty.⁷⁷¹ His Lordship stated that the term ‘warranted only’ was a, ‘*promissory declaration as to risk... (the insurer) will only insure you in certain circumstances, but only in certain circumstances*’.⁷⁷² This then, highlights that the courts are willing to go further than the expression of the parties and the *prima facie* meaning of the words used.

Alternatively, in **Re Morgan and Provincial Insurance Co**,⁷⁷³ the insured was requested to state the purpose for which the vehicle was going to be used and the nature of the goods which would be carried. Whereas the insured stated that he would carry coal only, the insured also used his vehicle to carry timber without stating this. The House of Lords declared this as a ‘description of risk’ rather than a warranty, as stated by Lord Buckmaster, ‘*to state in full the purposes for which the vehicle is to be used is not the same thing as to state in full the purposes for*

⁷⁶⁷ Ibid, 674.

⁷⁶⁸ Ibid.

⁷⁶⁹ Ibid

⁷⁷⁰ Roberts v Anglo-Saxon Insurance Association Ltd (1927) 27 Ll. L. Rep. 313.

⁷⁷¹ This is generally the approach of the Courts, see for example the Canadian case of The Bamcell II [1986] 2 Lloyd’s Rep 528, 533 where Mr Justice Lambert stated that “there is no magic in the word “warranted” which is frequently used with considerable ambiguity in policies.”

⁷⁷² Roberts v Anglo Saxon (n 758).

⁷⁷³ [1933] A.C. 240.

which the vehicle will be exclusively used.⁷⁷⁴ Lord Wright further stated that, ‘*the question turns entirely on the construction of the contract*’.⁷⁷⁵

It is evident that the Courts often take a more interpretative rather than literal view to these clauses to construe them as ‘*descriptions of risk*’ rather than warranties, which consequently mitigates the effect of them.⁷⁷⁶ As stated by Saville L.J. in ***Hussain v Brown***.⁷⁷⁷

“It must be remembered that ...warranty is a draconian term... if underwriters want such protection, then it is up to them to stipulate for it in clear terms”.⁷⁷⁸

The courts are therefore not reluctant to construe clauses against the insurer if they deem them uncertain. However, the courts no longer need to be concerned with mitigating the harsh effects of warranties, as the distinction between these terms is now largely irrelevant. The legislature has mitigated the effect of warranties by removing their most offensive features through the introduction of the ***Insurance Act’s*** provisions.⁷⁷⁹

Section 11: Regulation of Exclusion clauses and Warranties

The legislative intervention which will likely have some potential effect exclusion clauses and third parties, is within ***Section 11 Insurance Act***, which deals with, ‘*Terms not relevant to the actual loss*’. ***Section 11*** states:

"This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following— (a) loss of a particular kind, (b) loss at a particular location, (c) loss at a particular time.

⁷⁷⁴ Ibid, 247.

⁷⁷⁵ Ibid, 251.

⁷⁷⁶ UK Law Commission “Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment” Law Com No 353.

http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc353_insurance-contract-law.pdf [Accessed 1st June 2017].

⁷⁷⁷ [1996] 1 Lloyd’s Rep 627.

⁷⁷⁸ Ibid, 630.

⁷⁷⁹ Robert Merkin and Ozlem Gurses (n 768), 456.

(2) *If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured satisfies subsection (3).*

(3) *The insured satisfies this subsection if it shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.*

(4) *This section may apply in addition to section 10."*

This provision applies to both exclusion clauses and warranties due to **Section 11 (4)**. This chapter will now examine key aspects of this provision and whether it will have any significant effect on third parties in motor insurance.

'Terms Defining Risk as a Whole'

Potentially the most important part of this provision regarding motor insurance, is relating to '*terms defining risk as a whole*', which are expressly excluded. As stated previously,⁷⁸⁰ clauses which '*define risk*' are most prevalent in motor insurance policies, and are the clauses which are generally used to repudiate liability against third parties, because they fall outside the prohibited exclusion clauses in **Section 148 RTA**. The difficulty with the **Insurance Act**, however, is that the boundaries and definition of the phrase used is elusive, with irreconcilable borderline decisions probable due to this uncertainty.⁷⁸¹ However, the Law Commission (and later Lloyds Market Association) gave some indication as to the meaning of the phrase:

*"The clause is not intended to apply to contract terms which reduce the risk profile as a whole...These words are intended to exclude, for example, terms which set out: (1) **the use in which the insured property can be put** (2) **the geographical limits of the property** (3)*

⁷⁸⁰ Pages 50-57

⁷⁸¹ Professor Merkin and Dr Gurses (n 768), 461.

*the class of ship being insured (4) the minimum age/qualification and characteristics being insured".*⁷⁸²

In relation to motor insurance, only the first of these is permitted against third parties, with the other three contained within the prohibited exclusion clauses under **Section 148 RTA**. This consequently puts the **Insurance Act** and third party provisions contained in the **RTA 1988** in direct conflict. The Law Commission justified its approach relating to 'use' clauses by stating:

*"Insurance is based on the insurers' ability to decide what risk to accept, and on what terms. The insurer must be in a position to calculate risks and to charge higher premiums on "riskier" risks, therefore keeping the premiums down in relation to low risk policies...it would frustrate the insurers' risk assessment process if a policyholder could still recover for any loss not directly related to the ...use".*⁷⁸³

This is similar to the guidance from the 1937 Cassel Committee Report. The Report highlighted that insurers should be permitted to limit the risk via exclusion clauses, even against third parties, as this is key in the calculation of premium. The Law Commission has confirmed its approach in relation to motor insurance by relating this exception to the case of **Murray v Scottish Automobile and General Insurance Co**,⁷⁸⁴ which involved the valid use of a 'commercial use' exclusion when the vehicle was let out for hire. The Law Commission argued that insurers should not compensate those who take out the wrong type of coverage or 'play the system'⁷⁸⁵ by breaching exclusion clauses, whilst paying a lower price. Consequently, in relation to motor insurance, the aim of the inclusion of 'terms not relevant to loss' is to ensure that insurers can design risk and determine premiums effectively. Thus, it is submitted that the eminent 'use' exclusion clauses in motor insurance policies come under this provision and are therefore valid.

⁷⁸² Stakeholder Note: Terms Not Relevant to the Actual Loss, [1.8] emphasis added.

⁷⁸³ UK Law Commission (n 764), [18.21] and [18.23].

⁷⁸⁴ (1929) SC 48.

⁷⁸⁵ Ibid, [17.39].

There is nevertheless some uncertainty within ‘*risk*’ clauses, with ambiguity being whether the insured could bypass this definition, and claim that a clause is an ‘*exclusion clause*’ rather than ‘*risk definition*’. An example, as discussed by Professor Merkin and Dr Gurzes, is where an insurer could define the risk as ‘*driving*’, but then have an exclusion clause relating to ‘*business use*’.⁷⁸⁶ In this case, the ‘*business use*’ exclusion clause could fall outside of being a ‘*term defining risk*’, and subsequently be interpreted as being an exclusion clause, and therefore be open to being struck out by **Section 11**. It is submitted, however, that this is an unlikely situation, especially as this would work in detriment to the insurers. It is likely that insurers would draft the clause in a way to ensure that the clause can only be interpreted as ‘*risk definition*’ to fall outside this provision.⁷⁸⁷ It is further questionable whether exclusion clauses fall within **Section 11** at all. The authors in MacGillivray⁷⁸⁸ argued that as exclusion clauses do not require compliance by the insured, they would not fall within **Section 11**. Although this is contrary to the view of the UK and Scottish Law Commissions, by their comparison to the exclusion of shipping classes.⁷⁸⁹

Another issue noted by Professor Merkin, is that the Law Commission have seemingly skewed the definition of risk, by classifying terms previously thought to be descriptions of risk, as exclusion clauses, which would therefore fall within **Section 11**. For example, the term ‘*roadworthiness*’ has always been thought as a definition of risk, even historically, which was noted in the 1930’s by Shawcross.⁷⁹⁰ However, the Law Commission in its’ Consultation has stated that the roadworthiness provision will fall outside of risk definition.⁷⁹¹ This is a difficult point, the traditional view of ‘*roadworthiness*’, as noted above, is that it is such an important clause for insurers to use against first parties to make it a risk defining clause (it is excluded against third parties under **Section 148 RTA**). An alteration of this to being thought of as an exclusion clause, is something that will likely continue to be debated, although this is of limited relevance here. Similarly, Lloyds

⁷⁸⁶ Professor Merkin and Dr Gurses (n 768), 458.

⁷⁸⁷ Baris Soyer “Risk control clauses in insurance law: law reform and the future”, C.L.J. 2016, 75 (1), 109-127, 121.

⁷⁸⁸ MacGillivray (n 272), 282.

⁷⁸⁹ UK Law Commission No.353 (n 780), 18.24.

⁷⁹⁰ Shawcross (n 74), 496.

⁷⁹¹ UK Law Commission (n 780).

Market Association (henceforth 'LMA') have further argued that the distinction between 'terms defining risk' and 'risk mitigation' clauses is, 'unclear and uncertain' because, 'the problem is that the concept of a term "defining the risk as a whole" is inherently unclear and uncertain, and is liable to be confused with a mere "risk mitigation"'.⁷⁹²

The LMA has argued that whether **Section 11** applies:

*"Seems to turn on the scope of cover provided: if narrow (i.e. only fire risks) then section 11 would apply, but if broader (such as an all risks policy), the exact same term might not be covered by section 11, because in that context, it would only affect the particular risk of a specific type of loss".*⁷⁹³

Essentially therefore, according to the LMA, terms will be interpreted on each individual case based on the scope of cover. This is an approach which would lead to significant confusion and need for significant judicial interpretation, leading insurers and claimants to not know where they stand with certain clauses. Motor insurance policies are generally much broader due to the need to ensure that all risks are covered, including third party risks. Thus, it is submitted under LMA guidance, terms are likely to be held as risk definition rather than risk mitigation. The issue is uncertain and will certainly be clarified by future courts.

Loss of a Particular Kind, Location, and Time

Under **Section 11** of the **Insurance Act**, exclusion clauses relating to losses of a particular kind, at a particular location, and at a particular time, cannot be used to deny liability to the insured, if non-compliance with these terms by the insured would not have increased the risk of the loss. The issue with these terms is the breadth in which they are interpreted, and this has caused significant confusion and discussion. There is considerable overlap with the prohibited exclusion clauses in the **RTA 1988**, and this chapter will now examine possible interpretations and overlaps.

⁷⁹² House of Lords, Evidence to the Special Public Bill Committee, HL Paper 81, December 2014, 36.

⁷⁹³ Ibid, 37.

Time

It is unlikely that the 'time' provision of **Section 11** will influence third party motor claims, especially in cases where liability is required to be covered. This is because, '*the time at which...the vehicle has been used*' is already a prohibited exclusion clause under **Section 148 (2) (e) RTA**. However, if one took a broader interpretation of 'time' there are possible instances which would fall within the **Insurance Act 2015** but outside **Section 148 RTA**. For example, excluding the insured at the time of accident from using the vehicle for '*business purposes*'.⁷⁹⁴ Moreover, at the time of the accident, excluding the vehicle from going over the speed limit, would fall outside of the prohibited exclusion clauses in **Section 148**, but may fall within the 'time' provision. The first of these, of course, would depend on the interpretation by the Courts of '*the risk as a whole*'. However, it is submitted that using the '*risk as a whole*' defence, is a weak argument, as it would require the Courts to manipulate clauses and interpret them in such a way to fall under the **Insurance Act**.

Moreover, if this was simply due to the wording and the inclusion of the word 'time', then insurers would simply redraft the policy to ensure that it does not conflict with the provisions of the Act. It must be remembered, however, that **Section 148** only applies to liabilities which are required to be covered.⁷⁹⁵ Hence, the **Insurance Act** would come into effect if an exclusion relating to location was used in a situation where compulsory insurance was not required, such as in cases of use of a vehicle on private land.

Location

It is evident that '*loss at a particular location*' would also fall under the prohibited exclusion clauses in **Section 148 (2)**, although the **RTA 1988** refers to '*areas within which the vehicle is used*'⁷⁹⁶ rather than the term 'location' used in the **Insurance Act**. Certainly, it is argued that this is solely a difference in wording rather than meaning because as highlighted in case law '*areas*' also encompasses '*geographical locations*'.⁷⁹⁷ In relation to whether the term will confer a narrow or

⁷⁹⁴ An example used by Professor Merkin (n 23) 130.

⁷⁹⁵ See page 74.

⁷⁹⁶ Section 148 (e) RTA 1988

⁷⁹⁷ See Chapter Three of this thesis and the case of *AW&E Palmer v Cornhill Insurance Co Ltd* (1935) 52 Ll. L. Rep. 78.

wide meaning in motor insurance, Professor Merkin stated: '*the word might be confined at its narrowest to geographical limits imposed upon the use of a vehicle*'.⁷⁹⁸ The author concurs with Professor Merkin, especially in relation to the interpretation involving third party claims. This is because the courts would be obliged to look at the overall legislative framework especially **Section 148** and see that the legislative intention is to prevent such clauses.

Kind

The final provision relating to '*kind*' is less clear, as it is not contained within the prohibited exclusion clauses within **Section 148 RTA** and therefore not automatically void against third parties. Further, as stated in the House of Lord's consultation, it is a term that is conducive of '*satellite litigation*' which confers several different meanings and therefore its effect on third parties depends on a narrow or wide judicial construction.

It is evident, from the above analysis of '*location, time and kind*', that there is a significant clash between the **RTA 1988** and **Insurance Act**, especially in relation to the first two clauses and the **Insurance Act** is of limited effect in those cases. It must be remembered, however, as explained above there will be circumstances where the **Insurance Act** will influence third parties, namely where the risk is not required to be covered and **Section 148** is of no effect. Consequently, the next element, the '*terms not relevant to the loss*' test needs to be examined.

Causation and Terms Not Relevant

The final test to be satisfied is whether non-compliance with the exclusion or warranty could have increased the risk of the loss, which occurred in the circumstances in which it occurred. The Law Commission recommended this provision rather than the causation test introduced in New Zealand through **Section 11 of the Insurance Law Reform Act 1977**. The New Zealand test is one which was open to interpretation and states:

"The insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the

⁷⁹⁸ Rob Merkin (n 23), 129.

*insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified **was not caused** or contributed to by the happening of such events”.*⁷⁹⁹

It is notable that the Courts in New Zealand have interpreted this provision most prominently in motor cases and largely in favour of the insured. For example, in ***New Zealand Insurance Company Ltd v Harris***,⁸⁰⁰ a motor insurance policy excluded liability if a tractor was hired; the tractor subsequently caught fire when on hire. The New Zealand Court stated that the fact that it was on hire was not the cause of the damage and, therefore, the insured could recover. This result would almost certainly be the same if **Section 11** was applied as non-compliance with the ‘hire’ term would not have increased the risk of loss.

The obvious area in which the key difference in the tests exists is in relation to unroadworthy vehicles. For example, in ***Jones and James v Provincial Insurance Company***,⁸⁰¹ a pre-1930 case, the insurer repudiated liability for a faulty footbrake, although the cause of the crash was held to be due to driver inexperience. Under the New Zealand test, the insurer could not use the exclusion because the footbrake was not the ‘cause’ of the accident, however, under the UK test, the use of an unroadworthy vehicle certainly increased the risk of loss and therefore could be used to repudiate liability. This case example demonstrates that the UK test is certainly the harsher of the two tests.

The term, ‘*in the circumstances in which it occurred*’, seems to connote the need for a causal link between breach of the term and damage.⁸⁰² However Clarke noted that the requirement in the Act of a ‘causal link’ was ‘*surely unlikely*’,⁸⁰³ especially as the Law Commission altered its approach from a causal to non-causal approach, ‘*on the grounds of increased investigation costs, complex litigation, uncertain*

⁷⁹⁹ Section 11 Insurance Law Reform Act 1977 (nz), emphasis added.

⁸⁰⁰ [1990] 1. Z.L.R. 10.

⁸⁰¹ Which was discussed previously on pages 44-45.

⁸⁰² Robert Merkin, Law of Motor Insurance (n 23) and also MacGillvray (n 272), 283.

⁸⁰³ Malcom Clarke, “The future of warranties and other related terms in contracts of insurance”, in Malcolm Clarke and Baris Soyer, *The Insurance Act 2015: A new regime for commercial and marine insurance law*, (1st edition, Informa, 2016), 56.

outcomes, and difficulties of proof'.⁸⁰⁴ This, however, is an issue which will be required to be decided by the Courts.

Contracting Out

With the terms of the **Insurance Act** examined, it is important to note that, in some instances, there is potential for the insurer to contract out of the provisions of the **Insurance Act**, by inserting a clause into their policy explaining that certain sections of the **Insurance Act** would not apply. This would therefore mean reverting to previous insurance rules under the **Marine Insurance Act 1906** and interpreting case law. Contracting out is regulated by **Sections 15 to 18** of the **Insurance Act**. In relation to policies involving consumers, the contracting out provisions of the **Insurance Act** are clear. **Section 15** states that any contracting out term which, 'would put the consumer in a worse position' is, 'to that extent of no effect'. This is, therefore, to protect consumers who are the weaker party to the insurance contract, from insurers seeking to contract out of the safeguards under the Act. Due to the need to protect party autonomy⁸⁰⁵ businesses have more freedom to insert contracting out clauses within their policies against other businesses (**Section 16 (2)**). However, where such a term is 'disadvantageous', 'the insurer must take sufficient steps to draw the disadvantageous term to the insured's attention before the contract is entered into' (**Section 17 (2)**). Moreover, 'the disadvantageous term must be clear and unambiguous as to its effect' (**Section 17 (3)**). It is clear therefore, that comparable to requirements for exclusion clauses in the **CRA 2015**, contracting out provisions in business insurance contracts are examined for transparency. However, as **Section 16 (2)** applies to disadvantaged consumers only, it is difficult to see what effect this would have on third party claims, although it is submitted that this is likely to extend to third party claims.

Conclusion

This Chapter has found that there are several potential avenues open to the third party outside of the **RTA** to prevent the insurer from relying on an exclusion clause,

⁸⁰⁴ Law Com No 353/Scots Law Com No 238, [14.24].

⁸⁰⁵ Baris Soyer, "Risk control clauses in insurance law: law reform and the future", (2016), C.L.J. 75(1), 109-127, 123.

these are uncertain and complex alternative routes which are rarely (if ever) used by third parties. It is submitted that the complexities surrounding some of these routes, particularly the **Insurance Act**, may provide a deterrence from using them, with the EU law route as discussed in **Chapters Four** and **Five** being slightly more certain. However, once the UK leaves the EU this may change, especially if the exclusion provisions in the **RTA 1988** are relaxed.

The provisions of the legislation shown throughout this chapter, are aimed primarily at first party consumers and businesses. Due to a lack of case law on the issue, their effect is unknown on third parties. It is submitted that the most likely avenue to strike a clause out lies in **Section 71** of the **Consumer Rights Act 2015**, and the obligation for the Court to strike out an unfair term. This does not need to be brought by any party and the Court are under a duty, whether argued, to examine the clause for transparency and prominence. This, therefore, acts as a disincentive for insurers to hide terms in their policies, and to ensure the first party is made aware of it. The insurance industry has attempted to resist regulation of their terms; however, it seems that through the **ICOBS** sourcebook and FOS complaints, they leave themselves open to claims. This does not apply directly to third parties.

Recent legislation specifically targeted at the insurance industry through **CIDRA** and the **Insurance Act** may further have some effect on third parties. The removal of unjust and unfair basis clauses in both consumer and business contracts is welcome, especially as it was in motor insurance where they were used most prevalently. The **Insurance Act** has further restricted the use of both warranties and exclusion clauses, although as this a new Act and has only academic interpretation, there are uncertainties as to the scope of the provisions. It is submitted, however, that only a wide interpretation of the **Insurance Act**, would influence third party claims.

This Chapter has contributed knowledge and interpretation of other potential, albeit uncertain, routes open to the third party to challenge the use of exclusion clauses. It is clear, however, that these are only secondary routes which are restricted and will depend on later interpretation by the courts. As explained in previous chapters the main routes which could be taken, are through the **RTA 1988**, which prohibits

some exclusion clauses, or through EU Law which prohibits all exclusion clauses, although it has been interpreted narrowly.

It is clear, however, that under the current position that the MIB may be called upon to compensate the third party victim where an exclusion clause is breached. It is therefore important to examine the MIB Agreements and the policy behind them to see the effect of use of an exclusion and whether the third party victim will gain compensation.

Chapter Seven: Protection offered by The Motor Insurers' Bureau

Introduction

We have so far examined the validity of exclusion clauses in relation to third party claims in both UK and EU law and have found that although EU law prohibits the validity of exclusion clauses against third parties, UK law has only limited their use in some circumstances through different statutory methods. This is mainly through the list of prohibited exclusion clauses in **Section 148 RTA**. Consequently, where an exclusion is used against a third party, the driver of the vehicle becomes uninsured, and liability falls on the MIB, who should pay for any claims. It is important to therefore examine, in practice, the MIB agreements and the nature of the MIB's obligation.

Both doctrinal and empirical research was undertaken in relation to this Chapter. Doctrinal research of the MIB Agreements, case law, and occasional academic opinion is crucial in gaining a first-hand understanding of the MIB Agreements and their limitations. The use of case-law relating to the MIB Agreements is particularly useful, as it provides examples of the defences used by the MIB to repudiate claims, and further assists in the Agreement's interpretation.

Qualitative empirical research was undertaken with the MIB via two interviews, first through a semi-structured face-to-face interview with representatives of the MIB at their Milton Keynes office in March 2015, and a second structured interview via email in July 2017. The first interview took place prior to the introduction of the **UDA 2015**. Questions (available in the Appendix) were asked specifically on the MIB's viewpoints as to certain parts of their Agreements, their approaches to certain issues relating to third party claims. This was to allow thematical analysis of their answers in the context of the research question as to the practical consequences of exclusion clause breach. The interviews intended to provide overall policy approaches of the MIB relating to the **UDA**, the MIB's viewpoint on certain issues related to claims, and future challenges to be faced. Moreover, questions were asked in relation to the number of claims, the number of claims denied and the reasons behind these claims being denied. The data was analysed to examine the emergence of any patterns relating to where claims were being denied.

The second interview, which took place in July 2017, via email, was necessary due to numerous changes, including a new **UDA**, Brexit, and a Judicial Review. A second interview was therefore organised with specific questions to reflect those change (available in the Appendix). Similar questions were asked namely figures of claims which were denied, and further questions were addressed to the rationale behind any changes to the **UDA** alongside the consequences of Brexit.

The empirical aspect of the research is of crucial importance since it provides a pragmatic and policy context which complements the doctrinal research. Given the practical application to exclusion clauses, combining those aspects is essential to provide an understanding as to whether the MIB's **UDA** provide adequate protection.

The chapter is in three parts. Part I will examine the MIB, its background and nature of its obligation with potential ways in which it could avoid liability alongside the 1999 and 2015 **UDA**'s. Part II will examine the illegality defence in **Clause 6** of the **UDA**, and the *ex turpi causa* defence. Part III will further examine whether the MIB provide adequate protection through combining the chapters' findings on the Agreements and figures gained from the interview. The future of the MIB will also be examined in Part III, with the impact of the Judicial Review and Brexit analysed.

This Chapter seeks to answer two questions, first, what is the practical effect of the use of an exclusion on a third party? In other words, does the existence of the MIB mean that the use of exclusion clauses has little practical effect? Second in what circumstances will the MIB try to restrict their liability? This will help in answering the overall research question relating to the effect of exclusion use.

Part I: The MIB: Scope, Nature of Obligations, and Agreements

Background

In 1937, the Cassel Committee Report recommended the introduction of a central fund due to the number of cases where injured victims were left without compensation. The motor insurance industry was thereafter under consistent pressure to act to remove instances of non-compensation. With the threat of

statutory intervention looming, the industry collaborated to form a '*novel*'⁸⁰⁶ piece of extra-statutory machinery known as the MIB. The MIB registered as a private company limited by guarantee on July 1st, 1946 and subsequently entered an agreement with the UK Government.⁸⁰⁷ The **UDA** was then introduced in 1946 and was subsequently revised in 1972, 1988, 1999 and 2015, with slight amendments in 2017. The MIB exists in the same form today, its obligations are not found in any Act of Parliament but rather in its' extra-statutory agreements with the Minister of Transport. It is important to note, however, that MIB arrangements cannot simply be described as a contract with the Department of Transport, they have statutory backing and are part of an overall legislative scheme alongside the **RTA 1988**.⁸⁰⁸

It is important to note that it is obligatory under **Section 145 (6) RTA 1988** for a transacting motor insurer to be a member of the MIB and contribute to its funding. Any insurer who refuses to fund the MIB will be treated as unauthorised and insurance policies deemed non-compliant with legislation.⁸⁰⁹ Insurers' funding of the MIB is in proportion to their premium income for motor insurance in the UK. Thus, with contributions from insurers to the MIB's funding, it is the policyholder who indirectly funds the MIB with an average of £30 added on premiums per annum⁸¹⁰. However, even though the policyholder ultimately bears the cost of the MIB, Shawcross noted, '*The insurers have by this bold gesture taken upon themselves a great burden, in that they have agreed to shoulder the financial responsibilities of errant motorists in the absence of satisfaction by these wrongdoers*'.⁸¹¹

Nature of the MIB's obligation: UK

The MIB's obligation under UK law is not absolute. A claim under the MIB Agreements does not guarantee compensation even with a valid injury from an uninsured or untraced vehicle and liability deemed against the driver or vehicle.

⁸⁰⁶ See comments made in Silverton (n 631).

⁸⁰⁷ Named the "principle agreement".

⁸⁰⁸ This was discussed in the very recent case of Hussain [2017] EWCA Civ 366 [Sir Ross Cranston] [113].

⁸⁰⁹ This would lead to a criminal offence of the driver driving without insurance under Section 143. See Section 145 (6) in relation to this.

⁸¹⁰ Emma Wall, "*Motor insurance: uninsured drivers cost us £2bn a year*" <http://www.telegraph.co.uk/finance/personalfinance/insurance/motorinsurance/7089965/Motor-insurance-uninsured-drivers-cost-us-2bn-a-year.html> [Accessed 29th August 2017]

⁸¹¹ Shawcross (n 74), 379.

There are several defences that the MIB could use including limitation of liability, claims outside the **RTA 1988** and privity to which we turn.

Privity

As stated by Professor Rob Merkin QC,⁸¹² the MIB could potentially disregard their obligations to pay third party claims due to privity of contract. MIB Agreements are made between the MIB and the SoSFT, although third party victims are the intended beneficiaries of these Agreements, they are not legally a party to them. This point, however, has not been taken by the MIB to defend claims. As explained by Upjohn LJ in **Coward v MIB**,⁸¹³ it is unlikely that the Court will ever take this point individually. Moreover, as stated in **Carswell v MIB**⁸¹⁴ in relation to the Untraced Drivers Agreement:

*‘For some years before 2003, the MIB openly stated that it would not rely upon the lack of privity of contract between itself and an applicant to defeat court proceedings brought by an applicant against the MIB’.*⁸¹⁵

Of course, third party rights were amended by the **Contracts (Rights of Third Party’s) Act 1999** (henceforth ‘CRTA’), giving the third party the right to sue in certain insurance contracts.⁸¹⁶ However, this would only apply to the rights of a named driver who is not a party to the contract.⁸¹⁷ Moreover, this does not affect privity under the 1999 **UDA** due to the **UDA** preceding the **CRTA 1999**. It is unlikely that privity will ever be relied on by the MIB against a third party claim, as it would clearly be contrary to EU law which requires the Bureaux to provide adequate protection (**Article 1 (4)**). Moreover, it is clear from the decisions of earlier cases,

⁸¹² Professor Merkin argued this in Robert Merkin, *Tolley’s Insurance Handbook* (Tolley’s, 1st edition, 1994), 181 and later Robert Merkin, *Privity of Contract*, (Informa Law, 1st Edition, 2013), 46

⁸¹³ [1963] 1 Q.B. 259.

⁸¹⁴ [2010] EWHC 3230 (QB).

⁸¹⁵ Also see *Persson v London Country Buses and Another* [1974] 1 W.L.R. 569, 572 “It is in accordance with the publicly declared policy of the bureau that the bureau does not rely on the absence of privity of contract, and that policy has been fully adhered to before us”.

⁸¹⁶ Recognised by Professor Merkin and Margaret Hemsworth (n 23), [7-10].

⁸¹⁷ *Ibid.*

that the courts would take a negative view of such a defence to deny a perfectly valid claim⁸¹⁸.

Claims Outside RTA

The MIB is, '*not liable for any claim.... which is not required to be covered by a contract of insurance (within the RTA)*'.⁸¹⁹ This has major implications, because if the vehicle is used in a way which does not require insurance, the MIB are not required to cover the claim. There are several ways or places in which a '*vehicle*' could be used which falls outside of this. For example, where accidents take place outside a '*road or public place*', the MIB or **Article 79** insurer⁸²⁰ can refuse to compensate the victim, as it is a liability which does not need to be covered by insurance under the **RTA 1988**. Of course, due to the **Vnuk**⁸²¹ decision from the CJEU in 2014, the UK is certainly in breach of EU law regarding public and private property as the CJEU ruled that vehicle use must be covered anywhere.

The ramifications from this case are, of course, not yet known. First, because of an impact assessment from the European Commission in June 2016 proposing a new solution away from **Vnuk**, and second, due to the uncertainty of Brexit. Of course, it is not only through location which would fall outside of compulsory cover, there are also restrictions under the **RTA 1988** of the type of vehicle as well as the use of vehicle which require insurance coverage. For example, if a claim is made where the person in charge of the vehicle (such as repairing it) is not deemed to be '*using*' the vehicle, this may fall outside the requirements.

There are several examples⁸²² in case law of the MIB being able to avoid liability through the '*liability not required to be covered*' route. For example, in **Buchanan v MIB**,⁸²³ the MIB successfully argued that a dock did not fall within the meaning of '*road*' under the **RTA 1988** and therefore the MIB could avoid paying the claimant.

⁸¹⁸ See *Gurtner v Circuit* [1968] 2 Q.B. 587 "(we are) entitled to proceed on the assumption that the Bureau has, before action is brought, contracted for good consideration with the plaintiff to perform the obligations specified in the contract with the minister or has by its conduct raised an estoppel which would bar it from relying on absence of privity of contract." [Diplock LJ], 598.

⁸¹⁹ Article 5 UDA 2015, emphasis added.

⁸²⁰ Note these until recently were referred to as an 'Article 75 Insurers'. Their role will be discussed on page 213.

⁸²¹ *Vnuk* (n 239).

⁸²² This was highlighted particularly in the Times, see Pryn J, "*Caution! Car Park Prangs Can Cost Dear*", Times [London, England] 20 May 1995: 2[S1].

⁸²³ [1955] 1 W.L.R. 488.

Claims with Fault

The MIB are not liable for claims where there is no liability towards the third party, and can further restrict compensation based on the victim's contributory negligence. This is to ensure parity between victims of insured and uninsured drivers. As stated by the MIB in interview, *'you have to follow the rules of legal liability. So, if there is no legal liability, we won't pay any more than the insurer would pay'*. This, of course, is valid under European Law, so long as the MIB do not completely and disproportionately deny damages to the claimant.⁸²⁴ This includes the principle of *ex turpi causa*⁸²⁵ as shown in the case of **McCracken v Smith**,⁸²⁶ where the MIB attempted to use this defence to refuse payment to a teenager who was a passenger on a stolen motorcycle. The defence was permitted to be used and therefore the MIB could repudiate liability to the victim for his criminal conduct.

Article 79 (“Domestic Regulations”)

It is crucial to note that the MIB will only pay claims from its central fund if no insurer can be found. If an insurer can be found, who, at the time of the accident, was providing some insurance in respect of the vehicle, then under **Article 79** of the MIB's Memorandum of Understanding (henceforth 'MOU'), the insurer is obliged to handle and pay the claim as an agent of the MIB.⁸²⁷⁸²⁸ **Article 79** states

“(1) Without prejudice to the generality of the foregoing, a Member is the Article 79 Insurer notwithstanding that: (i) the insurance has been obtained by fraud, misrepresentation, non-disclosure of material facts, or mistake; (ii) the cover has been back dated; or (iii) the use of the vehicle is other than that permitted under the policy”

The inclusion of *'use of vehicle...other than that permitted under the policy'* within the MOU also clearly encompasses the use of an exclusion. However, unlike the **RTA 1988** insurer who must pay claims under statute and contract, the **Article 79**

⁸²⁴ See the requirements set out in Candolin (n 217) on pages 137-138 of Chapter Four.

⁸²⁵ This will be discussed in more depth later in this Chapter.

⁸²⁶ [2015] EWCA Civ 380.

⁸²⁷ This is subject to certain exceptions, namely if the policy is cancelled and the certificate is surrendered, for short term insurance and if the insurer can declare that the policy is void under Section 152.

⁸²⁸ For more in-depth examination of Article 79 see Robert Merkin and Johanna Hjalmarsson, *Compendium of Insurance Law* (Informa, 1st edition, 2007), 998-999.

insurer will pay claims under the MIB's umbrella, and therefore under the terms of the MIB agreements rather than the insurance policy. This simultaneously protects the MIB's funds and further acts as a deterrent for insurers who may want to repudiate a claim. Consequently, an insurer will not go to the expense and effort of defending a repudiation of liability, unless the **UDA** offers greater terms to the insurer than their own policy or if there are two or more insurers in which case the insurer could seek to downgrade its status to force the other insurers to pay who cannot downgrade.

It is clear therefore, that breach of an exclusion clause in relation to a third party claim will most likely not be acted upon by the insurer, unless some benefit can be conferred to that insurer. For example, in **Bristol Alliance v Williams**,⁸²⁹ the motor insurer utilised an exclusion clause to repudiate liability to prevent a subrogated claim from the property insurer, which is excluded under the MIB agreements, and therefore conferred a benefit from its repudiation. This is in contrast with the recent case of **Wastell v Woodward**⁸³⁰ where it is apparent that the insurer defendants did not argue the case for use of an exclusion clause, as it was barely mentioned in the decision. The insurers instead chose to argue that the accident fell outside the '*caused by or arising out of*'⁸³¹ requirement, which would absolve the insurer due to falling outside of the compulsory coverage of insurance under **Section 143 RTA 1988**.

Subrogated Claims

The general rule in insurance law is that if the insurer compensates the insured, they are put in the shoes of the insured and can bring proceedings against the wrongdoer under the position the insured would have stood. However, **Clause 6 (1)** of the **2015 UDA** states that the MIB is not liable for any claim, '*in respect of which the claimant has received, or is entitled to receive...payment or indemnity from any other person (including an insurer)*'. Hence, the MIB is not required to pay for subrogated claims or claims made by an assignee of the insured. This gives a

⁸²⁹ [2013] Q.B. 806.

⁸³⁰ Wastell (n 332)

⁸³¹ Section 145 RTA 1988.

motor insurer greater incentive to repudiate liability for breach of an exclusion clause, as they will not be required by the MIB to pay the claim under **Article 79**.

An example of the use of this exclusion clause can be found in **Bristol Alliance v Williams**⁸³² where the motor insurer argued that there was breach of an exclusion clause in the policy, and as this was a subrogated claim by the property insurer, they would not have been required to compensate for damage under the MIB Agreement. Ward LJ noted that the insurers' use of subrogation would have no effect on the third party victim, because they would have had their building repaired and had the loss covered by the property insurer. Ward LJ stated, '*one way or another the objective of the Directives, which seek to ensure that there is some compensation for losses caused by motor vehicles, is satisfied*'.⁸³³

This provision was challenged for breach of **Article 10** of the **Directives**⁸³⁴ in **McCall v Poulton**⁸³⁵ concerning a subrogated claim against the MIB by an insurer for hire charges, which the MIB refused to pay. The MIB argued that it should not be required to compensate where the ultimate recipient of compensation will not be the accident victim, but rather a commercial organisation such as an insurer. The case was based on direct effect and the requirements for '*emanation of the state*', rather than the specific issue of subrogation. The Court of Appeal subsequently referred the issue to the CJEU, however, the case was settled promptly, leaving the question unanswered. It is clear though, that if the provision was deemed to be breaching EU law and held to be directly effective, then it would leave the validity and legality of the subrogation provision in doubt. Leaving potential for less usage of exclusion clauses by insurers, knowing that they would be liable for subrogated claims.

The Nature of MIB Obligation: EU Law

It is important to note that the UK has several obligations under the EU Directives regarding Bureaux. Such obligations may change due to Brexit,⁸³⁶ although as a minimum, the EU will continue to have major impact on UK law for at least five

⁸³² Bristol Alliance (n 15).

⁸³³ Ibid, [70].

⁸³⁴ Provision relating to protection given by Bureaux.

⁸³⁵ [2009] C.P. Rep. 15.

⁸³⁶ As will be discussed in Part Four of this Chapter.

years, due to the Brexit implementation period and personal injury limitation periods. Similar to issues with compulsory insurance, it became clear across the EU, that differences regarding compensation paid to the victims of accidents from uninsured or untraced drivers, were causing major difficulties for those travelling across borders.

With the absence of an arrangement in place in some jurisdictions and many compensation bodies placing significant obstacles to compensation, it was apparent that a harmonised approach was required across the EU.⁸³⁷ Obligations regarding Bureaux were introduced in the **Second Directive** under **Article 1 (4)** but are now contained in the **Sixth Directive** under **Article 10**, which states:

*“Each Member State shall 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”.*⁸³⁸

Article 10 further conferred the victim the right to apply directly to the Bureaux and gave the Bureaux a responsibility to give a reasoned response. Unlike **Article 13 (1)**, there are no exclusion clauses which are listed as expressly prohibited within **Article 10**, although one exclusion clause is permitted which is where the passenger, ‘*voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured*’. As with the permitted exclusion clause in **Article 13 (1)**, there has been uncertainty as to whether this exclusion clause is exhaustive of the exclusion clauses that can be used.

It is apparent from **Bernáldez** and subsequent ECJ and CJEU dictum, that it is unlikely that any exclusion clauses can be used by the Bureau or its **Article 79** insurer. For example, A-G Lenz in **Bernáldez** stated that, ‘*member states are free to extend the competence of the ‘body’ by statute, **provided complete protection is ensured for victims***’.⁸³⁹ The then ECJ in **Bernáldez**, however, failed to specifically discuss **Article 10**. In **Candolin**, the ECJ omitted to mention **Article**

⁸³⁷ As discussed within Chapter three.

⁸³⁸ emphasis added.

⁸³⁹ **Bernáldez** (n 216), [51], emphasis added.

10, but stated in relation to exclusion clauses in **Article 13 (1)**, that as it is a derogation from the general rule, the permitted exclusion clause in **Article 13 (1)** should be interpreted restrictively. It is clear from this reasoning, therefore, that as the exclusion in **Article 10** is a derogation from the general rule, the exclusion clause would be interpreted restrictively. Meaning, that it falls within the general objectives of the Directives, and ensuring that significant protection is afforded. **Farrell v Whitty**⁸⁴⁰ concerned specifically the liability of the Motor Insurers' Bureau Ireland (henceforth 'MIBI') in relation to a passenger sat in a vehicle not designed for seating which was excluded. The ECJ again decided that in relation to passengers, Member States cannot go beyond the limitations prescribed in the Directives and therefore the MIBI was forced to compensate the victim. It is clear therefore that the EU approach is that exclusion clauses (whether contractual or statutory) cannot be used by the Bureaux beyond the exclusion clause permitted in the Directive.

Following this, in the UK case of **Delaney**,⁸⁴¹ the Court ruled that an exclusion involving a passenger being in a vehicle in '*course or furtherance of a crime*' in the **1999 UDA** was breaching EU law and the breach sufficiently serious enough to allow the parties to claim **Francovich** damages. In this case Jay J stated:

“the victim cannot be permitted to fall between two metaphorical stools: the principal obligation under article 2(1) of Directive 84/5 rests on the insurer, but if that is not satisfied then the national body must step up to the plate...the ability of the national body to avoid paying the victim is constrained to exactly the same extent (as the insurers)”.⁸⁴²

This is even if blameworthiness or criminal activity is apparent, Jay J noted the dicta of A-G Lenz in **Bernáldez** regarding blameworthiness⁸⁴³ and stated that although AG Lenz's decision was '*flawlessly coherent*', it did not mean that an exclusion could be used by the insurer or the Bureaux.⁸⁴⁴

⁸⁴⁰ Farrell v Whitty (n 383).

⁸⁴¹ Delaney (n 539).

⁸⁴² Ibid, [38] and [48], emphasis added.

⁸⁴³ See Chapter Four for the full dicta of A-G Lenz.

⁸⁴⁴ Delaney (n 539), [40].

Direct Effect and State Liability

As we established in previous EU chapters,⁸⁴⁵ the Directives are vertically directly effective, and therefore individuals can rely on them in their national courts against the state or its emanation. However, due to their imprecise nature, and the need for a Directive to be implemented by the Member States, Directives are cannot be used by individuals in private disputes against individuals or private bodies. Unless the body in question is classed as an emanation of the state.

The criteria for a body to be classed as an emanation of the state were laid down in **Foster v British Gas** (henceforth '*Foster*'),⁸⁴⁶ which are that: the body has state control; the body provides a public service, and the body has special powers. The courts have found difficulty in determining whether the MIB can be classed as an 'emanation of the state', particularly as the MIB is not under direct control of the State.

In the joint cases of **Mighell v Reading, Evans v Motor Insurers Bureau, and White v White**,⁸⁴⁷ the Court of Appeal (particularly Hobhouse LJ) stated that the MIB could not be classed as an '*emanation of the state*'. This was because the MIB was a private company with private members, and acted based on its' members interests. This is despite being a body to compensate individuals. Flaux J in **Byrne v MIB**⁸⁴⁸ then reaffirmed Hobhouse LJ's dictum. His Lordship stated that the MIB was not granted any special powers by the State, and further that the MIB is governed not under statute, but rather its' articles of association, making it a private agreement. This seems to go against the UK interpretation of the **Foster** '*control of the state*'. As stated by Blackburne J in **Griffin v South West Water Services Ltd**,⁸⁴⁹ the legal form of the body as well as the fact that the body is an agent of the state, is irrelevant in deciding if it is an emanation of the state.

Although the issue could have been cleared up by the then ECJ in **Farrell v Whitty** (henceforth '*Farrell*'). In relation to the MIBI,⁸⁵⁰ the then ECJ declined to answer the question. However, the AG stated that although state control and special powers

⁸⁴⁵ Chapters Four and Five.

⁸⁴⁶ [1991] 2 W.L.R. 1075.

⁸⁴⁷ [1999] 1 C.M.L.R. 1251.

⁸⁴⁸ Byrne v Motor Insurers' Bureau [2008] 2 W.L.R. 234.

⁸⁴⁹ [1995] IRLR 15.

⁸⁵⁰ (Case C-356/05) [2007] 2 C.M.L.R. 46.

assigned to the Irish MIB are unclear, it could be deemed on equal footing to the state. This is because it is the authorized body for the purposes of the state's **Article 1 (4)** obligations. The Directives could therefore be used against the Irish MIB.

The case was referred to the High Court of Ireland, where Birmingham J stated that Flaux J in **Byrne**, was incorrect in using a 'checklist' type approach to interpreting '*emanation of the state*'.⁸⁵¹ Flaux J instead followed the approach in a case not concerning the MIB, **The National Union of Teachers v St. Mary's Church of England**,⁸⁵² where the Court stated the concept of emanation of the state was broader than the three requirements laid out in the **Foster** case. Consequently, in **Farrell**, Birmingham J stated that there was a substantial degree of State influence in the Irish MIB. His Lordship stated that although the MIB may not meet the three criteria laid out in Foster, its overall role as the body responsible under the Directives for providing compensation on behalf of the state, makes it an emanation of the state for the purposes of direct effect. Although **Farrell** is an Irish case, it is still pertinent to the UK, as the UK and Irish MIBs are identical in their overall roles and relationship with the state.

It is clear therefore that there are substantial differences in opinion as to whether the MIB can be classed as an emanation of the state. It is unlikely that the MIB meets the requirement of state control, especially as it is a private body, however, as found in the **National Union of Teachers**, not meeting these criteria does not exclude a body from being classed as an emanation. Nevertheless, this is still a substantially important issue, because if the MIB agreements offer a lower standard of protection than EU law to the third party victim, then the victim can invoke EU law directly against the MIB. Of course, another potential solution is for the third party victim to sue the State for breach of EU law, this occurred in **Delaney** when the UK was sued due to an illegality exclusion in the Agreements.

Having examined the MIB's obligations generally, it is important to examine the **UDA** themselves, attention is paid to the **UDA 1999** and **2015**, as these are the key Agreements affecting third parties when an exclusion clause is breached.

⁸⁵¹ Farrell v Whitty [2008] IEHC 124

⁸⁵² [1997] 3 C.L.M.R. 630

Uninsured Drivers Agreements 1999 and 2015

The **1999 UDA** was superseded by the **2015 UDA**, which was later amended by the Supplementary **2017 UDA**. The previous Agreements are still applicable to accidents that occurred before the subsequent Agreements were introduced. There is currently a limitation period of three years for personal injury claims, although for minors there is no limitation period and a claim can be made up until their 18th birthday. Thus, the **1999 UDA** will continue to be relevant for several years, although the number of claims made under it will gradually decrease.

An example of an Agreement being used for substantial periods after it was replaced can be found in *Byrne*, where the **1972 Untraced Drivers Agreement** was being used for a claim for a minor in 2006 for an accident that occurred in 1992, this is a rare case and the delay was due to the age of the minor at the time of the accident. Hence, both the 1999 Agreement and its successor both need to be examined.

Procedural Limitations and Conditions Precedent

The MIB Agreements contain numerous limitations with regards to procedure and conditions precedent. If the claimant breaches these then there is potential that payment of compensation would be denied. It is important therefore to examine these.

Information and Joinder Requirements

Clauses 7 to 15 of the **UDA 1999** contain several conditions precedent to the MIB's liability. **Clause 7** states that the MIB will not be liable for any claims unless claims are made in, '*such form...giving such information...accompanied by such documents as may reasonably be required*'. Similarly, under **Clause 11**, the MIB requires to be given any further relevant information, such as: the notice of the filing of any defence, any amendments to the claim or addition of a trial date. Moreover, the MIB requires the victim to exercise their rights under **Section 154 RTA 1988** and to request the insurance or security details of the person responsible for the accident or to make a complaint to the police. The MIB further requires the victim to bring proceedings against the person responsible for the accident and that the MIB when it requests, is joined as a party to the proceedings and is assigned the unsatisfied decision.

Time Limits

There are further several notice requirements for the victim to adhere to. For instance, **Clause 9** requires ‘*proper notice*’ of the bringing of proceedings within 14 days. The notice must be given alongside all correspondence, documents and any insurance policies which are relevant to the claim. This is clearly different to the obligation imposed on the victim under **Section 152 RTA 1988**, which requires seven days’ notice to be given to the insurer after the commencement of proceedings.

Clause 11 requires seven days’ notice to be given to the MIB (or relevant insurer) after the filling of a defence in relevant proceedings, and any amendment to the of a claim, as well as any documents which would be required. The MIB further requires notice of the relevant proceedings to be given, in writing, once the proceedings have been commenced and within 14 days of when the service has been deemed to have occurred. Moreover, **Clause 12** states that the MIB must be given notice of the application for a decision within 35 days.

The MIB under its ‘*notes for guidance*’ has made several concessions to the time limits and information requirements imposed in the **UDA**. For example, the MIB will waive the requirement to request insurance of the person at fault for the accident, if the MIB application form is completed and signed by the victim. In respect of notice and the seven-day service of notice requirements, the guidance states that the MIB allow 14 days to receive notice.⁸⁵³ It is further important to note that the MIB will occasionally waive the notice requirements regarding the issue of proceedings, however, if the limitation period for bringing a claim has expired then the MIB will usually not do so.⁸⁵⁴

An example of waiver can be found in ***Begum and Ullah v MIB***⁸⁵⁵ where the Court failed to send through documents to the claimants in time to meet the MIB’s requirements, the MIB representative waived the notice over the phone.

⁸⁵³ See Para 7 of the Motor Insurers’ Bureau ‘Notes for the Guidance of Road Traffic Accidents’ (1999) <https://www.mib.org.uk/media/166947/1999-uninsured-drivers-agreement-england-scotland-wales.pdf> [Accessed 7th June 2017].

⁸⁵⁴ As explained by Sir Ralph Gibson in *Silverton v Goodall* (n 631), 460, “No doubt in other cases, and in particular where the period of limitation has expired, the requirement has not been waived”.

⁸⁵⁵ [1998] CLY 590.

However, after the limitation period had ended the MIB attempted to retract the waiver. The Court held that the MIB had waived its right to rely on the deadline.

It is arguable, that the general rule is that where the MIB can gain an advantage and rely on a defence open to it, it will take that course of action⁸⁵⁶ especially in relation to procedural requirements. However, this is contradictory to the statements of the MIB in interview that, '*some provisions were no longer relied on in practice e.g. some of the detailed provisions on notice of proceedings*'. It is difficult to know whether this is the reality, as there is no evidence as to whether the MIB use these provisions.

Although occasionally the Courts will take a negative view of their use. For example, in ***Dray v Doherty***⁸⁵⁷ the Court held that the requirement for the MIB to receive an affidavit of service within seven days and the MIB's repudiation of claim for missing this deadline was, '*not necessary, appropriate or reasonable*'.

It seems, however, that the courts generally will uphold the MIB's use of procedural requirements. For example, in ***Silverton v Goodall***,⁸⁵⁸ the claimant failed to meet the proceeding's notice requirement by a couple of days. The MIB did not instantly refuse to compensate, but rather allowed themselves to be added to the proceedings as a defendant, and then later repudiated liability due to notice breach. The claimant consequently argued that they had been '*lulled into a false sense of security*'⁸⁵⁹ by the MIB, and therefore the MIB were estopped from relying on this defence, especially as no harm had been done to the MIB by late notification. Finally, the claimant argued that limitation periods, and their use by the MIB, constituted a breach of EU law which prevents the compensation body from relying on any exclusions or contractual defences. The Court held that it is irrelevant whether the MIB was disadvantaged by the failure to give adequate notice and there is no requirement for the MIB to prove loss or disadvantage. Sir Ralph Gibson stated that there was:

⁸⁵⁶ See Nick Jervis and Judy Dawson, *A Practical Guide to Handling MIB Claims* (1st edition, Cavendish Publishing, 2002), 14

⁸⁵⁷ Unreported (1999) Current Law Cases, Ref 99/525.

⁸⁵⁸ [1997] P.I.Q.R. 451

⁸⁵⁹ *Ibid*, 456.

*“No basis for construing the agreement otherwise than by reference to ordinary principles of construction, having due regard to the language used and to the purpose of the agreement derived from the agreement as a whole”.*⁸⁶⁰

In relation to the EU law point, his Lordship stated that the UK scheme of protection offered to the victims of uninsured drivers was compliant with EU law and the **Bernáldez** decision. The Judge stated, *‘There is no real difficulty for a competent solicitor, or a layman who pays attention to the language of the agreement and the notes attached to it, to comply with the requirement of Clause 5(1)’.*⁸⁶¹

This case demonstrates that the MIB can rely on contractual defences contained within the **UDA** in the absence of a waiver, and have done so to gain an advantage. It is evident from this case, with the judge noting this point also, that there is often little reasoning as to whether the MIB will use or waive a defence.⁸⁶² In the first interview, the MIB recognised that it was unlikely that *‘every man on the street’* would understand the **1999 UDA**, and there was a need for *‘handholding’*. This was because the **UDA** is a contract (between the MIB and SoSFT), and must be in legal form. This follows the comments above from the Judge relating to *‘a competent solicitor’*, without legal advice it was easy for a claimant to fall through the procedural traps.

The **UDA 1999’s** procedural requirements have been reduced significantly in the **UDA 2015**. The MIB noted in interview that this was because many of the provisions were not relied on in practice. Additionally, the MIB had altered process significantly through ensuring that it is added an additional Defendant to the relevant proceedings and provided with a copy of any court proceedings and evidence as is required. Finally, although the MIB argued in the first interview that their Agreements were mostly user friendly, there was suggestion that their user friendliness could be enhanced further.

Some procedural requirements remain in the **UDA 2015**, such as the requirement to submit a claim: *‘(a) in such form, (b) accompanied by such signatures and*

⁸⁶⁰ Ibid, 461.

⁸⁶¹ Ibid.

⁸⁶² Ibid, 463.

declarations, (c) giving such information, and (d) accompanied by such documents as MIB may reasonably require' (Clause 12). Furthermore, the claimant is required to assign any unsatisfied decision or any future settlement to the MIB, and also take all reasonable steps to obtain a decision against those who may be liable. Finally, the notes of guidance⁸⁶³ advise claimants to undertake reasonable (but not exhaustive steps) to identify the insurer of the at-fault driver; to exchange names and addresses, vehicle registration numbers and insurance information, ideally at the scene of the accident. This therefore is to aide the MIB, as far as possible, in bringing a claim against the uninsured driver, to recover some of the costs paid to the third party.

The MIB has significantly amended the time limits imposed from the previous agreement, by removing exact deadlines and introducing the term '*reasonable timeframe*' in relation to making the claim by submitting any documents.

The changes and removal of requirements from the **UDA 2015** is seen as a beneficial step for victims, with Baker stating that, '*it will present much less of a potential minefield for the unwary claimant representative*'.⁸⁶⁴ Dr Bevan argues that this is a '*welcome change*',⁸⁶⁵ although reflects that this is too late, especially as the 1999 Agreement continues to apply to claims pre-2015⁸⁶⁶. This important as it is evident that victims, who are relying on the MIB Agreements due to breach of an exclusion pre-2015, are continuing to need to comply with significantly greater procedural requirements than those who have been injured post 2015. The removed procedural issues are not necessary for the MIB to operate or they would continue to be included in the Agreements.

Exclusions of Liability

The 1999 Agreement further included several exclusions of liability, specifically in relation to passengers. These '*passenger exclusions*' occur where the passenger:

⁸⁶³ Motor Insurers' Bureau "Notes for Guidance: MIB Uninsured Drivers' Agreement 2015" <https://www.mib.org.uk/media/335237/2015-uninsured-drivers-agreement-notes-for-guidance-v20.pdf> [Accessed 01/09/2017]

⁸⁶⁴ Baker A "Uninsured Drivers' Agreement 2015" <http://www.pibulj.com/content/law-journal-summaries/news-category-2/3560-uninsured-drivers-agreement-2015-andrew-baker-horwich-farrelly-solicitors> [Accessed 27th June 2017].

⁸⁶⁵ Nicholas Bevan (n 19) 147.

⁸⁶⁶ Ibid.

“at the time of use giving rise to the relevant liability was voluntarily allowing himself to be carried in a vehicle...and either before or after commencement (of the journey) 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*
- (ii) The vehicle was being used without there being in force in relation to its use a contract of insurance complying with Part VI of the 1988 Act.*
- (iii) The vehicle was being used in course or furtherance of a crime*
- (iv) The vehicle was being used to avoid apprehension “*

For the purpose of this thesis it is only (ii), (iii) and (iii) which need to be examined in any depth. This is because, in the case of a stolen vehicle, there is not going to be a policy in place. Prior to examining these clauses, it is important to examine the meaning of *‘known or ought to have known’* as these have been subject to significant interpretation and define how wide the clauses can be interpreted.

Known or ought to have known

The term *‘ought to have known’* is in direct conflict with the Motor Insurance Directives, which only utilise the term *‘knew’*.⁸⁶⁷ The term *‘ought to have known’* seems to confer a lesser standard of knowledge, connoting the need to examine the objective idea of the *‘reasonable man’*, than the term *‘knew’*. The House of Lords examined the issue in ***White v White***,⁸⁶⁸ which concerned a claim by a passenger who was being driven by his un-licenced (and thus uninsured) brother. The passenger knew that his brother had driven unlicensed previously, but failed to question him in this circumstance. The MIB submitted that the passenger *‘ought to have known’* that the vehicle was uninsured.

The House of Lords’, with Lord Scott’s dissent, stated that in absence of ***Marleasing***⁸⁶⁹ being applicable to MIB Agreements, the legislature’s intention was to satisfy the Directives. Consequently, the words *‘ought to have known’* should be

⁸⁶⁷ See Article 10 (4) of the Sixth Consolidated Motor Insurance Directive in relation to Bureaux Obligations and Article 13 (1) in relation to Exclusion Clauses relating to the insurer.

⁸⁶⁸ [2001] UKHL 9.

⁸⁶⁹ *Marleasing* (n 422).

construed in the same way as ‘*knew*’, requiring actual knowledge rather than negligence. Lord Scott disagreed and stated that: ‘*construction of “ought to have known” that excludes negligence would... be incomprehensible to the lawyers up and down the land who have to make our law work*’.⁸⁷⁰ The Court, however, stated that despite the restrictive nature required by EU Law of exceptions, the term ‘*knew*’ did not just connote situations where the passenger was told there was no insurance or had ‘*actual knowledge*’. The term would also be satisfied where the passenger thought that the driver may be uninsured, but failed to ask because they would rather not know, this is referred to as ‘*blind eye knowledge*’. It therefore is clear, that the ‘*ought to have known*’ requirement fulfils little purpose and should be interpreted restrictively. This is positive for the victims as a wider meaning of ‘*knew*’ could potentially have opened the MIB’s defences to a much greater number of victims.

Vehicle Used Without Insurance in Relation to its Use

Prima facie, the ‘*vehicle used without a contract of insurance in relation to its use*’ exclusion would not have any effect against third parties relating to exclusion clause cases, as there would be no contract (policy) of insurance for an exclusion clause to be contained. However, it is submitted that the phrase ‘*in relation to its use*’, if interpreted widely by the courts, could connote a situation where the passenger knew that the driver was driving outside of his policy terms or in breach of an exclusion. This is rather than there being no policy at all, as this would connote the absence of a policy specifically for the vehicles use.

It is submitted that the Court would be very unlikely to use such an interpretation. This is because the exclusion permitted within **Article 10** of the Directive⁸⁷¹ only states that Bureaux must prove that, ‘*they (the passenger) knew it (the vehicle) was uninsured*’, rather than insured in relation to its use. As stated previously, any exceptions in EU law must be interpreted narrowly. Furthermore, it is proposed that this is not what was intended by the MIB, as there are no-known cases of the MIB attempting to utilise this defence.

⁸⁷⁰ Ibid, [55].

⁸⁷¹ Article 2.

An examination of the rule of interpretation of general contract terms here highlights that it would be unlikely for a wide interpretation to be given. Lord Hoffmann in ***Investors Compensation Scheme Ltd v West Bromwich Building Society***⁸⁷² (henceforth '*West Bromwich*') stated that the interpretative test of a contractual document is whether the interpretation would convey, to a reasonable person having all the background knowledge, which would reasonably have been available to the parties when they were at the time of the contract.⁸⁷³ It is clear that the MIB were using this exclusion to comply with EU law which would not permit this exclusion. This is comparable to the issue of the interpretation of '*ought to have known*' above, where the interpretation of the phrase was based on the MIB attempting to comply with EU law, despite some dissimilarities with the wording of the Directive. Consequently, it is unlikely that the Court would give a wide interpretation that no reasonable person could have had, in the light of EU law. Finally, it is submitted that it would only be in very narrow occasions where this could be argued, as the standard of knowledge required in the term '*knew*' was high and the passenger, short of being practising lawyer or having discussed it with the driver, would not know the policy terms and restrictions which are contained within the driver's policy.

Avoiding Apprehension

Avoidance of apprehension is an exclusion rarely used by the MIB for claims arising from accidents pre-2015. It is submitted that this is because this would usually fall within the crime exception. In ***Ashton v Turner***,⁸⁷⁴ the MIB attempted to use this exclusion to prevent damages from being paid to the claimant who was committing a burglary. The Court in this instance used other means to deny the claim by stating that the driver did not owe a duty of care to the claimant or alternatively the claimant had consented to the risk. It has been submitted by Professor Merkin that this exclusion would be declared illegal under the Directives which are specifically aimed at protecting passengers.⁸⁷⁵

⁸⁷² *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896.

⁸⁷³ *Ibid*, 912-913.

⁸⁷⁴ [1981] 1 Q.B. 137.

⁸⁷⁵ Professor Merkin and Margaret Hemsworth (n 23), 611. Also see Pages 110 to 113 of this thesis on the Third Directive which provides protection of passengers.

Part II: Illegality

MIB's Policy to Repudiate for Third Party Illegality

When a claimant commits an illegal act, is he entitled to compensation beyond a potential reduction for contributory negligence? The MIB has two potential defences to a claim in this instance, namely through **Article 6** of the **UDA** (for pre-2015 accidents) and the defence of *ex turpi causa*. These put at risk the potential compensation available to the third party, including after breach of an exclusion clause by the driver. The law must be placed within the policy of the MIB and the context and rationale behind the use of this defence. The MIB were interviewed by the author of this thesis on the day that ***Delaney v Secretary of State for Transport***⁸⁷⁶ judgment in the Court of Appeal was decided and concerned the issue of illegality. In relation to the ***Delaney*** case and the issue of illegality generally, the MIB stated:

“we do things for organisations that don’t (sic) get passed to the public, these claims go through to the insurers which go through to your and my premium, there is a cost to this and we have to pay it. You empower the government on this. And if you Mr Public are happy that people taking n criminal offences should be ignored, then you will have to pay for it in your premiums... That’s why politically that is a bit sensitive that case (Delaney) because I think most of the public are not sensitive to that view, that is why there is a political perspective to that view, but not from ours, we are apolitical, it will be what it will be and what we have to pay and we will collect it from the insurers and that will then be put on your premiums that’s the way it works”.

The MIB's policy approach follows a comparable theme to the way in which exclusion clauses work, in that premiums are effected if cover is extended. This is because the MIB is funded by insurers, and insurers are businesses who make their money through premiums. It is therefore the average motorist who will compensate the person involved in the criminal use of a vehicle. This, then, brings the question as to whether the public would want to compensate a criminal injured

⁸⁷⁶ [2015] EWCA Civ 172.

during their criminal activity. The MIB's argument is that the general public would not want to pay for the damages in their premiums to someone who has been engaged in a criminal activity.⁸⁷⁷ The difficulty with this is in the width of the term 'criminality' and the circumstances of the accident. For example, the carrying of illegal drugs is completely different to not wearing a seatbelt. The width of illegality to permit a defence would have potentially major effects on the insurers' use of exclusion clauses, if illegality is deemed to encompass the majority of criminal offences, then it is likely that insurers would utilise exclusion clauses in their policies all of the time, so they can refuse a third party claim due to illegality.

Public perception surrounding these crimes are most likely to be very different, the public are of course likely to be more sympathetic to a person not wearing a seatbelt than a drug dealer. The MIB's approach is analogous to an argument made during the Hughes-Chorley debate and something examined in a paper written by this author.⁸⁷⁸ Hughes stated, in relation to compensation paid to third parties that, *'It is...questionable whether justice will be done, or more importantly, if justice will appear to be done'*.⁸⁷⁹ This is a very important point to make, the Delaney case will be discussed over next few pages, however, the difficulty with the case is that there was no causation, the injured parties drug dealing was nothing to do with the accident. However, the MIB do not want to be appearing to be compensating criminals, whether they were responsible for the accident.

The defences available to the MIB offer a degree of latitude for the court to decide based on the circumstances. It is clear, however, that the courts are not always following the MIB and therefore public opinion, as stated in the **Delaney** judgment, *'The understandable reaction might be: there must be some rule of public policy, reflecting public revulsion, which bars such a claim, the answer is there is not (in this particular case)'*.⁸⁸⁰ A difficulty with this, as will be shown below, is that there is lack of guidance for the courts to decide as to whether a claim should be prevented due to illegality.

⁸⁷⁷ The issue of 'public perception' was discussed significantly in the authors paper see Matthew Channon (n 24).

⁸⁷⁸ See Matthew Channon (n 24)

⁸⁷⁹ See Hector Hughes (n 178), 268.

⁸⁸⁰ [2014] EWHC 1785 (QB) [123].

The MIB, makes itself to be '*politically neutral*' and has stated that if forced to do so by the government it will compensate for any claims that arise. However, the government has not provided any guidance to the Courts on this, allowing the MIB to push forward arguments of illegality in cases, which it would not do if corrected by the legislature. This has left significant confusion and a difficulty in understanding the defences available, to which we will now move.

In-Course or Furtherance of Crime

The exclusion of compensation within the **1999 UDA** in relation to the victim's activity in '*course or furtherance of a crime*', is the most controversial exclusion within the Agreements. This is because there is no mention within the EU directives of this exclusion being available. The relationship between this exclusion and the defence of *ex turpi causa* is also obscure.

The interpretation of the clause, and the seriousness of the '*crime*' encompassed, was examined closely in ***Delaney v Pickett***.⁸⁸¹ This is the first case in the litigation involving a claim to the MIB by a passenger in a motor vehicle who was seriously injured whilst carrying a substantial amount of cannabis, which he was deemed to be dealing. The insurer refused to compensate the third party under the insurance policy due to the insured's breach of **Section 152 RTA 1988**, as the insured made a false statement that he was not using drugs. The insurer was nevertheless joined as a party with the MIB under **Article 79 UDA** to defend the claim. The defending parties denied the victims' claim due to the cannabis transportation under the maxim of *ex turpi causa* or the '*course or furtherance of a crime*' exception.

The Court of Appeal held that this fell outside of the *ex turpi causa* defence, as the claimant's illegality did not cause the accident. However, the judges disagreed as to whether the defence in the MIB Agreements could be utilised. Ward LJ defined '*in course of*', as a motor vehicle being used, '*in the process of committing the crime and as a subordinate part of the carrying out or carrying on of the criminal activity*'.⁸⁸² The words '*In furtherance*' meant that, '*the vehicle is being used to advance or to help the commission of the crime*'.⁸⁸³

⁸⁸¹ [2012] 1 W.L.R. 2149.

⁸⁸² *Ibid*, [41].

⁸⁸³ *Ibid*.

The Court found it difficult to decide the breadth of the word ‘*crime*’, which, if taken literally, could encompass all illegal activities irrespective of seriousness, including driving in excess of the speed limit. Ward LJ stated that it would be ‘*sad*’ to say that compensation could not be given in such a minor offence.⁸⁸⁴ Consequently, in examining the full extent of the term ‘*crime*’, Ward LJ followed Lord Hoffmann in ***West Bromwich***⁸⁸⁵ in stating that the background of the Agreement must be used in its’ interpretation. His Lordship stated that the Agreement must therefore be interpreted considering the EU Directives which require a narrow interpretation of exclusion clauses. Ward LJ stated therefore that ‘*crime*’ should not be interpreted as ‘*any crime*’ but rather must mean a ‘*serious crime*’, and the use of the vehicle for the intention of supplying drugs, ‘*is not heinous enough to be the kind of crime covered by the clause*’.⁸⁸⁶

Both Richards LJ and Tomlinson LJ disagreed with Ward LJ on the interpretation of **Clause 6** (although agreed on the non-application of the *ex turpi causa* defence). Richards LJ stated that although the term ‘*crime*’ should have its own *de minimis* exception, the judge was not willing to interpret it as narrowly as Ward LJ, as this would leave the clause with ‘*little practical purpose*’.⁸⁸⁷ His Lordship further stated that even if the definition of crime meant ‘*serious crime*’, drug dealing would fall squarely within it.⁸⁸⁸ Tomlinson LJ agreed that drug dealing should fall within the clause but differed slightly from Richards LJ by stating that he was, ‘*a little uncomfortable with the notion that hard cases can be regarded as capable of being dealt with by a de minimis gloss upon the exception*’.⁸⁸⁹ His Lordship stated that the Agreement and its’ provision has not been of any cause of concern, as the MIB generally does not utilise it to prevent compensation for minor crimes and would have little incentive in doing so, as it would be under pressure to amend the Agreement and remove the clause.⁸⁹⁰

Consequently, the majority in the Court of Appeal held that **Clause 6** of the **UDA** could be used against the drug dealing third party. Judicial inconsistency in the

⁸⁸⁴ Ibid [48].

⁸⁸⁵ West Bromwich (n 875).

⁸⁸⁶ Delaney (n 869), [50].

⁸⁸⁷ Ibid, [68].

⁸⁸⁸ Ibid.

⁸⁸⁹ Ibid, [79].

⁸⁹⁰ Ibid, [80].

extent of the word ‘*crime*’ demonstrates the difficulties faced by judges in illegality defences. A wider interpretation of the term ‘*crime*’ would give the MIB substantial discretion to repudiate even the most minor offences. This, it is submitted, is unlikely, as policy perspectives gained from the interview highlights a degree of ‘*public interest*’ involved. In **Delaney**, the Court clearly considered that drug dealers would be those with which society would not wish to compensate. It is clear, however, that **Clause 6** and the ‘*crime*’ defence are incompatible with the Motor Insurance Directives. The Directives only permit the Bureaux to have one exclusion from coverage, which is where the passenger knew that the vehicle was uninsured and from the ECJ decision in **Farrell**⁸⁹¹ this is to be interpreted narrowly.

The claimant in **Delaney** therefore undertook a **Francovich**⁸⁹² action against the Secretary of State for Transport (henceforth ‘SoSFT’). The SoSFT argued that the claimant knew that the vehicle was uninsured at the material time because it was being used for the purposes of a joint criminal enterprise. They argued that the words in the preamble of the Directive that: ‘*Member States should be given the possibility of applying **certain limited exclusion clauses** as regards the payment of compensation of the body*’,⁸⁹³ could be interpreted as meaning that the Directives permit more than one exclusion. Additionally, they argued that the clause is permitted by **Article 1(4)** of the **Second Directive**, because everyone knows that a vehicle being driven in the course or furtherance of crime is uninsured and it is therefore a permitted sub-set of that exclusion.

In the High Court, Jay J held that the MIB Agreement was in sufficiently serious breach of the Directives to allow **Francovich** damages for the claimant. The judge stated in relation to ‘*certain limited exclusion clauses*’, that:

“the recitals do not bear this overly punctilious textual approach, nor can they be permitted to override the express provisions of the Directive, which must be pre-eminent”.⁸⁹⁴

His Lordship further stated that the ECJ and CJEU jurisprudence were conflicting with the SoSFT arguments that the MIB were complying with the directives, and

⁸⁹¹ Farrell v Whitty (n 383).

⁸⁹² Francovich (n 469).

⁸⁹³ emphasis added.

⁸⁹⁴ Delaney (n 539), [60].

that this clause could not be a subset of the permitted exclusion because, '*That is not how the draftsman of the Uninsured Drivers' Agreement has approached the matter*'.⁸⁹⁵ This is because if the draftsman intended differently, he would have added it as rebuttable presumption or to the avoidance of doubt provision.

The matter was appealed to the Court of Appeal. The Department for Transport argued that Jay J erred by applying the EU law restrictiveness of exclusion clauses in motor insurance policies, to exclusion clauses from the MIB. Richards LJ in the Court of Appeal held that there was nothing in the text of the Directives to suggest that additional exclusion clauses were permitted, and the argument regarding the recitals was, '*weak in the extreme*'.⁸⁹⁶ Richards LJ further stated that although the ECJ and CJEU jurisprudence is complex in relation to exclusion clauses in insurance policies, Jay J had not erred in applying those cases to Bureaux exclusion clauses. This is because permitting exclusion clauses would:

"run...counter to the aim of protecting victims which is stated repeatedly in the Directives ...That aim is just as valid and important in the article 1(4) context as it is in the other contexts...To allow member states to introduce exclusion clauses additional to those specified would clearly undermine that aim".⁸⁹⁷

Richards LJ (along with Kitchin LJ and Sales LJ) held that the crime exclusion was breaching EU law. There was no dispute in this case that the Directives conferred rights on individuals, and that there was a causal link between the breach and the claimant's loss.⁸⁹⁸ The only question was whether the breach was sufficiently serious to justify an award of damages. The Court of Appeal held that the breach of EU law was sufficiently serious for the SoSFT to be liable for **Francovich** damages. Richards LJ was particularly scathing with the MIB's introduction of this exclusion in the 1999 Agreement, stating that it was, '*unwise in the extreme to introduce an additional exclusion in 1999 without seeking advice as to the legal*

⁸⁹⁵ Ibid, [70].

⁸⁹⁶ Delaney (n 539), [33].

⁸⁹⁷ Ibid.

⁸⁹⁸ Which as noted on pages 172-173 are requirements for Francovich actions.

position,⁸⁹⁹ and furthermore stated that although the breach of EU law was not deliberate, the risk of breach had been deliberately run.

The crime exception was subsequently removed from the 2015 Agreement. As noted by the MIB in interview, this is because of the Courts' decision in **Delaney** to permit damages against the State. However, despite the successful **Francovich** action in Delaney, the defence continues to be used to repudiate MIB liability in cases pre-2015. The MIB in interview stated that it would remove the exclusion if requested, but did not state that it would not stop using it (although this was not expressly asked). In **Smith v Stratton**,⁹⁰⁰ the MIB utilised the crime exclusion and the defence of *ex turpi causa* against the backseat passenger of a vehicle who was involved in dealing drugs. Laws LJ held that the crime exception could be used and that the **Francovich** action in Delaney was of no assistance to the claimant, this is because the clause continued to apply to pre-2015 cases. However, Laws LJ determined that the loss of damages could potentially be recovered by a **Francovich** action against the State. The case highlights, therefore, that the Courts are willing to apply the crime exclusion and that the MIB will continue to utilise it in cases of particularly serious crime such as drug dealing. Of course, an action can be brought against the State for breach of the Directive, which is more likely, since actions have been brought before, making breaches inexcusable.

Ex Turpi Causa

With the removal of the crime exception from the MIB Agreement, an alternative post-2015 defence for the MIB is *ex turpi causa* (illegality). This is a general defence open to other areas of law, with most cases coming within the laws of contract and unjust enrichment. In relation to tort law, the defence is often used by the insurer, or most often, the MIB, to refuse payment to a third party. The defence was first enunciated by Lord Mansfield in the 18th century case of **Hollman v Johnson**,⁹⁰¹ who stated: 'No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act'.⁹⁰² Consequently, if one commits an

⁸⁹⁹ Delaney (n 540).

⁹⁰⁰ Smith (By His Mother and Litigation Friend, Mrs Bonner) v Stratton & Anor [2015] EWCA Civ 1413.

⁹⁰¹ Holman et Al' v Johnson, alias Newland (1775) 1 Cowper 341.

⁹⁰² Ibid, [342].

illegal act which founds a cause of action, the Court could repudiate the cause of action due to criminality.

In relation to motor cases, the defence originates from almost a century ago in the cases of *Tinline*⁹⁰³ and *James*.⁹⁰⁴ Both cases involved the application of the defence in relation to the at-fault party of the accident claiming indemnification from the insurer to pay a third party claim. *Tinline* involved manslaughter due to dangerous driving, whilst *James* involved drunk driving. In both cases the defence of public policy was denied, with Roche J in *James* stating, '*(there is) not, in my view...that degree of criminality which in the doing of a known unlawful act makes it against public policy that the perpetrator should be indemnified in respect of it*'.⁹⁰⁵ These cases are slightly different to the current system in which *ex turpi causa* operates, as they involve paying an innocent third party compensation due to the act of a criminal driver rather than an illegal act of the third party. These are no longer of issue due to the MIB, who will pay innocent third parties for acts of a criminal insured, so long as the Agreements are complied with. However, as will be shown below, it seems that the precedent and theme of third party protection from *James* and *Tinline* go as far to protect criminal third parties.

It is important to note, however, that the law is uncertain with the courts struggling to determine the rules behind the principles. Inconsistent policy based approaches and legal precedent have led to the law being labelled a 'mess'.⁹⁰⁶ Motor insurance cases have often developed their own precedent with a mixture from other areas of law and illegality involved also, further adding to the confusion. This Chapter will now examine these complexities.

Joint Enterprise and Causation

A significant difficulty with *ex turpi causa* in a motor context is causation, with further causation issues in joint enterprise cases. Both are often intertwined and have caused the courts great difficulty. Where one party is involved in criminality, the causation approach can be found in the non-motor case of *Vellino v Chief*

⁹⁰³ *Tinline* (n 273)

⁹⁰⁴ *James* (n 274)

⁹⁰⁵ *Ibid*, 323.

⁹⁰⁶ *Patel v Mirza* [2016] UKSC 42, [265] [Lord Sumption].

Constable of Greater Manchester.⁹⁰⁷ In this case, Greater Manchester Police successfully utilised the defence against a defendant who was suing them for failing to take effective measures in preventing his escape. The Court of Appeal held: ‘*The facts which give rise to the claim must be inextricably linked with the criminal activity. It is not sufficient if the criminal activity merely gives occasion for tortious conduct of the Defendant.*’⁹⁰⁸ This case therefore gives the proposition that a clear linkage is needed for the criminal activity

In relation to joint-enterprise cases, it is apparent that this test has not always been followed. In **Pitts v Hunt** (henceforth ‘*Pitts*’),⁹⁰⁹ the Court permitted the defence where a motor cycle passenger encouraged the rider to ride dangerously whilst both were intoxicated. The judges seemingly ignored the idea of a ‘*causation*’ test, and instead enunciated another test by stating that they should examine whether it is impossible to find a ‘*duty of care*’ between the claimant and the rider of the motorcycle. Without explaining much further the Court held that in this situation it was impossible to find any duty of care. This test of impossibility has been the leading test in relation to joint enterprise.⁹¹⁰

However, it seems that this test has recently been doubted, particularly in the cases of **Gray v Thames Trains** (henceforth ‘*Gray*’)⁹¹¹ and **Delaney v Pickett**.⁹¹² In **Gray** (a non-motor case), Lord Hoffmann stated that the question was whether the:

*“criminal act in the causal relationship between the defendant’s breaches of duty and the damage of which he complains prevents him from recovering that part of his loss caused by the criminal act.”*⁹¹³

Lord Hoffmann in answering this question gave both a wider and narrower rule. The wider rule is, ‘*that you cannot recover compensation for loss which you have*

⁹⁰⁷ [2001] EWCA Civ 1249.

⁹⁰⁸ Ibid, [72].

⁹⁰⁹ [1990] 3 W.L.R. 542.

⁹¹⁰ Followed in several cases internationally, see for example *Gala v Preston* (1991) 174 C.L.R. 243; *Currie v Clamp* 2002 S.L.T. 196; Goudkamp J, “The Defence of Illegality in Tort Law: Wither the Rule in *Pitts v Hunt*?”, [2012], *The Cambridge Law Journal*, 71 (3), pp 481–484, 482.

⁹¹¹ [2008] EWCA Civ 713.

⁹¹² *Delaney v Pickett* (n 884).

⁹¹³ Ibid, [27].

suffered in consequence of your own criminal act',⁹¹⁴ with the narrower rule being, 'you cannot recover for damage which flows from loss of liberty, a fine or other punishment lawfully imposed upon you in consequence of your own unlawful act'.⁹¹⁵ The term 'in consequence' elucidates a causative approach, rather than an approach based on duty which was found in **Pitts**. This is a significant contrast causing difficulties in finding a defence of illegality especially in motor insurance.

In **Delaney**, concerning the MIB attempting to avoid compensating a passenger who was transporting cannabis for dealing, the MIB argued, alongside **Article 6** of its Agreement, that the claimant should not be compensated due to the principle of *ex turpi causa*. Ward LJ held that the fact that carrying of cannabis did not cause the accident was the important point in relation to the defence, Ward LJ stated:

*" It is not a question of whether or not it is impossible to determine the appropriate standard of care...(instead) the crucial question is whether, on the one hand the criminal activity merely gave occasion for the tortious act of the first defendant to be committed or whether, even though the accident would never have happened had they not made the journey which at some point involved their obtaining and/or transporting drugs with the intention to supply or on the other hand whether the immediate cause of the claimant's damage was the negligent driving".*⁹¹⁶

Hence, although the injury would not have happened if cannabis was not being carried, the carrying of the drugs was not the immediate cause of the accident and *ex turpi causa* could not be used.

The potentially contradictory decisions in both **Pitts** and **Delaney** were then discussed by the Court of Appeal in **Joyce v O'Brien**.⁹¹⁷ In this case, the claimant was hanging off the back of his uncle's van after stealing ladders and was seriously injured. The claimant argued that the uncle's dangerous driving broke the chain of causation and therefore the defence did not apply. The Court examined previous precedent and Elias LJ found a middle ground and stated that the introduction of

⁹¹⁴ Ibid, [29].

⁹¹⁵ Ibid.

⁹¹⁶ Delaney (n 869), [37].

⁹¹⁷ [2013] EWCA Civ 546.

the causation principle does not mean that the established jurisprudence on joint enterprise cases is of no continuing relevance.⁹¹⁸

The judge further held that, the courts must recognise the ‘*wider public policy consideration*’ which have previously led them to deny liability in joint enterprise.⁹¹⁹

Therefore:

*“the injury will be caused by, rather than occasioned by, the criminal activity of the claimant where the joint criminal illegality affects the standard of care which the claimant is reasonably entitled to expect from his partner in crime”.*⁹²⁰

Finally, the judge held that the principle to be established in joint-enterprise cases in most joint-enterprise situations is:

*“where the character of the joint criminal enterprise is such that it is foreseeable that... parties may be subject to...increased risks of harm as a consequence of the activities... in pursuance of their criminal objectives... the injury can properly be said to be caused by the criminal act of the claimant even if it results from the negligent or intentional act of another party to the illegal enterprise”.*⁹²¹

This, therefore is a rather strict approach in relation to illegal acts, as it highlights that even if the negligent act of another causes the act, a foreseeable risk of harm because of activities will suffice to prove causation. The decision was confirmed, albeit reluctantly in **Smith v McCracken**.⁹²² In this case, the MIB refused to compensate a teenage boy who was riding as a passenger on a stolen motorcycle and without wearing a helmet. The judge Richards LJ stated that even though there may be reservations about the principles in **Joyce v O’Brien**, the Court was bound by precedent and ought not try to backtrack.⁹²³ Consequently, although the negligent act was that of the driver, the passenger was jointly responsible for it in law, and could bring a claim for his own negligent act.

⁹¹⁸ Ibid, [27].

⁹¹⁹ Ibid, [28].

⁹²⁰ Ibid.

⁹²¹ Ibid, [29].

⁹²² [2015] EWCA Civ 380

⁹²³ Ibid, [47].

Breaking the Chain of Causation

Where both the claimant and the defendant's different actions are the possible cause of an accident with both having some causative effect, the court will weigh up the proportionality between their actions to see if the chain of causation had been broken. In **Clarke v Clarke**,⁹²⁴ the MIB repudiated liability where the claimant was attacking his sisters' vehicle with a machete. His sister drove at the claimant severely injuring him. The Court in this case paid attention to the examination of the law by the editors in Clarke and Lindsell on Tort. The editors found at least three relevant factors for the Court to look at and in particular stated:

“there has to be some proportionality between the claimant's conduct and that of the defendant. The defence does not apply where the defendant's conduct was an excessive response”.⁹²⁵

Consequently, even though the claimant was acting illegally the response was disproportionate to use the defence of *ex turpi causa* and any excessive response would be enough to allow the *ex turpi causa* defence to be used.

Criminal Act of the Claimant

The above cases show that the degree of causation needed for a successful defence of *ex turpi causa* is high. However, it is apparent that this does not mean that all accidents, which are caused by the claimant, would fall within the *ex turpi causa* defence. 'Minor' crimes such as speeding, or even intoxicated driving would usually not permit the defence, as the criminality of the act is linked to public policy. As stated by Lord Sumption in **Les Laboratoires Servier v Apotex Inc**:⁹²⁶

“The paradigm case of an illegal act engaging the defence is a criminal offence. So much so, that much modern judicial analysis deals with the question as if nothing else was relevant. Yet in his famous statement of principle in...Lord Mansfield CJ spoke not only of criminal acts but of ‘immoral or illegal’ ones. What did he mean by this? I think that what he meant is clear from the characteristics of

⁹²⁴ John Clarke v Phoebe Clarke & Another [2012] EWHC 2118 (QB)

⁹²⁵ Michael Jones et al, *Clarke & Lindsell on Torts* (Sweet and Maxwell, 21st Edition, November 2014), [3-30].

⁹²⁶ [2014] UKSC 55; [2014] 3 W.L.R. 1257.

the rule as he described it, and as judges have always applied it. He meant acts which engage the interests of the state or, as we would put it today, the public".⁹²⁷

This, from Lord Sumption does not give much information as to the extent of the 'illegal' acts covered, although when it comes to the term '*public interest*', this connotes some severity. Lord Sumption's dicta re-affirmed and agreed with the dicta of Lord Rodger in **Gray v Thames Trains**⁹²⁸ who referenced '*trivial*' cases as those that would not fall within the *ex turpi causa* doctrine.⁹²⁹ Moreover, the judge in **Vellino**⁹³⁰ expanded upon this by stating that a crime in which the claimant would receive imprisonment would be expected to allow the defence.⁹³¹

An example of criminality, from an MIB perspective, which, *inter alia*, did not meet the test to deprive the claimant of damages is in **Smith v McCracken**.⁹³² His Lordship, Richards LJ, in this case, held that this was not a case in which '*judicial abstention*'⁹³³ should be used, and therefore the claimant should recover damages. Instead, damages should be reduced under the claimant's contributory negligence. This, therefore, shows inequality in precedent and difficulty in determining which '*crimes*' would permit the defence of *ex turpi causa*.

It is apparent, however, that in motor insurance cases, reduction via contributory negligence can be a more favourable situation for example in **Joyce v O'Brien**,⁹³⁴ if some fault of the injured party can be found. Reducing damages via contributory negligence is certainly a more proportionate response to illegal acts, by not depriving a remedy altogether. Moreover, this complies with the Motor Insurance Directives and the then ECJ decision in **Candolin**, which states that it is only in, '*exceptional situations*'⁹³⁵ in which compensation can be limited in civil liability, by proportionately reducing damages based on conduct of the victim. Whereas the defence of *ex turpi causa* is plainly in contravention of EU law.

⁹²⁷ Ibid, [23], emphasis added.

⁹²⁸ Gray v Thames Trains (n 914).

⁹²⁹ Ibid, [83].

⁹³⁰ [2002] 1 WLR 218

⁹³¹ Ibid, [70].

⁹³² [2015] EWCA Civ 380.

⁹³³ Referred to Lord Sumption's words in Les Laboratoires (n 929), [23].

⁹³⁴ [2014] 1 W.L.R. 70

⁹³⁵ See Candolin (n 217), [30].

Patel v Mirza

The most significant case in terms of illegality is **Patel v Mirza**,⁹³⁶ decided in the Supreme Court by all nine judges. This was contractual in nature, where the claimant had paid monies for insider trading (an offence under **Section 52 of the Criminal Justice Act 1993**) and did not receive the benefit. The Court with a majority of five judges to four, decided to change direction in relation to the defence. Lord Toulson gave the leading judgment and introduced a policy based test with a trio of considerations for the Court to examine to decide whether *ex turpi causa* should be applied, the considerations are:

“(a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality”.⁹³⁷

Part b of this test is particularly relevant in a motor insurance context, as the principle of *ex turpi causa* clashes with the public policy of protecting the individual from harm caused by a motor vehicle, as discussed in **Hardy**⁹³⁸ and **Gardner**.⁹³⁹ Moreover, in relation to potentially relevant factors in examining proportionality, Lord Toulson stated that there was an infinite list of factors in determining this, these can include:

“the seriousness of the conduct...whether it was intentional and whether there was marked disparity in the parties’ respective culpability”.⁹⁴⁰

The above test from Lord Toulson seemingly replaces the causation test from Lord Hoffman in **Gray v Thames Trains**,⁹⁴¹ with a much more flexible test. Lord Toulson noted the uncertainty surrounding the test, and this was commented upon by the dissenting judges. In relation to motor insurance, it is submitted that it is now more

⁹³⁶ [2016] UKSC 42.

⁹³⁷ Ibid, [101].

⁹³⁸ Hardy v MIB (n 251).

⁹³⁹ Gardner (n 259).

⁹⁴⁰ Patel v Mirza (n 909), [107].

⁹⁴¹ Gray v Thames Trains (n 914).

difficult to use this defence, particularly as the courts must weigh up the different policy approaches, with the policy approach of motor insurance being third party protection. This is particularly in cases where there is some contribution to the accident from the illegal act of the third party, as it is submitted that it is likely that the courts would find the use of a total bar on claims disproportionate. However, with causation not needing to be proven, there is potential for those serious offences, such as drug dealing as in *Delaney v Pickett*,⁹⁴² to fall within the defence, although there seems to be some degree of '*culpability*' needed to satisfy criteria three.

It is clear though that the overall theme is that the defence of illegality, either through the MIB Agreements or in using *ex turpi causa*, is interpreted critically by the courts. In the majority of cases it is evident that the courts have rejected this defence or substituted it for the defence of contributory negligence. Moreover, due to the amount of case law, it is apparent that the MIB use this defence frequently and in a variety of situations. Whilst it is clear that the MIB Agreements cannot be used, the *ex turpi causa* defence is still uncertain, meaning, that third parties who have committed a criminal act, cannot be sure that they will receive the compensation.

Part III: Figures, Overall Protection and the Future of the MIB

With the exclusion clauses contained within the Agreements, as well as illegality examined, it is important to bring this together to determine the consequences of exclusion clause breach (essentially whether the MIB provide an effective backup), to combine this with any figures available, and finally to examine the future of the MIB.

It is first important to examine any figures given by the MIB in the number of claims denied. This would provide a good starting point in determining whether the MIB provide adequate protection. If the number of denied claims is minimal, then it matters little whether the exclusion clauses in the Agreement exist, as they are not being utilised. The author has requested the figures of claims, which was denied in both interviews. The MIB stated:

⁹⁴² Delaney (n 869).

“It is not something that we automatically, sort of record in a way, without deriving it from other bits of our data. But secondly when you get a bunch of claims in, so in 2014 we got 22,000 claims in the door, until you have closed the last one of those which might be in several years’ time, you can’t say exactly how many of those have been paid and how many haven’t. So, it’s not something that you say we got X thousand in and those were accepted and these aren’t”.

The MIB reinforced this in the second interview by stating:

“All claims that qualify under the terms of the agreement are accepted and all those that do not qualify are denied. In that sense, if “MIB claims” are ones that qualify under the Agreements then none are denied...Claims that are “denied” would encompass examples such as those found to be fraudulent, those where the uninsured or untraced driver was not at fault, those made too late according to the rules etc. A number of claims that are made and don’t qualify under the Agreements would be meaningless”.

This shows the difficulty in segregating claims which are denied, not just because of the **UDA**, but also because of the law of liability, or through fraud. As stated earlier in this Chapter, where the third party is deemed at fault, their claim would be denied, which is, of course, in line with EU Law. It is nevertheless, disappointing that the MIB do not hold segregated figures as to claims denied due to breach of the **UDA**, or through illegality. This absence of transparency makes it difficult for the third party, or those advising them, to have some idea as to whether their claim will be effective.

This also makes it difficult for us in determining the overall protection given to third party victims and thematic analysis of the data and ways in which the MIB repudiate claims.

However, it is important to make some remarks overall, as to the MIB Agreements and protection offered by bringing together the research already discussed throughout this chapter. It is notable that much more of this research has come doctrinally rather than through the interviews, this is because very little in the way of themes through their answers could be found. The MIB provided some

interesting points in relation to the rationale behind certain issues such as the use of the illegality defence, but there was little discussion from the MIB regarding the exclusions within their Agreements, other than the user friendliness of them, making it difficult to find themes from their answers.

In relation to the chapter overall, there are some themes which are evident. It is notable that the protection of third parties has certainly increased, especially with the **2015 UDA**. The new Agreement is evidently an improvement on the previous Agreements, by removing many of the conditions precedent and exclusion clauses and further by making the Agreements more user friendly. However, pre-2015 accidents continue to fall within these Agreements leaving potential for the victim to be uncompensated in these situations. However, the MIB have stated that many of the provisions, particularly with regards to time limits and procedural requirements, '*are no longer used in practice*', this is clearly positive.

It is submitted that if these provisions were used in practise to deny claims, then there would be some awareness. For example, cases concerning the use of MIB time limits are always considerably scrutinised.⁹⁴³ Moreover, it is notable the MIB is undergoing substantial scrutiny due to the Judicial Review, as well as authors writing critical pieces in several journals.⁹⁴⁴ However, these critical articles are broad generalisations of the MIB Agreements, and are not discussing recent instances of the MIB repudiating claims.

The 2015 Agreements themselves are also not completely watertight. Victims may continue to fall through the gaps and need to be careful to ensure that they keep to the requirements of the **UDA**. This usually would be done by ensuring a competent practitioner handles a claim, as highlighted earlier in this chapter, '*There is no real difficulty for a competent solicitor, or a layman who pays attention to the language of the agreement and the notes attached to it*'.⁹⁴⁵ It is evident, nevertheless, as the MIB have noted in interview, that the **2015 UDA** is significantly

⁹⁴³ See for example *Silverton v Goodall* (n 631), concerning the legality of time limits. This was scrutinised in – "Road traffic accident - uninsured driver - Motor Insurers Bureau - liability - construction of Clause 5 of MIB Agreement" (1998) *Journal of Personal Injury Litigation*, 150-152. Also, Robert Merkin "Time limits under the Motor Insurers Bureau Agreement" (1997) *Insurance Law Monthly* 9 (6), 11-12.

⁹⁴⁴ See the works by Nick Bevan and James Marson (n 31).

⁹⁴⁵ *Silverton v Goodall* (n 631), 461. [Sir Ralph Gibson].

more user friendly than previous Agreements, and therefore navigating it is much less problematic.

However, a significant gap continues to exist in the Agreements where insurance is not required, for example on private land, although this is something that goes beyond the Agreements, into UK statutory policy. Although **Clause 6** relating to illegality has been removed, the MIB can still use the defence of *ex turpi causa* to deny a claim, although again this certainly has been narrowed due to the **Patel v Mirza**.⁹⁴⁶

So, what is the overall effect of the utilising an exclusion clause on a third party claim? It is submitted that it is highly likely that the MIB will pick up a claim, as long as it fits within the law of liability and is made in good faith. The absence of figures cannot reinforce this viewpoint, however, the minority of recent cases specifically questioning the Agreements, provides a useful indicator that the MIB are rarely denying claims due to breach of the clauses of their Agreement. Moreover, the introduction of the 2015 Agreement provides a positive step in the protection of third parties by making it more user friendly and reducing exclusion clauses.

The Future of the MIB

Judicial Review

The MIB has a complex future ahead, first because of an ongoing Judicial Review, for the MIB's potential breaches of EU Law,⁹⁴⁷ second, because of the UK's impending departure from the EU. The Judicial Review is currently in its later stages, with several breaches of EU law argued against the SoSFT and MIB. This is largely in relation to the MIB's role to compensate for exclusion clauses, which as highlighted in Chapter Five, is not compliant with EU Law. Apart from this exclusion, the Judicial Review is not particularly relevant to this thesis, as the exclusion clauses involved are largely from the **UtDA 2017** or would not effect a

⁹⁴⁶ Patel v Mirza (n 909).

⁹⁴⁷ One of the key breaches, as discussed in the previous Chapter on page 245 relates to the role of the MIB. The rest of the breaches are mainly either in terms of the Untraced Drivers' Agreement which goes beyond the scope of this thesis or other areas of the Agreement which go beyond this thesis.

claim from an individual who has had an exclusion clause used against them. It is worth briefly discussing the Judicial Review in the overall context of the MIB.

Other exclusion clauses involved within the Judicial Review include the ‘*terrorism exclusion*’, which was where the MIB could refuse to compensate victims in case of a terrorist act. This exclusion was subsequently removed from the MIB Agreements, after the MIB conceded that this was illegal under the Directives during the Judicial Review proceedings.⁹⁴⁸ Moreover, the MIB’s non-application of the CJEU’s *Vnuk*⁹⁴⁹ decision is further subject to the Judicial Review proceedings, although the outcome of this is uncertain due to the EU’s current consultation on the decision.⁹⁵⁰ Uncertainty exists as to whether the Judicial Review will succeed, however, it must be remembered these provisions will not be subject to Judicial Review for their use post-Brexit.

The MIB, therefore have several significant challenges to face due to perceived breaches of EU law. As noted above, as the MIB are currently under the spotlight, it is submitted that it is unlikely that it will take any controversial actions where Agreements’ are breached, as this would increase attention further.

Brexit

The MIB noted in interview that the effect of Brexit on their Agreements is uncertain, as there is little indication as to what Brexit will look like. The MIB importantly noted:

“The UK creation of a Guarantee Fund (to compensate victims of uninsured and ‘hit and run’ drivers) predates any EU obligations to create such an arrangement, by many years. There is no reason to think that the arrangements will not be in place after we leave the EU”.

This is an important point to make, the MIB’s obligations will not cease post-Brexit, however, it is the extent of their obligations, which will be of interest. Of course, the obligations of the MIB will be dependent on whether the EU Directives and CJEU

⁹⁴⁸ Motor Insurers’ Bureau, “The impact of terrorism on the motor insurance industry” <<https://www.mib.org.uk/mib-insight/the-impact-of-terrorism-on-the-motor-insurance-industry>> [Accessed 8th August 2017].

⁹⁴⁹ *Vnuk* (n 239).

⁹⁵⁰ See Pages 142-143 which discusses this.

decisions are embedded into UK law. However, as stated previously, the UK Government is evidently sceptical of the Directives and there is potential for significant alteration when introduced in UK law post Brexit. It must also be remembered that the MIB's Agreements are undertaken with the SoSFT, who appeared to have permitted exclusion clauses (such as the illegal use exclusion) which were later deemed unlawful. It was the SoSFT who fought for their validity in the courts.

In the interview, the MIB have suggested that Brexit may allow them to re-introduce an exclusion which permitted the MIB to refuse paying for a claimant's damaged vehicle when that claimant's vehicle was itself not insured. The MIB stated:

"If at some point in the future the UK is not bound by the Directive then that may present an opportunity to reintroduce this exclusion. Bearing in mind it is doing no more than denying those illegally using a vehicle on the road, a right to recover the cost of damage to their vehicle at the expense of premium paying motorists, it is hard to envisage any objection".

The MIB referring to '*premium paying motorists*' is enlightening, as this was comparably the rationale behind the utilisation of the '*criminal use*' exclusion which we discussed earlier. This further emphasises that the MIB would potentially attempt to re-balance motor insurance towards consumers and away from the third party by focussing on pushing the premium lower, therefore potentially introducing exclusion clauses which are seen by the public as positive. There is, consequently, clear potential for the MIB to re-introduce other exclusion clauses post Brexit such as the '*criminal use*' exclusion. This would weaken the rights of third parties significantly and with EU law not limiting the use of exclusion clauses, could allow the MIB to widen this defence significantly, through expressly stating in its Agreements, when it would be used.

Conclusion

As noted in previous chapters, the MIB Agreements are utilised by insurers, acting as agents of the MIB, where an exclusion clause is used. It is unlikely that an insurer would go to the lengths to repudiate liability under their insurance policy, if there

was nothing to be gained by utilising the MIB agreement. This Chapter has contributed to this thesis through seeking to answer the second research question in relation to the effect of exclusion clauses on third party claims, essentially questioning whether the MIB provides adequate protection.

In this Chapter, we have found that this question cannot be answered categorically, particularly as the MIB has failed to provide figures as to the number of claims denied. However, we can make several conclusions.

It is clear that neither the **1999 UDA** nor the **2015 UDA** are watertight, there continue to be some gaps in coverage. The **1999 UDA** contains a number of procedural conditions, which if not complied with, could leave the victim without any compensation. It is apparent that the MIB or **Article 79** insurer tend not to use these conditions and there is limited evidence that they do use them at present. However, it is clear that the **1999 UDA** was not user friendly and required handholding, making it easy for claimants, without legal representation, to fall through these traps. The 2015 Agreement has improved by significantly reducing the number potential 'traps' for third parties but has not removed them altogether. This highlights that protection is not guaranteed although there is an improvement.

Moreover, there is still potential for the MIB to use the illegality defence through the MIB Agreements (pre-2015) or through the defence of *ex turpi causa*, it is apparent, however that this has been narrowed significantly due to the narrow judicial interpretation. It is clear, however, resulting from the MIB interviews, that the MIB are focussed on public opinion and lower premiums when it comes to the illegality defence, believing that the average motorist would not want to pay for illegal acts. The defence, however, is still potentially available resulting in another gap in compensation.

The MIB's obligations are likely to change in the future, however the extent of this is uncertain. It is apparent, however, with the potential removal of protection provided by the EU Directives, the MIB could remove protection for third party victims, something that it is submitted, is a backwards step.

Chapter Eight: Overall Conclusions

Protection for third party victims has undoubtedly increased since the introduction of compulsory motor insurance over 80 years ago. The EU has spurred much of this by ensuring a very high level of protection is available in every Member State, whilst attempting to ensure certainty for victims. Although it is fair to say that the UK has followed this in some respects, we have discovered that the UK's approach is littered with uncertainties, both in the application of EU law, and also of the interpretation of national legislation and MIB Agreements.

The aim of this thesis was to answer three research questions. First, to what extent are exclusion clauses valid in third party motor insurance policies against third parties? Second, what is the effect of the use of exclusion clauses on third party claims? In answering these questions, we sought to combine the theoretical and practical issues in relation to exclusion clauses and third party claims in motor insurance. Third, how should the law in this area be reformed?

The enquiry began by laying out the legal context of the UK's approach to exclusion clauses in Chapter Two. This was important not only to provide the rationale and historical context, but also as it was, surprisingly, never done before. This was followed and expanded in Chapters Three, Four, and Five, which were all important in relation to the first research question, the validity of clauses against third party claims. Together, these chapters provide a comprehensive evaluation of the validity of exclusion clauses. In Chapter Three we examined the law as it currently stands in relation to the **RTA 1988** and the list of prohibited exclusions in **Section 148**. We further discussed the extent to which exclusions are permitted beyond the list of prohibited exclusions. This was further added to by examining other potential legislation which could influence exclusion clauses, and in Chapters Four and Five we compared UK's approach with the EU's approach.

The second research question, the effect of exclusion clause use on third parties, was answered through the examination of the MIB in Chapter Seven. The approach of this Chapter was to combine doctrinal and empirical research. Given the role of the MIB and its' importance in relation to the practical application of exclusion

clauses, this method allowed an approach the problem from a policy, practice and academic angle, necessary in the circumstances.

The third research question will be answered through an overall examination of potential reform in the conclusion through bringing together research within this thesis to propose a solution.

The overall findings of the thesis, and the contribution to this area, are threefold. First, the rationale of exclusions and the need to balance the objectives of motor insurance law in protecting the third party whilst keeping premiums low. Second, that exclusion clauses can be used against third parties, subject to a case by case evaluation by the courts. Third, the effect of exclusion clauses is that the MIB will usually pick up claims, however, this is not a guarantee and some gaps exist, depending on the time in which the accident occurred. It is important to examine these points in more detail and to finish with a look at the future of the area and potential reform to tie together the results of this thesis.

The Rationale behind Exclusion Clauses: Balancing Objectives

It is crucial, as explained in Chapter Two, to understand the rationale behind exclusion clause use and prohibition, since it provides insight into the policy approaches, a point often discussed by the courts. Surprisingly, the matter has never been explored in any depth in academic study before. In doing so, the thesis is filling a crucial gap.

The rationale behind use of exclusion clauses is located in the Cassel Committee consultation responses. First, to ensure that risk can be determined effectively by the insurer, second, to provide lower premiums for the insured, allowing the insured to cater their premiums, and third, to provide some deterrence to the insured in using their vehicle dangerously or for passengers committing illegal acts which would potentially allow lower premiums.

Of course, a difficulty with the above rationales is their relation to third party claims. As the Insurer would pay in the majority of circumstances anyway due to the existence of **Article 79**, these rationales do not ring completely true, as the third party will, in the majority of cases, be compensated in the same way as if an exclusion clause is breached.

There are, however, a couple of arguments in relation to deterrence for the driver which would only work without the MIB acting as the last resort. First, by refusing to pay the third party when an exclusion clause is breached and therefore transferring the obligation to compensate to the insured (who breached the exclusion), there is a potential deterrent on the insured as they will be put under significant financial strain to compensate. However, this goes back to the 'man of straw' argument that the insured may not always be in the position to compensate. Moreover, there is already power under **Section 148 (4)** for the insurer to recover from the insured any sums that they pay out to the third party if a prohibited exclusion is breached. This means that by recovering the money from the insured through the legislation (where they are not a 'man of straw') there would be a potential deterrent through the legislation, which is also beneficial in providing lower premiums due the insurer recouping any pay outs.

Second, by permitting exclusion clauses in relation to blameworthy passengers (for example in relation to drunk passengers as in **Candolin**) there may be a potential deterrent effect in preventing the insured from driving outside of the policy, with the blameworthy passenger not being compensated and in the position to prevent the insured from driving outside of the policy. The EU have noted previously⁹⁵¹, however, that this would not provide a deterrent particularly in intoxication cases as the passenger would not always be in the position to judge this. Moreover, there is already a deterrent through the criminal liability of the driver if they breach an exclusion clause in the policy, because they would be driving uninsured, whether criminal sanctions is an adequate deterrent is unknown and should be subject to further study.

Of course, as noted in Chapter Seven, a significant finding of the interviews is that the MIB have attempted to reduce premiums whilst providing a deterrent by refusing payment to those who commit a criminal act, either via the **UDA (Clause Six**, removed from the UDA in 2015), or *ex turpi causa*. The MIB state that it would be unpopular amongst insureds if they are forced to compensate injured third parties who are committing a criminal act. However, in this author's view this would

⁹⁵¹ As discussed on page 114 of this thesis.

be inequitable if the illegal act was not a cause or contribution to the accident. This comes back to the difficulty with regards to balancing premiums and deterrence and has caused the courts great difficulty in determining what counts as an illegal act, with which they are evidently cautious. Unlike in cases involving the insurer's use of exclusion clauses, the MIB's repudiation has much greater effect as there is no backup for the injured party when their claim fails.

It is important to note, in relation to the rationale of providing lower premiums, there is evidently a difficulty in balancing the rights of third parties to gain compensation, whilst trying to ensure a lower premium for the insured. This was noted in the Hughes-Chorley debate in Chapter Two and was a significant theme of this thesis. This can be demonstrated in the width of the term '*accident*', discussed in Chapter Three (and as noted above, in relation to deterrence). A wider interpretation of '*accident*', would include deliberately caused damage (expanding policy scope significantly), whereas a narrower interpretation would mean less third parties are covered. This, however, is beginning to lose some significance, as noted above, due to the role of the MIB.

Overall therefore, this thesis highlights major challenges. The question of balancing lower premiums and the rights of third parties to gain compensation is something that has been overlooked in motor insurance law both academically and often in practise, it is submitted that further discussions should be had in the future as to where this balance should lie.

The Validity of Exclusion Clauses

The thesis sought to answer the question regarding the extent to which exclusion clauses are valid against third parties. As seen in Chapters Three to Six, the answer to this question in relation to UK law is tentative and largely uncertain, whereas the EU provides greater certainty.

The only certainty in UK law is that there is a list of prohibited exclusion clauses in **Section 148 RTA** which cannot be used against a third party and these are interpreted widely. These exclusion clauses were chosen due to being the most prevalent prior to the introduction of the **Section 12 RTA 1934**.

As seen in Chapter Three, the vast majority of exclusion clauses beyond **Section 148 RTA** have been permitted within case law due to **Section 151 RTA** which states that insurers are liable only for claims which are, ‘*covered by the terms of the policy*’. However, it is evident that judges have found difficulty in coming to this conclusion, because of the conflicting policy approaches within the Act, which is focussed on compensating the third party. Some of the leading cases have found difficulty in balancing these approaches.⁹⁵² Judgments are made slightly easier by the fact that the MIB provides a back-up if the insurer utilises an exclusion. For example, Ward LJ in **Bristol Alliance**⁹⁵³ was focussed on the fact that the ‘*real victim*’, the damaged shop, gained compensation despite an exclusion clause being used.

Chapter Three identified, in relation to the validity of individual exclusion clauses that ‘*limitation of use*’ clauses are looked upon favourably by the courts. The authoritative judgments in **Sahin**⁹⁵⁴ and **Bristol Alliance** both stated that these are permitted. There is uncertainty as to the validity of other exclusion clauses, and it is likely that these will be dealt with on a case-by-case basis. However, it is submitted that it is probable that the **RTA 1988** only prohibits exclusion clauses contained within the prohibited exclusion clauses list. The legislature has set out clearly those exclusion clauses which are deemed to be prohibited, and the courts have so far stuck to this list.

Chapter Six found that it is likely that the **CRA 2015** and **ICOBs** will have some, albeit indirect, effect on exclusion clauses. It is expected that insurers will be more careful to ensure that they draft their policies in a transparent and fair way, which will have a beneficial effect on both first and third parties. It is submitted that the **Insurance Act 2015** is more likely to have a direct effect on the validity of exclusion clauses. The relationship between the **Insurance Act**, the **RTA 1988** and EU law is uncertain and is yet to be tested. However, the effect that the **Insurance Act** has on exclusion clauses in motor insurance is dependent on the interpretation that the Courts give to **Section 11**.⁹⁵⁵ A wide interpretation of ‘*loss of a particular kind*’ has

⁹⁵² Hardy (n 251), Gardner (n 259) and Charlton (n 262).

⁹⁵³ Bristol Alliance (n 15).

⁹⁵⁴ Sahin (n 208).

⁹⁵⁵ Insurance Act 2015.

the potential to incorporate '*limitation of use*' exclusion clauses, which could substantially restrict insurer's use of these clauses.

Chapter Four found that the EU's regulation on exclusion clauses contrasts significantly with the UK's, with the EU providing greater certainty. The EU Directives are vague because they contain a list of prohibited exclusion clauses, with only one exclusion permitted. However, the CJEU has clarified beyond doubt, that exclusion clauses cannot be used against third parties, and therefore, the insurer is responsible for compensating third parties. This is even in cases where the '*victim*' is partially to blame for the accident. However, one slight uncertainty in EU law is in relation to civil liability rules and the relationship with insurance law rules, this is likely to be clarified by the CJEU in the future.

Chapter Five observed that the UK's interpretation of EU law and particularly the ***Bernáldez*** decision is conflicting. Moreover, the ***RTA 1988***, in permitting exclusion clauses, is clearly incompliant with EU law. The two authoritative UK cases from the Court of Appeal on exclusion clauses ***Bristol Alliance*** and ***Sahin***, both interpret ***Bernáldez*** narrowly, as only prohibiting exclusion clauses relating to intoxicated drivers, rather than a blanket prohibition. However, this is in contrast to the judgment of Jay J in ***Delaney***,⁹⁵⁶ who interprets ***Bernáldez*** widely, but later contradicts himself by stating that the UK is compliant with respect to exclusion clauses.

The ***Sahin*** judgment is perhaps the most surprising, as it arose after the CJEU decision in ***Csonka***⁹⁵⁷, which re-affirmed previous CJEU decisions. The Supreme Court later denied the claimants an appeal in ***Sahin***, meaning that all routes to utilising the full extent of ***Bernáldez*** were impeded. However, with the very recent CJEU decision in ***Fidelidade***,⁹⁵⁸ clarifying that the insurer must pay when an exclusion clause is breached, it is unlikely that the ***Bristol Alliance*** and ***Sahin*** interpretation will survive and the UK's ***Section 148*** provision would need amending to bring it in line with EU law or face ***Francovich*** actions. Moreover, if a case goes to the Supreme Court concerning the validity of exclusions, and the

⁹⁵⁶ Delaney (n 539).

⁹⁵⁷ Csonka re-affirmed Bernáldez by stating that the insurer must pay when an exclusion clause has been breached.

⁹⁵⁸ Fidelidade (n 452).

Supreme Court fails to refer to the CJEU or misinterprets EU law, there could be case for **Kobler** liability providing a potential remedy against the State, a **Kobler** claim which would stand a greater chance of succeeding due to the **Fidelidade** decision.

The first research question can be answered by tentatively stating that, 'limitation of use' clauses which fall outside of **Section 148**, can be utilised against third parties due to UK courts' interpretation of the **RTA 1988** and **Bernáldez**. It is submitted that the validity of other clauses beyond **Section 148** would need to be determined on a case-by-case basis, subject to future change in the law, this will be addressed below.

The Effect of Exclusion Clause Use on Third Parties

This thesis has determined that when an exclusion clause is breached, the insurer will be forced to pay the third party compensation under **Article 79** of the **UDA** and not the insurance policy. The thesis has therefore examined the scope of the **UDA** along with potential exclusion clauses, to determine whether the third party is likely to gain compensation.

Chapter Seven observed that the **2015 UDA** generally provides protection to the third party claimant, subject to liability and scope issues. Protection has significantly increased because of the 2015 Agreement. However, there are some limitations to the **UDA** such as through procedural requirements, meaning that third parties can continue to fall through the gaps in protection. However, the extent and likelihood that this occurs is not determinable, due to the absence of figures from the MIB as to claims denied for this reason. It is further submitted that it is unlikely that the MIB will, in future, succeed in being able to utilise defences of illegality, first because of the removal of the defence in the Agreement and second because of the narrowing of the *ex turpi causa* defence. It is clear, bringing all of this together that the protection offered to third parties has substantially increased. Consequently, the thesis has found that result of use of an exclusion post-2015, is that the insurer will continue to pay in the vast majority of instances through **Article 79**.

However, as the **UDA 1999** continues to apply to accidents pre-2015, the answer in respect of these accidents is different. The thesis has shown that the 1999

Agreement is littered with exclusion clauses, particularly relating to procedure to be followed. Although the MIB has argued that these exclusion clauses will not be used, this is not certain, as there are no figures available to determine this and earlier cases have found that these exclusion clauses have been used. Moreover, the illegality exclusion continues to apply for these accidents pre-2015, meaning that more severe crimes could be caught. It is submitted that the accident victim is vulnerable to falling through the gaps of the 1999 Agreement and could be uncompensated. The only way to prevent this from happening, as noted in **Silverton v Goodall**,⁹⁵⁹ is to gain legal advice in helping to fill out the forms correctly. The 1999 Agreement, it is submitted is inadequate, and the result of the use of an exclusion clause for accidents pre-2015, leaves a greater possibility of being uncompensated.

The answer to the second question is therefore that effect of exclusion clause use is dependant on the individual circumstances, and there is potential for victims to be uncompensated due to breach of the Agreements. The number of claimants who are left uncompensated, however, is uncertain due to the absence of figures from the MIB.

A Look to the Future/Some Recommendations

Motor insurance law has changed more in the last five years than it had in the preceding 80 years, with numerous new cases, an EU REFIT exercise, and new MIB Agreements. There are more substantial changes to come due to the recent **Fidelidade** decision from the CJEU, the Judicial Review, and of course Brexit.

Fidelidade is likely to have a significant impact on the UK's interpretation of EU law, and could expose the illegality of the **RTA 1988's** acceptance of exclusion clauses, meaning, that the exclusion clause provisions of the **RTA 1988** could be annulled or subject the UK to state liability actions. This would significantly modify the situation of third parties, as the insurer would be forced to pay under their insurance contract, rather than the **UDA**.

However, it is less than two years until this could change again due to Brexit, although this could be greater due to the potential for a Brexit implementation

⁹⁵⁹ Silverton v Goodall (n 631).

period. There is significant uncertainty as to what Brexit, and the UK's implementation period, will eventually look like. Although there is potential for the UK to be required to follow EU law and CJEU decisions in the implementation period with no say in how they are formed. Moreover, it is likely once this period is passed that EU Directives and CJEU decisions could be entrenched in national law with the opportunity to repeal them later.

The government's generally negative outlook of the Directives and consistent breaches, increases the uncertainty surrounding this area of law further, making it impossible to predict how the law will look in five years or ten years. Moreover, as suggested by the MIB in interview, there is potential for exclusion clauses under the Agreement's to be re-introduced. This, it is submitted, would be damaging for the rights of third parties, leaving potential vulnerabilities in the future. Judging by the MIB's reluctance to remove potentially illegal exclusions, this is certainly possible post Brexit.

At the beginning of this thesis, it was noted that motor insurance is the most significant area of insurance law due to the numbers involved, yet despite the importance that motor insurance has in every-day lives, the area is extremely complicated and there is no sign that this is going to end anytime soon.

As a result of this thesis, the following proposals could be made which would remove some of this uncertainty, whilst ensuring that victims are protected. It is submitted that new legislation should be introduced providing that no exclusions can be used. It should not be left to the courts to interpret this area on a case-by-case (and often inconsistent) basis which is the current situation. Moreover, this new legislation should replace the current outdated **RTA 1988** (which is based on the **RTA 1934**). This new legislation would further remove the need for the **Insurance Act** or **CIDRA** to regulate exclusions in motor insurance which are further causing uncertainty.

New legislation would allow the UK to follow the EU's current approach. However, it should be recognised that the UK should not simply replicate the wording of **Article 13** of the Sixth Directive. This is because the Directive has caused confusion due to being comprised of a narrow list of prohibited exclusions rather than an overall approach of prohibiting all exclusions. Instead, the UK should

enshrine in legislation the EU's judicial approach in **Bernaldez**, **Csonka**, and **Fidelidade**, that all exclusion clauses are prohibited (except for the stolen vehicle exclusion) and that liability is with the insurer and not the Bureau. This would remove any uncertainty whilst ensuring a high level of protection and compatibility with the EU's approach.

Moreover, EU law should be mirrored in relation to the MIB, which cannot use exclusions. It is clear that the MIB Agreements, as found in Chapter Seven, are not watertight, potentially allowing victims to fall through the gaps in protection. The effect of Brexit on third party claims both in the **RTA 1988** and the MIB Agreements is uncertain. It is finally submitted that Brexit should not be used to further reduce protection offered to victims, any reduction in protection, it is submitted, would undermine the purpose of motor insurance and could cause significant injustice.

Appendix

Questions from the First Interview with the MIB

Part I: Claims

1. (a) How many claims do you receive yearly? And (b) how many out of those claims are accepted?

2. What is the greatest basis in which claims are declined?

3. (a) Are fraudulent claims a big issue for the MIB? And (b) How many fraudulent claims do you estimate that you receive yearly?

4. Do you believe that your agreements are user friendly?

Part II: European Union

5. I am sure you are aware of the *Delaney v Secretary of State* Case awaiting appeal; do you think that Clause 5 of the MIB agreement which specifies that liability is excluded in 'furtherance of a crime' breaches European Union Law?

6. Do you believe that the exclusion clauses in Clause 6 are fair and reasonable?

7. What is your view as to the opinion that the concept of the 'Article 75' insurer is illegal under European Union Law?

8. (a) Do you take the view that it is not permissible for insurers to exclude liability in any circumstances where a third party has been injured? (b) What is the MIB's view of the *Bernáldez* decision, which appears to indicate that exclusion clauses are not permitted?

9. Do you believe that the MIB agreements currently conform to European Law?

10. Do you believe that the MIB should continue to compensate where the third party contributes to the accident or knowingly accepts and increased risk (such as where the driver is drunk)?

11. How do the MIB approach claims whereby the driver commits an illegal act? (Such as intoxication or deliberately caused damage)?

12. Do you believe that the MIB agreements and the Road Traffic Act correctly balance the needs of society and commercial interest? And why?

13. Will the MIB's agreements change in light of the Vnuk Judgment?

14. Do you believe that the MIB has a 'good' relationship with other Bureaus?

The future

15. What reforms do you see in the future?

16. How would you further reform this area of law?

17. What are the greatest challenges facing the MIB in the future?

Questions for the MIB Interview Two

1. What do you envisage the likely effect of Brexit on your Agreements to be?

2. What is the rationale behind the introduction of the MIB Agreement in 2015 and why amend it again in 2017?

Specifically, why remove the following exclusion clauses? Removing provisions on Conditions Precedent to MIB Obligations in the 1999 Agreement, the exclusion clauses under Article 6 of the 1999 Agreement and the terrorism exclusion from the 2015 Agreement.

3. Would it be possible for you to tell me the number of MIB claims that are denied

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