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PERSONAL INJURY CASE LAW UPDATE

MIB AS AN EMANATION OF THE STATE MUST COMPENSATE FOR OFF-ROAD USE BY UNINSURED DRIVER - IAN HUFFER AND TOBY SASSE DISCUSS *LEWIS v TINSDALE AND MIB [2018 EWHC 2376]*

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Whilst the outcome of decision of Mr Justice Soole in Lewis v. Tindale, MIB and Secretary of State for Transport [2018] EWHC 2376 (QB) may not have come as a surprise to practitioners in the light of the European Court decision in Vnuk[1], it has highlighted again the wholly unsatisfactory state of this important area of road traffic and insurance law.

Mr Lewis was injured whilst walking on private land by an uninsured 4 x 4 motor vehicle driven by Mr Tindale. He brought a claim against Mr Tindale whose liability for the accident was not in issue and against the MIB (under the Uninsured Drivers agreement). A 'Francovich' claim[2] against the Third Defendant, the Secretary of State, alleging failure to implement the Directive was stayed pending resolution of the claim against the MIB.

The MIB argued successfully that because Mr Lewis' injuries were not sustained on a "road or other public place" (section 145(3) Road Traffic Act 1988), it was not a liability that Mr Tindale was required to be compulsorily insured against and therefore not one the MIB was required to satisfy under the Uninsured Drivers' Agreement. The judge rejected the argument that section 145 could be purposefully interpreted to reflect the wording of the Motor Insurance Directive (the 'Marleasing' principle[3]) to include 'on private land' as to do so would "go against the grain and thrust" of the Act.

However, the MIB was unsuccessful in its other submissions that it was not a liability that it was required to satisfy under article 3 of the Motor Insurance Directive which provided for a compulsory insurance obligation in respect of use of motor vehicles on 'land'.

The judge accepted the Claimant's submission that article 3 of the Directive gave him a right to be compensated for the accident irrespective of whether the vehicle was on private land. There was a failure in UK domestic legislation to implement this right to make it compatible with the Directive and, as it was directly effective between the individual and the state, it could be enforced against the MIB as an "emanation" of an EU member state. The decision of the European Court of Justice in Vnuk and subsequent cases[4] made it clear that the compulsory insurance obligation extended to vehicles used on private land and the decision in Farrell v Whitty[5] where the

1 Vnuk v Zavarovalnica Triglav, September 4 2014, C-162/13 .
2 A claim for damages against government for a Claimant's loss consequent on their failure to implement EU law.
3 When a national court interprets a provision of national law it is required to do so as far as possible in the light of the wording and the purpose of the community law in order to achieve the result sought by community law.
4 Rodrigues de Andrade v Salvador and others, November 28 2017, C-514/16; Torreiro v AIG Europe Ltd (C-334/16).
5 Farrell v Whitty (No 2), C-413/15.

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Motor Insurance Bureau in Ireland was categorised as an emanation of the Irish State, was applicable to the UK.

The outcome confirms what practitioners have been aware of for some time that the law in this area remains unsatisfactory. Whilst the MIB has obtained permission to appeal, in my opinion, the underlying conflict between domestic and EU law can now only be satisfactorily resolved by government. It is over four years since Vnuk and, despite the Roadpeace[6] case where the government conceded that it had failed to implement the Motor Insurance Directive properly, they have still not brought forward proposals to amend the domestic law on motor insurance. It seems likely that nothing will now happen for some time because of the wider issues of harmonisation that are required to be addressed in the Brexit negotiations.

Mr Lewis' Francovich claim against the government was stayed but, given the outcome of the case, it will not now be necessary for Claimants in a similar position to consider that route to recovery. For the foreseeable future, this case confirms that the MIB will have to compensate Claimants injured by motor vehicles negligently driven by uninsured drivers on private land.

It should also be noted that Vnuk applies the broader definition of motor vehicle found in the Motor Insurers Directive ("any motor vehicle intended for travel ….by mechanical power…not running on rails") whereas the Road Traffic Act 1988[7] provides for a narrower definition of motor vehicle for which compulsory insurance is required. The Motor Insurers Bureau will thus also be faced with claims to satisfy judgments obtained against negligent uninsured drivers or riders of vehicles not intended for road use such as off-road quad bikes, scrambler motor cycles, Segways, large earth moving lorries[8], sit on lawn mowers, golf buggies and fork lift trucks. The uncertainty will continue for a while longer.

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6 Roadpeace v Secretary of State for Transport & MIB [2017] EWHC 2725. An unsuccessful Judicial review brought by Roadpeace requiring the Secretary of State to bring UK law on compulsory insurance in line with the CJEU by Marleasing interpretation or setting aside the legislation.

7 Section 185 - "a mechanically propelled vehicle intended or adapted for use on roads".

8 Lewington v MIB [2017] EWHC 2848. Decided by Marleasing interpretation.

TOBY SASSE

Summary
In a significant first instance decision Soole J has departed from previous English authority and concluded that the MIB was an emanation of the state and thus required to compensate for injury caused by use of a vehicle off-road as required under EC Directive 2009/103, although not a requirement of compulsory insurance under the Road Traffic Act 1988 nor covered by the Uninsured Driver's Agreement (UDA).

Brief Facts
Mr Lewis was struck by a vehicle driven into a field in pursuit of thieves. The driver was uninsured. The MIB argued that, as a private entity acting in accordance with the terms of contractual arrangements entered into with the Government, it could not be held liable to provide compensation under the Uninsured Driver Agreement (UDA) for a use not covered by compulsory motor insurance prescribed under s.145 of the Road Traffic Act 1988 to which the UDA was limited.

The Claimant sought to argue that the MIB was liable on three bases, namely:

i) that as the driver had used public roads to reach the field where the incident occurred his use of a vehicle included use on a public road so as to found liability [*causation*].
ii) alternatively, the Court should read into the language of s.145 the requirement of Directive 2009/103EC for insurance to cover use on private land, (**Vnuk v Zavarovalvica Triglav d.d.(C162/13)**). [*purposive interpretation*]
iii) that the MIB being the entity by which the state discharged its obligations under EC law prescribed in directive EC 2009/103, which obligations were of **direct effect**, the MIB was an **emanation of the state** and as such compelled to compensate the Claimant to at least the minimum level of compensation (1m euros) provided under that directive. [*direct effect liability*]

The court rejected the first two arguments.

Causation: The judge found that the use of the relevant vehicle on public roads, before it was deliberately driven off the road for some distance and ultimately into a private field, was merely part of the background to the use giving rise to the injurious event and not directly connected in terms of causation. In doing so he affirmed two earlier English cases[1] and declined to accept that **Vnuk (supra)** and **UK Insurance Limited v Holden [2017] 1 AER 199**[2] had the effect of sweeping away the previous binding case law as to the causal proximity link.

Purposive Interpretation: The judge rejected an argument that the principle of purposive interpretation required in approaching law derived from the EU (see **Marleasing SA v La Comercial Internacional de Alimentation SA [1990] ECR 1-4135**) could be applied to read ss.143 and 145 of the Road Traffic Act 1988 as applying to use on private land (as European Court of Justice, CJEU, case law including **Vnuk** clearly established the directive as doing) as to do so "ran against the grain" of the statutory provisions, would expose the court to policy ramifications it was ill-placed to assess, and would give rise to potential retrospective criminal liability .

Direct Effect and MIB as an emanation of the state.

The Claimant's third argument was that the relevant provisions of the Motor Insurance Directive (MID) 2009/103 were "directly effective,"

1 Inman v Kenny [2001] EWCA 35, Clarke v Clarke [2012] EWHC 2118 (QB).
2 Under appeal to Supreme Court.

that is they were effective immediately upon coming into force as against a given member state, without need for prior implementation by that member state or an emanation of it[3]. The essential ingredients for a directly effective provision[4] are that its subject matter is unconditional and sufficiently precise. The MIB disputed that the relevant terms of the Directive were unconditional or sufficiently precise but required implementation through the terms of the UDA. It also challenged that MIB could be held liable as an emanation of the state.

In a previous case[5] both the Secretary of State for Transport and the MIB had recently conceded the directly effective character of the relevant articles of the 2009/103EC. In **Farrell v Whitty No.1** (see note 4) the CJEU made clear, in a reference by the Irish High Court, that the relevant article of a previous Directive in identical terms (to Article 3 of the 2009 directive) was directly effective, whilst reserving the issue of the status of the MIBI (the Irish MIB) for the national court to decide. Despite MIB arguments (highlighting the range of provisions which were implemented in the UDA but unspecified in the Directive and the uncertainties which had from time to time previously prevailed as to the interpretation of the Directive regarding for example the scope of the term "use of a motor vehicle") the judge concluded the previous concession of direct effect in the **Roadpeace** case was correct. In particular while the Directive may have left it to the member state to set up its own compensating entity, the directive was explicit as to the result to be achieved and hence was unconditional, not merely stating an objective or framework to be fleshed out. He rejected the argument that the existence of previous, now superceded, interpretations of the provision's meaning evidenced uncertainty, highlighting the familiar logic that the legal meaning of a provision is always certain, but may not have been known until definitively interpreted.

The judge then dealt with the status of the MIB as an emanation of the state.

The MIB contended that it was a private entity set up under contractual arrangements between itself, its members and the Secretary of State and was governed by normal legal rules applicable to all citizens. As such it could not meet the test[6] for an emanation of the state laid down by the CJEU in Foster v British Gas plc[7]. That was the decision of Flaux J in Byrne v MIB [2009] QB 66 (untouched in the Court of Appeal on this point). He held that the second and third limbs of the test were not met (i.e. not controlled by the state and without special powers not applicable between individuals). In so deciding Flaux J cited the judgement of Hobhouse LJ in **Mighell v Reading**[8] where he explicitly concluded that MIB was not an emanation of the state but a private law company. His judgement on this point was not a binding part of the ratio as the other Judges did not find it necessary to decide that issue, despite being in apparent agreement.

However, in Farrell (No.1) supra, the Irish High court then concluded that the MIBI was an emanation of the state. Soone J observed that Waller LJ had commented on this decision

3 Becker v Finanzamt Munster-Innenstadt [1982] ECR 53.
4 See Farrell v Whitty No.1 [2007] 2CMLR 1250 at 37.
5 R (Roadpeace) Ltd v SS for Transport [2018] 1WLR 1293.
6 namely that i) the entity performs a public service, ii) it is under the control of the state, and iii) it has special powers beyond those which result from the normal rules applicable between individuals.
7 [1991] 1QB 405
8 [1999] Lloyds Rep IR 30.

in the course of another English case[9] that it was "*difficult to think that a body such as the MIB or its equivalent should be an emanation of the state in one member country but not in another.*"

Critical to the decision in Lewis was the outcome of a further reference to CJEU in **Farrell v Whitty (No.2) [2018] 3 WLR 285**.

The CJEU ruled, firstly that the elements of the test of an emanation of the state were disjunctive, so that provided the body in question was discharging a public service, and held special powers for that purpose, that would suffice, whether or not it was "controlled by the state".

The CJEU further ruled that where the member state causes the establishment of a body, even one governed under private law, to perform the function imposed on the member country that body was discharging a public service and further the role of that body was to remedy what would otherwise be a failure of the member state to discharge an important obligation under EU law.

The CJEU considered that the provisions in the Irish road traffic statute, which made membership of the MIBI compulsory for any provider of motor insurance, conferred special powers on the MIBI, not available between individuals, sufficient to qualify it as an emanation of the state.

The CJEU therefore concluded that the MIBI was an emanation of the Irish state for this purpose.

MIB was set up for the explicit purpose of giving effect to the UK's obligations under the Motor Insurance Directives. The parties before the court in Lewis v Tinsdale agreed that there were no material differences in i) the structure of the MIB and MIBI, ii) in the terms of the agreements in each case, or iii) in the relevant statutory provisions taken as a whole, to distinguish those national bodies.

Despite this the MIB sought to argue that the CJEU had exceeded its remit in purporting to determine whether the MIBI was an emanation of the state, which conclusion was a matter for the national court, and as such, whilst persuasive, the reference was no more authoritative than that.

MIB then sought to persuade the Judge that, as the UK had not delegated to it power to compensate victims of vehicles used on private land, so the MIB could not be said to have been entrusted with this public service at all; nor was it given special powers, but that in keeping with the decision in **Byrne** and the Court of Appeal's approach in **Mighell** the power to demand payment of a levy from its members was a straight forward private law provision. Even if the power to compel membership was a special power, the MIB argued that this did not extend to those who insured activities on private land, and that the MIB levy fell only on those insuring against use on the public road (and other public places), so the MIB could only address the duty to compensate those classes of victim and was not an emanation of the state for the purpose of compensating other classes of victim (whereas in Farrell the MIBI had been delegated the relevant power to compensate but the power had been defectively defined).

Soone J dealt succinctly with each of these points in holding that the MIB is an emanation of the state. He accepted that, whether or not CJEU had overstepped the limits of a reference, its guidance on whether such a contractual body could be an emanation of the state superceded the reasoning in **Byrne** and **Mighell**,

9 McCall v Poulton [2009] 1 CMLR 45 @ 47-48.

that there was nothing to distinguish the positions of the MIB and MIBI and that in both instances the state's failure was one of defective implementation of the Directive as opposed to non-delegation by the state.

Comment

The result appears to be an inevitable recognition of the ongoing effect of the clear and broad CJEU interpretation of Article 3 of the directive as applying to injury arising from use of a vehicle regardless of location identified in Vnuk. The judge left open the issue of whether the claim was limited to the minimum level of compensation mandated under Article 9 of 2009/103 (namely 1 million euro) or whether in accordance with another established principle of EU law there should be equivalence of treatment with other claimants compensated under the scheme (entitled to unlimited damages pursuant to ss.143/145 of the Road Traffic Act 1988). It is understood that the Claimant intends to pursue this argument. The decision opens the door to other direct claims against the MIB in respect of further identified aspects of defective implementation of the MID in both the UDA and the recently revised Untraced Driver's Agreement.

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