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)

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Introduction

It is well established that the Council Directive 2009/103/EC [1]on motor insurance (the Directive) imposes the obligation on member states to ensure that persons sustaining loss or injury caused by the use of a motor vehicles, wherever registered in the Community, are guaranteed the recovery of their compensatory entitlement under law. Furthermore, it is the responsibility of member states not only to implement that law but to make sure that none of its domestic laws and provision undermine the effectiveness of the Directives' legislative aims[2]. It is also trite law that a directive is only binding as to the result to be achieved[3] and that they do not generally have direct effect and so cannot be relied on in national courts in disputes between private individuals. The basic premise is that citizens depend on their member state transposing a directive into its domestic law provision to assert the rights conferred on them through it. To properly implement a directive member states must ensure that the legal rights conferred are sufficiently precise and clear and that individuals are made fully aware of all their rights and, where appropriate, that they can rely on them before the national courts[4]. Unfortunately, the United Kingdom's (UK) implementation is incomplete and its domestic transposition is often misleading.

This paper focuses on two particular aspects of the Directive: namely the third party motor insurance obligation, imposed under art 3 and the provision for authorised compensating body for victims of unidentified and uninsured vehicles under art 10. It will begin by summarising the minimum standard of compensatory protection imposed by the Directive for third party victims of motor accidents, explaining how this has evolved into a widely scoped protective principle. It will then briefly outline the UK's domestic transposition of this law. A comparative law analysis is then offered of some of its provisions to indicate the nature of the gaps in protection that span the UK's entire national law transposition of the Directive, before moving on to the various ways in which these infractions are being challenged. Finally, it will consider some emerging issues in this dynamic area of the law and whether the Directive is capable of having direct effect against an art 10 authorised body.

The Directive

The Directive creates the legal framework for ensuring that persons injured or suffering loss caused by the use of a motor vehicle, wherever registered in the Community, are guaranteed that they will either be able to recover their full compensatory entitlement from the responsible vehicle's insurers or, failing that, from the relevant authorised compensating body set up in each member state for compensating victims of uninsured or unidentified vehicles. These legislative objectives have an important role in furthering the European Union's policy of promoting the free movement of persons, goods, services (and implicitly, vehicles) within the European Union. The Directive does not seek to alter the domestic laws and rules relating to civil or criminal liability.

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[1] Council Directive (2009/103/EC) 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. Official Journal L 263 , 07/10/2009 P. 0011 – 0031

[2] Case C 537/03 *Candolin* [2005] ECR I 5745, para 17

[3] Article 288 of the Treaty on the Functioning of the European Union 2012/C 326/01

[4] Case C-63/01 *Evans v Secretary of state for Transport and the Motor Insurers Bureau* [2003] para 35 referring in turn to Case C-365/93 *Commission* v *Greece* [1995] ECR I-499, para 9, and Case C-144/99 *Commission* v *Netherlands* [2001] ECR I-3541, para 17

An evolving legislative scope

The Directive consolidates five earlier directives and it is the product of an evolving policy to facilitate the free movement of people and vehicles.

First tentative steps

The process began with the Council Directive 72/166/EEC (the First Directive) which first set out in broad terms the obligation to take out civil liability insurance for motor vehicle use within the relevant territory of each member state. This measure, which survives as art 3 of the (sixth) Directive, had relatively limited ambitions.

Article 3 of the First Directive provided:

> *1. Each Member State shall, subject to Article 4, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures.*
> *2. Each Member State shall take all appropriate measures to ensure that the contract of insurance also covers: - according to the law in force in other Member States, any loss or injury which is caused in the territory of those States;*

Article 1 defined a '*vehicle'* as:

> '*any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled*'

Article 3 cover was restricted to personal injuries, initially.

The First Directive also required member states to designate a national guarantee fund to be set up for each member state, to (i) facilitate the free movement of people and vehicles throughout the European Community (by discarding the need to display a green card and to take out separate cover to driver abroad within the EC) and (ii) facilitate the compensation of victims in cross border claims within the European Union.

The UK was at this stage arguably ahead of the game, so to speak, in its national law provision for guaranteeing the compensatory entitlement of victims of road accident. Compulsory insurance had been in force since 1930 and the first Uninsured Drivers Agreement dated back to 1946.

Unfortunately the First Directive provided a wide margin of discretion on member states as to how its legislative objective was implemented both in form and substance. This resulted in considerable disparities in the levels of protection between the different member states in a number of areas. For example, there was no attempt to regulate the terms of cover, such as contractual preconditions relating to the state of health of the user, the use to which the vehicle could be put, exclusion clauses, financial restrictions nor the amount of cover or the amount of any excess.

Some member states allowed insurers to exclude liability for passengers, others, excluded liability for passengers who were also family members. Yet others restricted the insurance requirement to the seating area of vehicles, excluded any third party cover where the driver at fault was intoxicated or restricted the minimum amount of the indemnity to paltry amounts.

The Second Directive

As these variations were perceived as undermining the effectiveness of the legislative aims of this legislation, the Second Council Directive 84/5/EEC (the Second Directive) had three principle aims in this regard. The first being to impose a degree of conformity in the amount of cover and the second to restrict the ability of the contracting parties (the insurer and policyholder) from excluding their liability to the third party victims. A third was to require each member state to approve or institute a compensating body responsible for meeting the claims of victims of uninsured and unidentified drivers.

As to the first aim, art 1 extended the third party cover to embrace property damage[5] and it imposed minimum financial levels of cover and set a limit on the policy excesses[6]. Article 2(1) was drafted in very specific terms to nullify the effect of certain types of exclusion clause[7], as follows:

> '*Each Member State shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3(1) of Directive 72/166/EEC, which excludes from insurance the use or driving of vehicles by:*
>
> - *persons who do not have express or implied authorisation thereto, or*
> - *persons who do not hold a licence permitting them to drive the vehicle concerned, or*
> - *persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned,*
>
> *shall, for the purposes of Article 3(1) of Directive 72/166/EEC, be deemed to be void in respect of claims by third parties who have been victims of an accident*.'

The same provision continued by specifying a single permitted exclusion of liability[8]:

> '*However the provision or clause referred to in the first indent may be invoked against persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen*.'

This produced a degree of ambiguity. The natural implication of a finite list of exclusions that are deemed void against a third party is that any other exclusion, no so excluded, is prima facie permitted. In which case, why was there any need to allow for the specifically permitted exclusion? The enigma was only partially addressed within the prefatory recitals, of which the following is particularly noteworthy:

> '*Whereas it is in the interests of victims that the effects of certain exclusion clauses shall be limited to the relationship between the insurer and the person responsible for the accident; whereas, however, in the case of vehicles stolen or obtained by violence, Member States may specify that compensation will be payable by the aforementioned body*;'

Article 3 provided that 'members of the family of the insured person, driver or any other person who is liable under civil law' should not be excluded from cover in respect of their personal injuries solely on account of that relationship.

The third measure was to require the authorisation of a compensating body in each member state. Article 1 provided the following:

> '*4. Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied ...*
> *The victim may in any case apply directly to the body which, on the basis of information provided at its request by the victim, shall be obliged to give him a reasoned reply regarding the payment of any compensation.*
> *However, Member States may exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured.*
> *Member States may limit or exclude the payment of compensation by that body in the event of damage to property by an unidentified vehicle.*
> *...*
> *Furthermore, each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by this body, without prejudice to any other practice which is more favourable to the victim*.'

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[5] Property damage is now incorporated into the definition of insurance within the art 3 of the Directive.
[6] Third party excesses were subsequently abolished by the Fifth Directive, save in relation to a claim in respect of an unidentified vehicle where the compensating body can apply a property damage excess of EUR 500 where it cannot exclude such loss entirely under art 6. This provision survives in art 10.3 of the Sixth Directive.
[7] This survives as art 13.1 of the Directive.
[8] This is also included in art 13.1.

It is now well established that the compensating body's role is governed by the European law principles of equivalence and effectiveness. The principles require that proceedings to ensure the legal protection of rights which individuals derive from Community law must be no less favourable than the rules governing similar domestic actions and nor must they render virtually impossible or excessively difficult the exercise of such rights.

This was specifically considered by the Court of Justice in relation to the UK's compensating body in *Evans v Secretary of state for Transport and the Motor Insurers Bureau*[9] where the court ruled:

> ' [27] *It is thus clear that the Community legislature's intention was to entitle victims of damage or injury caused by unidentified or insufficiently insured vehicles to protection equivalent to, and as effective as, that available to persons injured by identified and insured vehicles.* '
> ...
> ' [34] *The fact that the source of the obligation of the body in question lies in an agreement concluded between it and a public authority is immaterial, provided that that agreement is interpreted and applied as obliging that body to provide victims with the compensation guaranteed to them by the Second Directive and as enabling victims to address themselves directly to the body responsible for providing such compensation.'*

On the equivalency principle, the Court ruled that the compensating body did not necessarily have to be on the same footing as a defendant of an identified and sufficiently insured vehicle. It remains to be seen how the introduction of the art 18 direct right has altered this, as it now offers a direct procedural comparator that did not exist at the time of the Evans ruling.

It is also worth noting that the Second Directive sets out the only two permitted exceptions[10] to the obligation to protect and guarantee payment of the compensatory entitlement of accident victims. Both exceptions (one restricted to the insurance policy, the other to the compensating body's duty to compensate) are restricted to passengers who bear a high degree of responsibility for their loss by agreeing to ride in a motor vehicle either in the knowledge that it has been stolen or that it is uninsured.

The Third Directive

It is clear from the recitals to the Council Directive 90/232/EEC (the Third Directive) that the First and Second Directives still allowed too wide a discretion for member states to introduce their own idiosyncrasies. This directive continued the work of its immediate predecessor in restricting the discretion of individual member states to restrict or exclude liability.

In its third recital it acknowledged the fact that considerable disparities existed in the insurance cover provided for under different member states' national law. Its fifth recital went on to declare the following aim:

> '*Whereas there are, in particular, gaps in the compulsory insurance cover of motor vehicle passengers in certain Member States; whereas, to protect this particularly vulnerable category of potential victims, such gaps should be filled*.'

In its sixth recital it declared an objective of removing any uncertainty as to the geographic scope of insurance policies required by art 3 of the First MVID; cover should not be restricted to the territory of individual member states.

In its thirteenth recital it explains its objective of extending the mandatory cover to all passengers in terms of providing '*a high level of consumer protection'*. This indicates that, by this stage at least, directives were now

[9] [2003] Case C-63/01.

[10] Whilst these are the only permitted exclusions of any liability, certain restrictions in liability are allowed by the directives, such as (i) financial limits exceeding the minima prescribed by art 2 of the Second Directive as updated by art 1 of the Fifth Directive (now set out in art 9 of the Sixth Directive) and (ii) the property damage exclusion permitted to the compensating body in respect of unidentified vehicles by art 1.4 of the Second Directive, as amended by art 2 of the Fifth Directive that removed this exclusion where a significant injury had been sustained in the accident, which now survives in art 10.3 of the Sixth Directive.

perceived not just only providing protection for accident victims but also consumer protection to the individual citizens that purchased the third party motor insurance cover required by art 3 of the First MVID.

Article 1 of the Third Directive provides:

> '*Without prejudice to the second subparagraph of Article 2(1) of Directive 84/5/EEC, the insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle*.'

The recitals to the Second Directive set out two important underlying principles:

> (i) to ensure the free movement of vehicles normally based on territory of the Union, as well as the people on board and
> (ii) to ensure that that accident victims caused by those vehicles receive comparable treatment.

These first three directives introduced the concept of a European wide requirement for third party motor cover and then proceeded to harmonising some of this provision across the different member states by locking down the ability of individual member states to allow their own limitations, exclusions and restrictions in the compensatory protection afforded to third party victims. Their effect was to oblige all motor vehicles in the European Community to be covered by compulsory third party insurance and ensure the abolition of border checks on insurance so that vehicles can be driven as easily between Member States as within one country. They also progressively enhanced the compensatory safeguards for victims of accidents, including those caused by unidentified or unidentified vehicles. All passengers in the vehicle (including the family of the driver) were expressly required to be covered by compulsory insurance.

The Fourth Directive

Council Directive 2000/26/EC (the Fourth Directive) established mechanisms to increase the speed with which claims are settled for accidents in any given Member State involving a victim who is a citizen of another Member State ("visiting victims"). This complements the first three Directives and ensures that local victims should be compensated for accidents where the responsible party is from another Member State.
Recital 27 introduced the first mention (omitted from the first three MVID) of subrogated claims. It provides that subrogated parties (e.g. other insurance undertakings or social security bodies) should not be entitled to present the corresponding claim to the compensation body. There is no corresponding provision in the operative part of the Fourth MVID. It is unclear whether this applies only to the direct right conferred under the Fourth MVID or generally; quite possibly the latter. The provision is incorporated in the Sixth MVID as recital 49.

Article 18 conferred a direct right of action against the responsible party's motor insurers. This was transposed into UK law by the European Community Rights Against Insurers Regulations 2002.

The Fifth Directive

The Council Directive 2005/14/EC (the Fifth Directive) increases the minimum compensatory levels and it extends the right of direct action provided for by the Fourth Directive to all injured victims, whether the accident occurs at home or abroad in a foreign EU or EEA member state..It also amended the Third Directive by inserting the following provisions:

> '*Member States shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy which excludes a passenger from such cover on the basis that he knew or should have known that the driver of the vehicle was under the influence of alcohol or of any other intoxicating agent at the time of an accident, shall be deemed to be void in respect of the claims of such passenger.*
> *'The insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover personal injuries and damage to property suffered by pedestrians, cyclists and other nonmotorised users of the roads who, as a consequence of an accident in which a motor vehicle is involved, are entitled to compensation in accordance with national civil law. This Article shall be without prejudice either to civil liability or to the amount of damages*.'

Consolidation not rearticulation

One of the problems with the present form of the (Sixth) Directive (2009/103/EC), is that it is essentially a reassemblage of is five predecessors. Its core provisions are to be found in art 3 which repeat the insurance obligation[11] from the First Directive and art 10 that defines the role of the authorised body responsible to compensating victims of uninsured and unidentified vehicles[12]. One must look to art 9 for the minimum levels of cover[13]; art 12 for the wide and inclusive categories of passenger and '*other road users*' covered by the protective principle[14]; art 13 for the permitted and void exclusions[15] and finally art 18 for the direct right of action[16]. This approach has perpetuated certain differences of emphasis and terminology, such as the retention of potentially restrictive terms introduced in the later Directives such as 'accident' or 'road' that were absent from the First. Certain other provisions, particularly the list of exclusions deemed void against third party victims in art 13 and the clarification of to the inclusive nature of the categories of third party victims subject to the protective principle in art 12 - now appear rather anachronistic if not entirely redundant in the light of the Court of Justice rulings interpreting the meaning and scope of the protective purpose.

A purposive interpretation

The Directive cannot be properly understood without an appreciation of to the extent to which its legislative objectives have evolved and then been further enhanced by the Court of Justice's purposive interpretation. Three judgments are of particular importance.

Bernaldez

The first landmark ruling was in *Ruiz Bernaldez,*[17] nearly two decades ago. That case featured a claim where a drunk driver crashed his car in Spain causing extensive property damage. A civil award of damages was made within the prosecution proceedings that followed. The driver sought indemnity from his insurers. However, the vehicle's insurance policy excluded cover where the driver was intoxicated and this was permitted under the national law. At first instance, his insurers were absolved from any liability to indemnify the policyholders' accident damage and so the third party was unable to look to the motor insurers to recover their loss.

That decision was appealed and the case was referred to the CJEU for guidance. It will be recalled that art 2(1) of the Second Directive expressly provided that certain specific exclusions of liability were void as against a third party claimant. It also set out the single instance where a policy exclusion is permitted by the Directives: namely where the insurer can prove that the passenger knew that the vehicle is stolen.
In essence, what the referring Court sought to establish in *Bernaldez* was whether the list of invalid policy exclusions set out in the Directive was exhaustive or illustrative. Put another way, were any other policy exclusions, not specifically made void by art 2(1), permitted by the Directives?

The Court ruled, as follows:

- Article 3(1) of the First Motor Vehicle Insurance Directive , as developed and supplemented by the Second and Third MVID, must be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all the damage to property and personal injuries sustained by them.
- That this interpretation precludes an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle.
- That the list of void exclusions merely serves to illustrate the comprehensive nature of the insurance requirement imposed by art 3(1).

[11] Originally conferred under art 3 of the First Directive.
[12] Originally conferred under art 1.4 of the Second Directive.
[13] Originally imposed by art 1 of the Second Directive
[14] Introduced under both the Third and Fifth Directives.
[15] Originally set out in art 2 of the Second Directive
[16] Introduced under the Fourth and Fifth Directives.
[17] [1996] CJEU (C-129/94) E.C.R. I-1829.

- That any other interpretation would have the effect of bringing about disparities in the treatment of victims depending on where the accident occurred, which is precisely what the directives intend to avoid.
- That this did not preclude the insurer pursuing a claim against its insured.

So according to *Bernaldez*, art 2(1) of the Second Directive did not confine the instance of void exclusions to those instances specifically listed[18]. Instead, the comprehensive nature of the insurance requirement imposed by art 3(1) of the First MVID was emphasised. The Court ruled that subject to the single instance of the stolen vehicle exception, insurers could not rely on a contractual or statutory exclusion of their liability to compensate a third party victim.

A raft of subsequent Court of Justice rulings have consistently and uniformly endorsed the general application of the comprehensive principle first propounded in *Bernaldez*. Its ratio has been followed and recited with approval in *Ferreira v Companhia de Seguros Mundial Confianca* SA[19]; *Candolin*[20] (where it was quoted from extensively); *Farrell v Whitty*[21]; and more recently in *Churchill v Benjamin Wilkinson and Tracy Evans*[22]. The case of *Farrell* is particularly significant in the way it resulted in the Irish Republic's compensating body[23] being held liable to compensate a victim of an uninsured driver in circumstances where the national law had failed to fully implement the art 3 insurance requirement. In the words of one English High Court judge, '*Farrell is the taking of the final short step - the express application of the comprehensive code principle to Article 1.4 cases*[24] *- left untaken in Candolin'*.[25]

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[18] Contrast this interpretation with that given by the UK Court of Appeal in EUI v Bristol Alliance Partnership in 2013, considered below under *The United Kingdom's transposition* / *Limitations in cover* headings.

[19] 2000 CJEU (Case C-348/98) ECR 1-6711. In *Ferreira* the Court of Justice ruled (i) that a Portuguese law that allowed liability to be apportioned to take account of the responsibilities of the parties involved did not infringe the protective principle of this insurance obligation as the legislation did not aim to harmonise national civil liability law, (ii) that an exclusion from cover of passengers who happen to be family members of the responsible driver is not permitted and (iii) that national laws cannot permit maximum levels of cover that fall below the minimum amounts prescribed by the Second Directive, now art 9 of the Sixth Directive.

[20] [2005] CJEU (Case C-537/03) ECR I-5745. *Candolin* featured a case where the responsible driver and all the other passengers were drunk and where it was established that they knew the driver to drunk. Under Finnish law the passengers culpable knowledge and conduct constituted gross negligence which allowed third party motor insurers to exclude them from recovering any compensation unless special circumstances justified a different outcome. The Court of Justice ruled that national provisions of member states which govern compensation for road accidents cannot deprive the directives on motor insurance of their effectiveness. Accordingly this precluded any national rule which allowed the compensation borne by the compulsory motor vehicle insurance to be refused or limited in a disproportionate manner on the basis of the passenger's contribution to the injury or loss he has suffered.

[21] 2007 CJEU (Case C-356/05). *Farrell* concerned a passenger claim that had been rejected by the Irish Republic's compensating body on the ground that as the victim was travelling in part of a van not designed to accommodate passengers. The Irish MIB claimed that it was not liable to compensate because the Irish legislation imposing compulsory third party insurance did not extend to that part of the vehicle. The Court of Justice ruled that the right to derogate from the obligation to protect accident victims is defined and circumscribed by the directives on motor insurance and that member states are not entitled to introduce additional restrictions to the compulsory insurance cover to be accorded to passengers under that Community law.

[22] [2011] CJEU (Case C-442/10). In *Churchill* the Court of Appeal in the UK was confronted by two competing statutory provisions in the Road Traffic Act 1988. Section 151(5) imposed a statutory duty on motor insurers to satisfy third party claims and S151(8) conferred on such an insurer a right to recover that outlay from its policyholder. The case featured a claimant who was both policyholder and passenger where it was established that he knew his driver was uninsured. Here the Court of Justice referred to *Bernaldez* and *Candolin* and ruled that the only situation in which a third party who has been a victim of an accident may be excluded from insurance cover is that specified in the second sub-para of art 2(1) of the Second Directive (ie where the passenger knew it was stolen – now set out in art 13 of the Sixth Directive). According any national rule that automatically excluded such a passenger from cover was not permitted.

[23] i.e. responsible to compensate victims of uninsured and unidentified vehicles under art 10 of the Directive.

[24] Article 1.4 of the Second Directive, now art 10 of the Sixth Directive.

[25] Jay J in *Delaney v Secretary of State for Transport* [2014] EWHC 1785 (QB), in which the UK Government was held liable under *Francovich* principles for permitting its compensating body to include an exclusion of liability that was not expressly provided for by Community law.

Vnuk

The second landmark judgment was delivered in September in *Damijan Vnuk v Zavarovalnica Triglav*.[26] Its significance derives from two aspects of the judgment, the first relates to the way it elevated the status of the protective purpose of the directives on motor insurance, the second is the holistic manner in which it defined the scope of the insurance obligation itself.

On the first point, the Court of Justice ruled that the Directives on motor insurance have a dual purpose, firstly of facilitating free movement of people and vehicles throughout the Union and secondly the protection of those affected by the use of motor vehicles. It went on to indicate that that the latter social policy aim was of equal importance to its twin objective. .

The case feature a Slovenian farmworker had been knocked off a ladder by a reversing tractor and trailer, whilst he was stacking bales of hay in a barn loft. The incident occurred in a farm yard on private property. The claim against the driver's motor insurers failed at first instance. It held that the duty to insure did not extend to the use of a motorised machinery. When he appealed the Slovenian Supreme Court referred the case to the Court of Justice of the European Union to determine whether the duty to insure 'the use of vehicles' within the meaning of art 3(1) of the First Directive on motor insurance covered the accident circumstances

The Court of Justice, after considering and explaining the importance of the protective purpose of the directives, proceeded to rule that the accident circumstances were capable of falling within the scope of insurance cover required under the directives. It also ruled that even though the tractor was being used as a piece of farm machinery and not to transport people, that use was covers by the motor insurance obligation, *which extended to 'any use of a vehicle that is consistent with the normal function of that vehicle'*

Prior to *Vnuk* it had been feared by some that the newly rearticulated provisions within the codifying Sixth Directive may have introduced an unwelcome inconsistency in the way it sets out the protection to be afforded to passengers and other especially vulnerable categories of victim set out in within art 12 (see under *Consolidation not rearticulation* above). This is because sub-para 3 of that article states:

> *'The insurance referred to in Article 3 shall cover personal injuries and damage to property suffered by pedestrians, cyclists and other non-motorised users of the roads who, as a consequence of an accident in which a motor vehicle is involved, are entitled to compensation in accordance with national civil law*.'

It is worth noting that the use of the term 'road' was not employed throughout the first three EU Motor Insurance Directives that introduced and developed the concept of compulsory third party insurance. It is arguable that art 12 is to be construed as amounting to no more than a non-exclusive illustration of the type of cover to be included within art 3, in much the same way that the list of void exclusions within art 13 has been held by the CJEU to be non-exclusive reaffirmation of art 3's predecessor.[27] In which case it would seem that the restrictive territorial scope of the third party insurance obligation under our National law conflicts with EU Community law. This issue has yet to be contested; still yet determined.

Csonka

Gábor Csonka v Magyar Állam[28] was a reference from the Hungarian government to the CJEU concerning a number of cases where ostensibly insured motorists found themselves personally liable for the claims arising out of the road accident that they had caused because their motor insurer, MÁV General Insurance Company, became insolvent[29]. The victims sought to recover their compensatory entitlement from the Hungarian art 10 authorised body. The Hungarian government wanted to know whether the directives were intended to confer a

[26] [2014] CJEU (Case C-162/13).
[27] *Ruiz Bernáldez* [1996] CJEU (Case C-129/94 [1996] ECR I-1829, para 21.
[28] [2014] CJEU (Case C-409/11).
[29] In the UK when an insurer becomes insolvent its liabilities are met - in full in the case of compulsory liability insurance - by the Financial Services Compensation Scheme under the Financial Services and Markets Act 2000. Independent Insurance and Quinn were covered by a similar scheme under the Policyholders Protection Act 1975.

complete long stop guarantee or whether (what is now the art 10 duty to compensate) was restricted in a way that would prevent recovery from their compensating body.

The Court ruled that a member state's obligation under (what is now art 3) is to ensure that the use of motor vehicles in its territory is insured against civil liability at least to the minimum levels required under the Directive. This had been complied with. The obligation of the compensating body to compensate under art 10 is confined to specific, clearly identified, sets of circumstances, namely to compensate a victim of motor vehicle use of '*a vehicle in respect of which no insurance policy exists*'. Clearly in the *Csnoka* case a policy of insurance did exist. The Hungarian compensating body was not therefore obliged to compensate victims of policyholders whose insurers have become insolvent.

The significance of this case lies in the fact that that the Court of Justice found it necessary to define the circumscribed role of the compensating body. In para 31 it stated:

> '*As regards the determination of the actual circumstances in which the insurance obligation laid down in Article 3(1) of the First Directive may be regarded as not having been satisfied, it is significant – as the Advocate General stated in point 32 of his Opinion – that the European Union legislature did not confine itself to providing that the body must pay compensation in the event of damage caused by a vehicle for which the insurance obligation has not been satisfied in general, but made it clear that that was to be the case only in relation to damage caused by a vehicle for which the insurance obligation provided for in Article 3(1) of the First Directive has not been satisfied, that is to say, a vehicle in respect of which no insurance policy exists*.'

This suggests that the art 10 compensating body is not intended to provide a catch-all fund to meet claims where some motor insurance is in place but it is inadequate to meet the risk that has eventuated. The compensating body's role is confined to situations where the vehicle responsible has absolutely no insurance in place at all or where an insurer has excluded liability to passengers who know the vehicle has been stolen and the insurers are able to prove this. The corollary of this is that provided the vehicle responsible for causing the third party victim's loss or injury has some insurance in place, then regardless of its contractual liability to its policyholder, its third party cover must be good for any use actually made of the vehicle.

Accordingly, insurers cannot use the compensating body, whether as a mutualised fund or otherwise, to compensate victims of insufficiently insured vehicles or in situations where they have cover in place notwithstanding that the policyholder is otherwise in breach of a policy term that would otherwise entitle the insurer to avoid the policy.

The implication of *Bernaldez* and *Csonka* combined, along with the new gloss bestowed on the protective purpose by *Vnuk*, means that the compensatory protection afforded to third party victims of motor vehicle use under art 3 of the Directive is a free-standing entitlement under European law. This is consistent with the recital considered above in the Second Directive[30], now incorporated in the Sixth Directive as Recital 15.

The culminating principles

When the Directive is read in the light of the underlying principles that feature in the *Bernaldez* and *Vnuk* judgments, its various provisions are capable of being distilled into the following simple propositions:

On the duty to insure and the third party cover required under Article 3

1. Third party cover must be good for:
    - Any motor vehicle conforming with the art 1 definition
    - Any use consistent with the normal function of the vehicle
    - Anywhere on land
2. The duty to insure and the scope of cover are coextensive
3. Member states have no discretion to introduce new restrictions, exclusions or limitations.
    - Only one exclusion of cover is permitted: this applies to passenger who voluntarily enters the vehicle knowing that it has been stolen.

[30] '*Whereas it is in the interests of victims that the effects of certain exclusion clauses shall be limited to the relationship between the insurer and the person responsible for the accident*.'

On the Compensating Body– Article 10

1. The compensating body has a strictly circumscribed role. It can only deal with:
    - Unidentified vehicle claims, or
    - Claims where no insurance in place at all
        - Subject only to the passenger exclusion that applies to someone who voluntarily enters the vehicle knowing that it is uninsured
2. It must compensate at least up to the level of TP cover requirement for identified insured drivers
3. It must apply EU law principles of equivalence and effectiveness

It follows from the above that whilst member states retain a relatively wide discretion as to how they choose to implement the Directive and it does not directly interfere with the autonomy of the insurer and policyholder, when it comes to the substantive law rights of third party victims there is very little, if any discretion, for member states to permit variations in what is now a highly prescriptive social policy aim of ensuring the compensatory entitlement of motor accident victims.

The United Kingdom's transposition

The UK's compensatory guarantee is currently delivered by a curious blend of closely interlinked statutory and extra-statutory provisions. The former consists of the statutory duty to insure the use of a motor vehicle on a road or other public place against third party liabilities under s 143 of the Road Traffic Act 1988 (RTA 1988) together with a corresponding statutory indemnity imposed on motor insurers to satisfy third party claims by s 151 of the RTA 1988.

The extra-statutory provision is contained in a series of agreements between the Motor Insurers Bureau (MIB) and the Secretary of State for Transport on behalf of the UK Government. There are separate schemes: the first is for victims of uninsured drivers (currently set out in the Uninsured Drivers Agreements 1999 and 2015 and the second if unidentified drivers (currently set out in the Untraced Drivers Agreement 2003 as amended by five successive supplementary agreements). The insurance industry's collective liability to meet these uninsured losses is a mutualised one: every authorised insurer contributes to a central fund that is managed by the MIB under its contractual arrangement with the Department for Transport. The MIB also investigates and settles individual claims under the Untraced Drivers Agreement 2003.

Antecedent origins

Compulsory third party motor insurance was introduced under Part II of the Road Traffic Act 1930, long before the UK accession to the European Community. The underlying objective of the 1930 legislation (including its sibling: the Third Party Rights Against Insurers Act 1930[31]) was as simple as it was compelling: to mutualise the financial hazard posed to private citizens from the risk of being injured by motor vehicles. The focus was on protecting victims; not policyholders, nor motor insurers[32].

A flawed execution

Two statutory provisions in the RTA 1988 lie at the heart of the UK national law provision for guaranteeing the compensatory entitlement of third party victims:

- The first of these are ss 143 and 145. Section 143 imposes on users of motor vehicles to insure against third party liability. Its sibling, s 145, defines the nature and scope of the third party cover required under s 143. These are original to the 1930 Act. These provisions bear a very close resemblance to the original 1930 wording[33].

[31] The provisions of the Third Party Rights Against Insurers Act 1930 are largely subsumed and enhanced by s153 of the 1988 Act and by the European Communities Rights Against Insurers Regulations 2002.
[32] This objective is clearly discernible from the 1930 Act itself, the early case law such as Lord Denning's judgment in *Hardy v MIB* 1964 2 All ER 587 and also Lord Hailsham's judgment *Gardner v Moore* [1984] A.C 548 and also from Sir Felix Cassell's 1937 report reviewing the national law provision in this area.
[33] Sections 35 and 36 of the Road Traffic Act 1930.

- The second duo, consist of ss148 and 151. These were an afterthought, introduced under sections 10 and 12 of the Road Traffic Act 1934. Section 148 lists of eight different types of exclusion of liability made ineffective against third party victims. Section 151 is an odd medley of different provisions but chief amongst these are (i) the insurer's duty to satisfy judgments in favour of third parties, (ii) a provision that expressly authorises insurers to exclude liability to passengers who know or ought to know that the vehicle in which they are riding was stolen or unlawfully taken, and (iii) two further instances where a breach of policy term is ineffective against third party victims.

What is not so readily appreciated is that the piecemeal way in which these provisions have evolved over the past 84 years has detracted the central social policy aim of protecting motor accident victims. Take for example, s 148 and 151, these were a stop gap measure. They were introduced in 1934[34] to address a fundamental flaw in the new regime: the lack of any free-standing direct right of action[35]. Unfortunately, they failed to address the underlying problem.

The Third Party Rule, a common law anachronism

Problems surfaced almost immediately the Road Traffic Act 1930 was implemented. Its legislative aim was compromised by common law rules that allowed insurers to avoid compensating third parties. This was achieved through the simple expedient of insurers (i) restricting their contractual liability to their policyholders and then arguing that the claim was not coved by the policy, and (ii) by refusing to settle claims direct, as the victims were non-contracting parties and the legislation did not confer a direct right on third parties.

These failings arose out of the common law rules on privity of contract under which the actionable benefits and burdens of a contract are generally confined to the contracting parties. So whilst a contract's performance may be intended to benefit a third party, the general rule was (and remains) that it cannot not be enforced by a third party[36]. This is usually referred to as the Third Party Rule.

The harsh effect of the Third Party Rule has long been criticised and a number of exceptions[37] have evolved but it was upheld by the House of Lords in 1915 when it ruled that it was a fundamental principle of English law that only a party to a contract who had provided consideration could sue on it[38]; and again in 1965[39]. As recently as 1983, Lord Diplock referred to the Third Party Rule as 'an anachronistic shortcoming that has for many years been regarded as a reproach to English private law', see *Swain v Law Society*[40].

A further difficulty with the Third Party Rule is that even where one of its exceptions apply, so as to enable a contractual benefit to be transferred to a third party, that entitlement is a subrogated one. In the context of a contract of insurance, the subrogated third party is deemed to stand in the insured party's shoes. The problem with this being that the transferee is generally entitled to no more than the transferor's contractual entitlement. Accordingly where an insurer has a contractual defence against its policyholder this will hold good against a subrogated transferee. As Harman LJ so aptly put it, in *Post Office v Norwich Union Fire Insurance Society Ltd*[41], '*One cannot ...pick out the plums and leave the duff behind*.'

It is interesting to note that the Third Party Rights Against Insurers Act 2010[42], which has been sitting in the wings for the past five years is expected to be implemented in the Autumn this year, perpetuates the policy of subjecting transferred rights to the same defences that the insurer had against its policyholder. The same

[34] In s 10 and 12 of the Road Traffic Act 1934.
[35] Except where the Third Party Rights Act 1930 applied to transfer an insolvent policyholder's rights.
[36] *Tweddlev Atkinson* (1861) 1 B & S 393.
[37] Not least being Lord Atkin's landmark tort law ruling in *Donoghue v Stevenson* [1932] AC 562 where the manufacturer of a ginger beer was liable to a non-contractual consumer; *Ross v Caunters* [1980] Ch 297 where solicitors were held liable to a beneficiary for not warning the testator about formal witnessing requirements, to a failure to draw up a will
[38] *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.
[39] *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446 (Lord Denning dissenting) note also and *Beswick v Beswick* [1968] AC 58 in which the House of Lords upheld the third party rule but then opened the door to the possibility of specific performance serving as a remedy for enforcing promises made contracts for a third party's benefit, where the third party rule would otherwise produce an unjust result.
[40] [1983] 1 AC 598, 611.
[41] [1967] 1 All ER 577.
[42] The 2010 Act continues the work of the Third Parties Rights Against Insurers Act 1930

doctrine applies to the European Communities (Rights Against Insurers) Regulations 2002[43] and it is expressly retained in s 1(4) of the Contracts (Rights of Third Parties) Act 1999 which for the first time provided victims' of uninsured and untraced motorists with a statutory right to enforce the benefits conferred under the MIB Agreements.

A wrong turn in 1934

Parliament reacted to the insurer challenges in the early 1930s with surprising speed. It passed a new Road Traffic Act 1934 to supplement the original scheme.

It is interesting to note from the official note of a Cabinet Office[44] meeting on 11 January 1934 recorded by the Minister for Transport (none other than Mr Leslie Hore-Belisha, who gave his name to the distinctive pedestrian crossing indicator), that the Government wanted the insurance companies to agree to the following amendments to the Road Traffic Act in 1934:

a. Right of action shall not abate on the death of the insured;
b. Where a certificate of insurance has been issued, purporting to cover the driver in the circumstances of any particular accident, it shall not be open to the insurer to repudiate liability on the ground of misrepresentation or non-disclosure in the proposal form;
c. Any condition in a policy to the effect that the insurer is not liable if the vehicle is driven when unsafe or damaged shall be void, so far as any third party is concerned who has suffered personal injury or death;
d. The injured party shall have a direct remedy against the insurer
e. As regards (b), (c) and (d), that there should be a right of recovery by the insurer against the insured.

Unfortunately the Government's will did not prevail. It is interesting to note that the proposals at (b), (c) and (d) appear to anticipate the European directive by several decades.

Section 10 of the 1934 Act imposed a new statutory duty on motor insurers to satisfy judgments 'notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy', (under what is now s 151 of the RTA 1988). This statutory duty was qualified by what is now set out in s 152 of the RTA 1988: requiring notice of commencement of proceedings; exempting policies surrendered before the event giving rise to the claim and also where the insurer has obtained a declaration that the policy is void for non-disclosure or misrepresentation of a material fact.

Section 11 of the 1934 Act shored up third parties rights against insurers by providing that the bankruptcy or insolvency of the insured party would have no effect on insurable liability under s 36 of the 1930 Act.
Whilst there is little that is intrinsically wrong with any of the above, the following measure contained a serious flaw. Section 12 listed eight types of policy restriction that are deemed to be void against a third party. This survives as a 148 (1) and (2) in the RTA 1988. Arguably, this particular provision was unnecessary, given the widely scoped wording of s10 and the anomaly of its complete absence in the Road Traffic (Northern Ireland) Order 1981[45]. According to Sir Felix Cassell's 1937 report[46], these contractual restrictions and exclusions had all been previously upheld against third party victims. It seems plausible that far from attempting to limit the scope of protection to third parties, the aim of s 12 had been to shore up their protected status under the newly coined direct right under s 10 by overturning those decisions.

Unfortunately, the necessary implication of the s 12 wording is that by providing a finite list of nullified restrictions, it made it possible to argue that all other policy limitations and exclusions, not so nullified, remained effective against a third party and serve as an effective bar the new statutory remedy under s 10.

[43] See reg 3(2) ... 'that insurer shall be directly liable to the entitled party to the extent that he is liable to the insured person'.
[44] Mr Matthew Channon, research Phd student at the Faculty of Law in Exeter, is thanked for supplying the author with the relevant papers.
[45] The 1981 Order is designed to replicate in Northern Ireland our national provision for compulsory third party insurance.
[46] *Board of Trade report of the Committee on Compulsory Insurance*, 1937 [Cmd. 5528]

It soon became apparent that instead of providing for a new independent statutory right to compensation (free from any contractual restrictions or exclusions), Parliament had instead sanctioned a qualified entitlement. This exposed third party victims to the vagaries of the insurer / policyholder relationship; a matter over which they had absolutely no knowledge or control.

When Sir Felix Cassell's reviewed these arrangements in his 1937 report he identified this failing and he recommended that s 12 be replaced by a short list of permitted exclusions[47]; the default position being that no other restrictions or exclusions should be effective against a third party. Unfortunately, his recommendations were not adopted.

A very British muddle

Our modern domestic law provision for guaranteeing third party compensatory protection is set out in Part VI of the RTA 1988 and the Uninsured Drivers Agreements 1999 & 2015 and the Untraced Drivers Agreement 2003.

These measures are an eclectic mix of different statutory and extra-statutory initiatives, each developed and refashioned in response to various discrete issues and bolted on as accretions to the whole, sometimes without any apparent concern for the way they interact with one another. The end result of this convoluted assortment of residual common law, legislative and executive provision is that it has attracted its own extensive body of case authorities that more often than not fails to interpret it properly[48]. Small wonder then that such a regime should have its flaws or that some victims' should fall through the gaps that such an empirically derived regime inevitably produces.

So whilst law abiding, insurance premium paying members of the public might be excused for thinking that the *quid pro quo* for their expensive premiums is the reassuring certainty that if they are unfortunate enough to be injured by a careless driver, then their full compensatory entitlement is guaranteed, independently of the driver at fault's ability to pay; the reality is rather different. What began as a legislation measure devoted to protecting accident victims has, in its application, become increasingly biased towards enhancing the commercial interests of motor insurers, at the expense of the original social policy objective.

Restrictions in the geographic scope of cover

With the benefit of hindsight, we can now see that the precision with which the Parliamentary draftsmen defined the geographic and technical scope of the third party insurance requirement was overly prescriptive. Both the statutory and extra statutory schemes are restricted to the use of motor vehicles '*on a road or other public place'*. This excludes private property, forecourts and shared parking areas, farm lanes and driveways leading onto public highways. The exactitude employed within the statute has prevented the common law from adapting the scope to accommodate new hazards introduced through technological and social change[49].
The compulsory insurance requirement is further restricted in the way it only applies to motor vehicles that are 'intended or adapted for use on a road'. This exempts many off-road motor vehicles from the duty to insure, even when used on public highways.

Limitations in cover

The extent to which the underlying social policy aim of the 1930 legislation has been compromised is vividly illustrated by the Court of Appeal in *EUI v Bristol Alliance Partnership*.[50] This case is the unfortunate legacy of s 12 of the 1934 Act; now s 148 of the RTA 1988.

In *EUI* an ostensibly fully insured motorist attempted to commit suicide by driving his car into a department store in Bristol. He caused extensive damage to the building and seriously injured another motorist. The Court of Appeal held, unanimously, that the insurer's policy term that excluded liability for deliberate damage was effective against third party victims because it was not one of the exclusions expressly nullified by the RTA

[47] Such as use of the vehicle by unauthorised persons and a short list of unauthorised uses, such as speed testing and racing.
[48] See below under Exclusions of Liability and Duty to apply a European law consistent interpretation.
[49] Such as the present ubiquity of 4x4 recreational vehicles and other off-road motor vehicles. See also the comments on *Clarke v Kato* under *Limits to consistent interpretation*.
[50] [2012] EWCA Civ 1267.

1988. The Court of Appeal based its reasoning, that the basic proposition is that policy exclusions are valid against a third party, firstly from the fact that this is the position at common law and supported by inference from the way the RTA 1988 only nullifies certain specific exclusions: Section 148 prevents an insurer from relying on a limited number of exclusions against third parties and these are listed in subsection 2 (such as the invalidation of any restrictions on the age or physical or mental condition of the driver) The only other nullifications are set out in s 151. Section 151 (2) applies to unauthorised users and 151 (3) makes void any restriction of cover to persons holding a driving licence. The correlative implication of these specific exceptions is that all other contractual limitations are valid against third party.

So the property insurer came away empty handed in *EUI* because the Court deemed the driver to be effectively uninsured and because the Uninsured Drivers Agreement 1999 purports to exclude subrogated claims[51].

The ruling appears to give insurers a free hand to restrict or exclude their statutory liability to third party victims; save where expressly precluded from doing so by the RTA 1988.

A frustrated policy aim

One wonders how these limitations in the protective measures for third party victims can possibly serve the wider public interest. They expose seriously injured accident victims to the risk of being made destitute and dependent on the National Health Service, hard pressed local authority social services and the charity of friends and relatives. The only beneficiaries of these flaws are the authorised motor insurers that operate in this highly regulated market.

Simpler, clearer, fairer European law

It will be readily appreciated from the preceding sections that the qualified and restrictive nature of our national law provision contrasts sharply with the European directives on motor insurance that the UK Government is supposed to implement.

The basic premise of this European law is that third party cover should be good for any use made of motor vehicle, provided that use is consistent with its normal function[52].

The directives do not seek to interfere with the ability of the contracting parties to set limits on the contractual scope or extent of the indemnity. This enables an insurer to impose almost any conditions it likes on its insured, provided however that they do not undermined the effectiveness of the protection extended to third party motor victims. Insurers therefore retain the ability to differentiate the contractual risk and to set appropriate premiums.

The directives expressly stipulate that an insurer's liability to compensate a third party victim is independent of any contractual restriction between the insurer and the policyholder[53]. So under European law (and subject to one proviso, mentioned below) as long as the vehicle has some insurance in place, the insurer on risk must satisfy a third party claim, regardless of any contractual law defence it may have against its policyholder. This necessarily confines the scope of the MIB's role to two scenarios: (i) where there was absolutely no insurance in place and (ii) claims featuring unidentified vehicles.

As indicated above under '*A purposive interpretation'* a consistent line of Court of Justice rulings, originating in *Bernaldez* and *Candolin* through to *Churchill* confirms that under European law only one exclusion of liability is capable of affecting a motor insurer's liability to compensate a third party. This single derogation from the mandatory third party cover requirement is confined to a passenger whom the insurer can prove actually knew the vehicle he was riding in was stolen[54].

All this makes perfect practical sense from a social policy and common sense perspective. It protects the state as well as the victims' immediate family from having to support and care for innocent victims who might

[51] See cl 6(1)(c)(ii) of the 1999 Agreement.
[52] See under *Culminating principles*, above and Case C-162/13 in *Damijan Vnuk v Zavarovalnica Triglav d.d.* [2014] below.
[53] See recital 15 in the the Sixth consolidating European Directive on Motor Insurance (2009/103/EC)
[54] See the second sub-para of art 13 of the Sixth Directive (2009/103/EC).

otherwise be left destitute. It also furthers the twin European legislative objectives of facilitating free movement between different member states and protecting victims.

The obligation that these European directives impose on every member state is to put in place suitable measures to ensure that third party victims' compensatory entitlement is guaranteed. It is a commonplace that the RTA 1988 and both MIB Agreements are intended to implement this European law. Unfortunately, there are over 50 instances where our defective national law fails to fully implement this simple imperative.

Comparative law analysis

The United Kingdom's failure to fully implement the minimum standards of compensatory protection are not confined to the limited geographic scope of the insurance obligation and the ability of insurers to compromise the third party protection by imposing contractual restrictions in cover.

The failings can conveniently be listed under ten broad categories. What follows is offered as an illustrative appraisal; not an exhaustive statement.

1 Restrictions in scope

The geographic restriction has already been alluded to. This applies not only to the duty to insure and the cover required under ss 143 and 145 of the RTA 1988 but it also effects the UK implementation of the art 18 direct right of action in reg 2 of European Community (Rights Against Insurers Regulations) 2002 as well as both MIB schemes as they rely on the RTA 1988 definitions when stipulating the MIB's duty to compensate. It is also worth noting that reg 2 also wrongly restricts the direct right of action to accidents occurring in the United Kingdom. Furthermore the requirement in reg 2(3) that the insurance policy must comply with s 145 of the RTA 1988 prevents a foreign registered insurer of a vehicle responsible for causing an accident in the UK from being the subject of the direct right of action. This is because this requires the insurer to be a member of the MIB.

The types of vehicle covered by the insurance are confined by ss 143, 145 and 185 of the RTA 1988 to a mechanically propelled vehicle intended or adapted for use on roads. The geographic and technical limitations both conflict with the *Vnuk* decision.

2 Exclusions of liability

There are numerous unlawful exclusions of liability that pepper the UK's statutory and extra statutory implementation of the Directive. There is only space to allude to a handful of these instances.
Section 151.4 allows a motor insurer to exclude its statutory liability to compensate a third party passenger who

> '*at the time of the use which gave rise to the liability, was allowing himself to be carried in or upon the vehicle and knew or had reason to believe that the vehicle had been stolen or unlawfully taken, not being a person who—*
>
> > *(a) did not know and had no reason to believe that the vehicle had been stolen or unlawfully taken until after the commencement of his journey, and*
> > *(b) could not reasonably have been expected to have alighted from the vehicle*.'

This exclusion is clearly much wider scoped than the single permitted contractual exclusion permitted by art 2.1 of the Second Directive, now art 13 of the Directive. It embraces constructive knowledge or negligent ignorance, not just at the time of entering the vehicle but subsequently. It also applies to knowledge that the vehicle has been unlawfully taken or borrowed.

The corollary of the over-prescriptive car sharing provisions within s 150 of the RTA 1988 are that any car sharing arrangement that does not conform to its terms is deemed to be a business use and thus potentially excluded under the standard terms of the vast majority of all motor insurance policies issued in the United Kingdom which are restricted to social domestic and recreational use.

All three current MIB Agreements (the Uninsured Drivers Agreements 1999 and 2015 and the Untraced Drivers Agreement 2003) unlawfully exclude liability where there is constructive knowledge or negligent ignorance that the vehicle is uninsured. These agreements infested with numerous conditions exclusions of liability that conflict with the single permitted exclusion referred to above. These are also sometimes described as conditions precedent to liability, such as the unlawful requirement in cl 13 of the Uninsured Drivers Agreement 1999 that

the victim must have reported the responsible driver to the police if no insurance information is provided, or the strictly enforced requirement under cl 4.3(c) of the Untraced Drivers Agreement 2003 that the victim must have reported the accident to the police within 5 days (for property claims) or 14 days (for injury claims) or as soon as reasonably possible thereafter on penalty of the entire claim being excluded. To the writer's personal knowledge this has been applied against a four year old infant. There is also the exclusion of liability under both MIB schemes where the death, bodily injury or damage to property was caused by, or in the course of, an act of terrorism. The problem here is that the UK statutory definition of 'terrorism' is so widely drawn that it is capable of applying against a victim escaping from a fleeing anti GM crop activist who has committed arson.

This is capable of producing perverse anomalies and is in any event unlawful as it does not conform with the single permitted exception in art 13 of the Directive.

Unlawful exclusions of liability are also rife within the motor insurance policies, as the discussion above under the 'Limitations in cover' heading. It is unfortunate that the Court of Appeal's decision in *EUI v Bristol Alliance Partnership* was not appealed and so this misconceived ruling remains as an unwelcome obstacle to further legal challenges due to the UK common law principle of *stare decisis*.

The problem is also found in the common law policy precept of e*x turpi causa non oratur action* that bars claims where the claimant's criminality has caused the injury.

3 Procedural mechanisms that undermine the effectiveness of the directives

Section 152(2) of the RTA 1988 enables an insurer to apply to the court for an order declaring the policy void, after the event giving rise to the claim.

For policies issued on or before 5 April 2013

This statutory remedy is highly prescriptive. The insurer commences an action for a declaration that it is entitled to avoid the policy for material non-disclosure or misrepresentation, or to confirm that it has avoided the policy on these grounds. The application must be made before, or within three months after, the commencement of the proceedings in which the judgment was given

A material non-disclosure used to be perceived to be fatal to any claim under the policy because, under the common law (now amended by the Consumer Insurance Act 2013) an insurance contract is deemed to be a contract of utmost faith, *uberrima fides*, this vitiated the policy *ab initio* at common law. Any risk that influenced or induced the insurer to underwrite the risk or which influenced the premium and its conditions was deemed a 'material' risk that entitled the insurer to avoid the contract.

As the non-disclosure and misrepresentation provisions of s152 reflect the common law and because the European directives on motor insurance do not seek to harmonise the civil law provision of the member states, this provision did not inherently conflict with the protection required under the directives on motor insurance. This made it relatively easy for motor insurers to avoid liability by seeking a s 152 declaration that the policy was void and then to rely on the exemption from the s 151 statutory indemnity (in s 151(2)) by complying with the notice requirements in s 151(3).

However there are increasing concerns expressed by some academics and practitioners that this remedy is capable of being abused by insurers imposing preconditions of cover to reduce their risk of exposure and only raising these points when a claim was presented.

In *Delaney v Pickett*[55] the defendant insurers, Tradewise, successfully obtained a declaration under s152 on the ground the claimant had failed to disclose the following material facts: that he was a diabetic, he was suffering from depression and that he had a cannabis dependency. According to official sources of information there are thought to be over 500,000 individuals in the UK suffering from depression and 3 million diabetics in the United Kingdom.

For policies issued after 6 April 2013

[55] [2011] EWCA Civ 1532.

Avoidance under s 152 has been made a little more difficult for insurers following the coming into force of the Consumer Insurance (disclosure and Representations) Act 2012 (CIDRA 2012) on 6 April 2013. This Act replaces the common law and the previous statutory provision that governed insurance contracts generally (the Marine Insurance Act 1906) and it applies to all consumer insurance contracts entered into after that date.

Section 1 defines a consumer insurance contract as one entered into by 'an individual who enters into the contract wholly or mainly for purposes unrelated to the individuals trade, business or profession.'
This definition excludes policies issued to motor trade dealers and car hire companies, who are now covered by the Insurance Act 2015.

The 2012 Act makes important changes to the s152 of the RTA 1988. The Act does not dispense with the need for an insurer to commence the s152 application before or within 3 months of the commencement of the claimant's action under s153(2) and to notify the claimant of the s 152 declaration, if made, within 7 days of the claimant issuing proceedings under s152(3).

The overwhelming majority of motor policies are issue to private consumers. Henceforth it will be possible, albeit probably difficult, for a consumer insurance policyholder to argue that an undisclosed material fact did not, in the circumstances, amount to a misrepresentation.

This Act provides a more nuanced approach. It imposes a duty of the consumer '*to take reasonable care not to make a misrepresentation to the insurer before the contract is made'*. There is no longer the '*duty of utmost good faith*', the *uberrima fides* common law principle no longer applies. Section 2(4) goes as far as to explicitly override the old law by expressly stating that it replaces '...any duty relating to disclosure or misrepresentation by a consumer to an insurer which existed in the same circumstances before this Act applied.'

The 2012 Act also abolishes the policyholder's obligation to disclose all material facts. The Act distinguishes between careless misrepresentation and reckless or deliberate representation. The Act prevents an insurer from avoiding a contract for misrepresentation except where:

- It was careless and the insurer would not have entered the contract at all had the truth been known or it would have done so only on different terms
- It was deliberate or reckless

A qualifying misrepresentation is only deliberate or reckless if the consumer—

(a) knew that it was untrue or misleading, or did not care whether or not it was untrue or misleading, and
(b) knew that the matter to which the misrepresentation related was relevant to the insurer, or did not care whether or not it was relevant to the insurer.

The burden of proving these matters is on the insurer. However, the consumer's conduct is judged by an objective standard and, furthermore, he is presumed to understand that where the insurer has put a clear specific question on any issue, that this is a relevant to the insurer, see s 5(4) of the Act . Otherwise the misrepresentation is deemed to be careless.

The insurer can avoid the policy and retain the premium, unless it would be unjust to keep it, where the consumer's misrepresentation was deliberate or careless. Where the misrepresentation was only careless, then the insurer can only avoid the policy if it can show that it would not have entered the contract on any terms had it known the relevant facts. In which case it must return the premium. Where a careless misrepresentation does not as fundamental to the contract, so the insurer is left arguing that it would have insisted on different terms, then the Act deems the contract to be been agreed on those different terms. It imposes a formula that allows the insurer to make a reduction in is liability.

The standard of care is an objective one, namely that of the reasonable consumer. Furthermore, instead of a material misrepresentation, we now have a new term: a '*qualifying misrepresentatio*n' which is defined as either '*deliberate or reckless" or "careless'*.

Insurers have become adept at asking pertinent questions in their online and telephone sales and in requiring the consumer to check the accuracy of the policy statements on receipt of the certificate. Obviously much will turn on whether an insurer will able to prove a misrepresentation to be reckless or deliberate. Otherwise, it will only

be able to obtain a s 152 declaration where it can satisfy the court that it would not have offered any cover, had it known the truth.

We are likely to see a raft of cases that will clarify the practical implications of this reform. Even so, the power of a court to declare a policy void ab initio after the accident giving rise to the third party's claim appears to conflict with the overriding protective purpose of the Directive and in particular recital 15:

> '*It is in the interest of victims that the effects of certain exclusion clauses be limited to the relationship between the insurer and the person responsible for the accident*. ...'

In *Evans v Secretary of state for Transport and the Motor Insurers Bureau*[56] the Court of Justice was asked to decide, amongst other things, whether the UK's Untraced Drivers Agreement[57] was consistent with the Second Directive and in particular whether the lack of provision for interest on damages was lawful. Its ruling was grounded on a basic Community law principle, without explicit reliance on the equivalency principle, to the effect that compensation must take into account the passing of time as this can reduce the value of the principle sum[58]. It then ruled that the Second Directive should be interpreted as requiring the compensating body, in effect, to pay interest on its compensatory awards but left it to the UK to implement this requirement. The Agreement was subsequently amended to allow interest.

Raising a European law challenge against an ostensibly unfair procedural provision on the other hand is more problematic because the Directive confers a reasonably wide discretion as to the procedural rules and form in which its objectives are implemented. In *Evans* the court explained the European law principle of equivalence:[59]

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

The Court went on to qualify this by observing that the twin Community law principles of equivalence and effectiveness do not confer identical provision[60].

The *Evans* case featured an untraced driver claim where the application of the equivalence principle presented difficulties. This was due to the complete absence of any identifiable defendant that could be pursued through legal process, which denied any obvious comparator against which to measure the equivalency of the provision under the Untraced Drivers Agreement. Arguably, the difficulty has been mitigated somewhat by the introduction of the art 18 direct right of action, where the position of the insurer and the compensating body are comparable.

On the issue of whether the private contract format of the Untraced Drivers Agreement was capable of implementing the Second Directive's objectives relating to the compensating body, given that the agreement itself conferred no right of action on the victims it is intended to benefit, it ruled:

> '*The fact that the source of the obligation of the body in question lies in an agreement concluded between it and a public authority is immaterial, provided that that agreement is interpreted and applied as obliging that body to provide victims with the compensation guaranteed to them by the Second Directive and as enabling victims to address themselves directly to the body responsible for providing such compensation*.'[61]

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[56] [2003] Case C-63/01.
[57] The 1972 version of the Untraced Drivers Agreement applied to the claim.
[58] At para 68 of *Evans*.
[59] At para 45.
[60] At para 28 of *Evans*.
[61] At para 34 of *Evans*.

It went on to qualify this by restating the importance of conformity to the European law principle of legal certainty:

> '*...it is essential for national law to guarantee that the national authorities will effectively apply the directive in full, that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of all their rights and, where appropriate, may rely on them before the national courts (Case C-365/93 Commission v Greece [1995] ECR I-499, paragraph 9, and Case C-144/99 Commission v Netherlands [2001] ECR I-3541, paragraph 17)*'

On the basis of the apparently limited and arguably one sided account of the way the Untraced Drivers Scheme operated, the Court concluded that its procedural arrangements and in particular its arbitral appeal procedure did not render it practically impossible or excessively difficult for applicants to exercise their right to compensation under the Second Directive.

This makes it very difficult for UK legal practitioners to challenge the numerous procedural knock out provisions that pepper both MIB compensation schemes. However, where those procedural requirements also constitute a substantive law infraction it is easier to substantiate: such as with cl 13 of the Uninsured Drivers Agreement 1999[62] and cl 4(3) of the Untraced Drivers Agreement 2003[63]. These provisions appear to present a clear and unequivocal impediment on a claimant's right to compensation.

4 Insurers' right of recovery

In *Churchill Insurance v Wilkinson; Evans v Equity Claims*[64] the Court of Justice was asked to rule on whether s 151(8) of the RTA 1988 conflicted with the Directives protective purpose. This was a conjoined appeal in which the common facts in both cases were that the persons injured were travelling as passengers in vehicle that they owned and which they were insured to drive, but the negligent drivers of these vehicles were. In *Wilkinson* that permission was given in the knowledge that the driver was uninsured; in *Evans* the permission was given without any thought to that question.

The key issue concerned a preliminary point of law on the interpretation of s 151(8) of the RTA 1988. This enables an insurer to recoup its outlay where it has acted as a statutory insurer under s 151 where the policyholder caused or permitted the vehicle's use by the uninsured driver. Were the injured passengers in these cases, (who were entitled to be compensated by their negligent drivers but where those drivers were not covered to drive the car under the terms of the insurance policy in place) in effect to be denied their statutory guarantee of payment under s 151(5) of the RTA 1988 because they, as policyholders, are in breach of their policy terms for permitting their vehicles to be driven by an uninsured driver?

The Court of Justice's ruling responded to the specific questions that the Court of Appeal had referred to it. It held:

- The only situation in which a third party who has been a victim of an accident may be excluded from insurance cover is that specified in the second sub-para of art 2(1) of the Second Directive (ie where the passenger knew it was stolen – see art 13 above of the Sixth Directive)
- The Directives must be interpreted as precluding national rules whose effect is to omit automatically the requirement that the insurer should compensate a passenger who is a victim of a RTA when that accident was caused by a driver not insured under the insurance policy and when the victim, who was a passenger in the vehicle at the time of the accident, was insured to drive the vehicle himself and who had given permission to the driver to drive it.

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[62] Clause 13 entitles the MIB to refuse to compensate a claimant who has failed to request insurance information from the defendant driver or for failing to use all reasonable endeavours to obtain this information or to report the failure to provide that information to the police. This subverts the parliamentary objective behind s 154 of RTA 1988 which is to increase, not diminish, the prospects of a victim recovering their compensatory entitlement. The 1999 Agreement remains in force for all accidents that predate 1 August 2015.

[63] Clause 4.3 (c) Imposes as a condition precedent of any MIB liability a requirement that the applicant has reported the accident to the police with 5 days (property) or 14 days (injury) or as soon as reasonably practicable thereafter. A High Court judge has upheld an arbitrator's finding that 'reasonable practicability' has nothing to do with the victims' belief that the driver has been properly identified; even where such a belief was reasonably held. It has also been applied against an infant.

[64] CJEU C-442/10.

- The answer to the question does not alter depending on whether the insured victim was aware that the person to whom he gave permission to drive the vehicle was not insured to do so, whether he believed that the driver was insured or whether or not he had turned his mind to that question.

When the case was referred back to the Court of Appeal s 151 of the RTA 1988 was purposively construed so as to add notional wording not present in the original text to restrict the insurer's right of recover to an amount proportionate to the circumstances of the case. No explanation has been given as to what this means in practical terms.

Section s 148(4) of the RTA 1988 provides an almost identical claw back provision that applies where the effect of an exclusion clause is nullified against a third party victim in one of the eight categories specified. This provision has not been modified; notionally or otherwise.

5 Direct right against insurers

Deficiencies in the European Communities (Rights Against Insurers) Regulations 2002 have already been alluded to above under the following headings: *The Third Party Rule, a common law anachronism* and under *Restrictions in geographic scope*.

Regulation 3(2) of the ECRIR 2002 confers a qualified right to compensation: a claimant enjoys no greater right against an insurer than its insured, in keeping with the common law rule considered above. It provides, amongst other things that:

> *'...(the) insurer shall be directly liable to the entitled party to the extent that he is liable to the insured person'.*

This appears to conflict with recital 15 in Directive and the raft of CJEU rulings from *Bernaldez* in 1996 to *Vnuk* in 2014, also considered above.

6 No provision for victims of derogated vehicles

Section 144(1) of the RTA 1988 allows the minister to exempt a body that provides security of £500,000 from the duty to insure under s143. It is not known whether this power has ever been exercised. The amount appears insufficient to satisfy the minimum cover requirement imposed under art 9.
Section 144(2) provides an extensive list of derogated bodies that are also exempted from the duty to insure under s143. However there is no national law provision that extends to the art 3 compensatory protection to a third party victim injured or suffering loss through the unauthorised use of such vehicles as the Uninsured Drivers Agreement 1999 only meets claims in circumstances where the RTA 1988 requires third party motor insurance.

Article 5.2 of the Directive allows member states to derogate certain categories of motor vehicle from the insurance obligation provided suitable provision is made for the compensating body to compensate third party victims. The MIB Agreements do not extend to vehicles that do not conform to the s 185 of the RTA 1988 definition of 'motor vehicle'. The author's own enquiries of the Department for Transport reveal that no vehicle types have been identified as exempted from the duty to insure under art 5.2.

7 Misallocation of insured claims as uninsured claims

In *EUI v Bristol Alliance Partnership*[65] the Court of Appeal court also came to the conclusion that whilst motorists must ensure that *any* use they actually make of a vehicle is always covered by third party insurance[66], there is no corresponding obligation on motor insurers to provide such a wide ranging scope of cover. One obvious flaw here is that the common law precludes insurance for illegal or bye purpose, so the driver in EUI would not have been able to obtain insurance to cover the consequences of his suicide attempt. Whilst Ward LJ's decision in EUI v *Bristol Alliance Partnership* makes complete sense when viewed from the perspective of the contracting parties, it has the effect of undermining the consistency of the compensatory protection afforded to the third party victims.

[65] *EUI v Bristol Alliance Partnership* [2012] EWCA Civ 1267, paras 68 and 69.
[66] At para 38.

Every year thousands of motor victims' claims are treated by insurers as though they were claims against completely uninsured drivers. These claims are commonly described Article 75[67] claims and run by the insurer on risk for the vehicle concerned, nominally as the MIB's agent, under the terms of the Uninsured Drivers Agreement 1999 or 2015, even though some insurance cover was in place at the time of the incident giving rise to the claim.

Indeed Advocate General Lenz [68] advising the Court of Justice in *Bernaldez* expressed the view that were the Court minded to rule that a policy term that excluded cover where the driver is intoxicated was permitted by the Directives, contrary to his advice, then member states would be free to extend the competence of the compensating to act as a fail-safe measure to ensure victims are compensated. This was an entirely hypothetical postulation premised on a scenario[69] that ran counter to his explicit advice that the protective aim of the directives required contractual exclusions to be invalid against third party victims. This hypothetical opinion was adopted by Jay J to attempt to square the circle of the UK's non conformity with the Directive in the following passage in *Delaney v Secretary of State for Transport*:[70]

> '*Were it not for the manner in which the MIB operates in this jurisdiction, this state of affairs would have the tendency to place the UK in breach of its obligations under the Directives - if that were not already clear enough from the wording of the Directives themselves, a swathe of ECJ decisions state that (subject to specified exceptions) any attempt by an insurer to avoid third-party liability is of no effect.*'[71]

Later on in the same judgment he paraphrases the Advocate Generals thesis:

> '*...although the scheme of the Second Directive is such that the insurer (if it exists) and not the national body should pay compensation, provided that the system as a whole ensures complete protection for victims there may be no objection in principle to the national body having an enhanced role. This is exactly the position which obtains in this jurisdiction on account of section 152(2) of the RTA 1988. However, the logical corollary must evidently be this: that the national body, here the MIB, must pay compensation in circumstances where the insurer - "for whatever reasons", which must include the avoiding of the insurance policy for misrepresentation or non-disclosure by the insured - owes no liability in respect of the victim's claim.*'[72]

This view disregards the Advocate General's clearly articulated view, following a review of the way the motor insurance requirement had evolved, that:

> '*the body is in no way conceived as a general catch-all, providing compensation upon the occurrence of any excluded events. Nor does the provision simply refer to the absence of insurance to which the national court alludes. Everything therefore indicates that, within the framework established by the directives, the person who has suffered harm as a result of an accident must recoup his loss from the insurer.*'

As we have seen from the review of the *Bernaldez* case above, the Court of Justice did not need to consider the Advocate General's hypothesis as it adopted his primary position. However, it is worthwhile repeating the following extract from this seminal judgment:

> '18. *In view of the aim of ensuring protection, stated repeatedly in the directives, Article 3(1) of the First Directive, as developed and supplemented by the Second and Third Directives, must be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents*

[67] Article 75 of the Articles and Memorandum of Association of the Motor Insurers Bureau is a private intra-insurer arrangement and is regularly misconstrued as imposing an obligation on third party victims of insufficiently insured drivers to pursue their claim for compensation under the highly prejudicial terms of the Uninsured Drivers Agreement 1999; whereas there is no legal basis for this position.
[68] Advocate General Lenz's opinion delivered on 25 January 1996 in *Bernaldez* Case C-129/94, para 51.
[69] Namely that the compensatory protection of third party victims are capable of being affected by contractual terms agreed between the policyholder and the insurer.
[70] [2014] EWHC 1785 (QB).
[71] At para 21 of the Advocate General's opinio. See also paras 66 and 67 of Ward LJ's judgment in *EUI v Bristol Alliance Partnership* [2012] EWCA Civ 1267.
[72] At para 39.

caused by vehicles to be compensated for all the damage to property and personal injuries sustained by them, up to the amounts fixed in Article 1(2) of the Second Directive.
19. *Any other interpretation would have the effect of allowing Member States to limit payment of compensation to third-party victims of a road-traffic accident to certain types of damage, thus bringing about disparities in the treatment of victims depending on where the accident occurred, which is precisely what the directives are intended to avoid. Article 3(1) of the First Directive would then be deprived of its effectiveness*.
20. *That being so, Article 3(1) of the First Directive precludes an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle*.

The *EUI v Bristol Alliance Partnership* decision accurately reflects UK jurisprudence and practice that is well established through long usage. This enables insurers to qualify the compensatory protection conferred on third parties by permitting reliance, against third parties, of contractual exclusions and restrictions in cover save, where expressly precluded from doing so within the RTA 1988.

This misallocation of claims might not matter quite so much if the government's extra statutory regime for uninsured drivers provided an equivalent level of protection to a fully insured defendant but it doesn't. Unfortunately the Uninsured and Untraced Driver Schemes are riddled with vicious, oppressive and disproportionate, strike out clauses that permit the MIB to escape any liability even for the smallest procedural infraction. They also exclude liability for certain heads of loss[73] and permit deductions from an applicant's proper compensatory entitlement in situations that would not be permitted in a normal civil action against an insured driver. These are decidedly inferior schemes which insurers regularly exploit to evade or reduce their liability to third parties in numerous scenarios.

This practice survives in the UK, notwithstanding its non-conformity with European law, seemingly for no other reason that it is a widely held misconception of many years standing.

8 Discrimination of minors and protected parties

Of grave concern is the complete absence of any proper safeguards to ensure that children and the mentally incapacitated are treated fairly by the MIB. The MIB have admitted to settling numerous childrens' PI claims without any independent legal advice having been given; let alone court approval being sought.
In *Dunhill v Burgin*[74] the United Kingdom Supreme Court ruled that in a normal contentious claim governed by the Civil Procedure Rules children and other protected parties are entitled to a sophisticated multi-faceted degree of protective measures. It ruled that these were necessary not just to protect these vulnerable individuals against their opponents but also from their own legal representatives.

Claims under the Untraced Drivers Agreement are not contentious claims but this ruling clearly applies to a settlement agreed made under the Uninsured Drivers Agreement 1999 because those are contentious claims that are subject to by the Civil Procedure Rules.

Clause 3 of the Uninsured Drivers Agreement 1999 and cl 2 of the Untraced Drivers Agreement 2003 impose a binding authority on the representative of a child or mentally incapacitated claimant / applicant to make decisions and to conclude agreements: '....as if it had been done to or by, or made to or in respect of an applicant of full age and capacity'. This contrasts with the common law position and the Civil Procedure Rules and so appears to conflict with the equivalence principle.

The absence of any provision for (i) independent legal representation and (ii) court approval of settlements - for children and mentally incapacitated applicants under the 2003 Agreement for untraced driver claims also appears to conflict with European law equal treatment and equivalence principles and arguably with the European Convention on Human Rights.

9 Unlawful deductions from or reductions in compensation

Mention has already been made of the purported exclusion of MIB liability for subrogated claims which are expressly excluded under the Uninsured Drivers Agreement 1999 and impliedly so under the Uninsured Drivers

[73] See below under *Unlawful deductions*.
[74] [2014] UKSC 18.

Agreement 2015 and the Untraced Drivers Agreement 2003. Furthermore, the Agreements also purport to entitle the MIB to deduct any other sums received by the claimant by as a result of the accident.[75]
Article 10 of the Directive requires the authorised body to compensate victims '*at least up to the limits of the insurance obligation for damage to property or personal injuries*'. However the very same provision goes on to qualify the equivalent compensation principle by stating that it is '*without prejudice to the right of the Member States to regard compensation by the body as subsidiary or non-subsidiary and the right to make provision for the settlement of claims between the body and the person or persons responsible for the accident and other insurers or social security bodies required to compensate the victim in respect of the same accident*.' There is no definition or case law on what is meant by 'subsidiary'.

However, art 10 does not appear to envisage the victim being left undercompensated in comparison to an equivalent claimant in an action against an identified and fully insured defendant. Under UK common law[76], certain insurance payments are disregarded when assessing damages, for example an accident, health or life insurance policy or pensions or mortgage protection plan which the victim has funded in kind, through services or where he has paid the premiums. One obvious point to mention here is that the payments made under these policies are not deemed in law to be payments made 'to compensate the victim' for the accident. Such payments are in reality an independently predetermined contractual sum conferred under a policy term that merely happens to be triggered by the accident; there is a world of a difference. It cannot be the objective of the Directives to discriminate against victims of uninsured and untraced drivers in this way.
Similar issues arise elsewhere, such as under s 1(4) Third Parties (Rights Against Insurers) Act 1930 and s 10 of the Third Parties (Rights Against Insurers) Act 2010 (not yet in force) which preserve an insurer's right to plead breaches of warranty or condition by its policyholder against a third party.

10 Lack of legal certainty

The author has notified the Secretary of State for Transport and the European Commission of at approximately eighty instances where the UK national law provision appears to conflict with the minimum standard of compensatory protection required under the Directive. Some of these inconsistencies represent different aspects of a single breach. However in this author's view approximately fifty these constitute, separate and potentially actionable infringements of European law in the sense that they are capable of either reducing or extinguishing completely a third party victim's entitlement to compensation in circumstances not permitted by the Directive. It follows from this and from the problems alluded to above that the UK transposition of the Directive is so extensively flawed that it simply cannot be taken at face value. The fact that some provisions are so obvious or egregious that they are capable of being remedied by a Court applying a European consistent interpretation does little to address the problem. Such is the complexity that it is unlikely that no well-educated and informed lay person could reasonably be expected to discern their true legal entitlement from reading the convoluted and highly technical and in places contradictory provisions of the UK implementation of this Directive. Furthermore, it is unreasonable to expect a lay person to succeed where so many eminent jurists from the senior appellate courts have so signally failed.

Ongoing developments
The UK's failure to properly implement the Directive has been the subject of a number of different initiatives that are part of a wider campaign for comprehensive reform. This paper will review these developments roughly in chronological order but a degree of artificiality cannot be avoided as some of them overlap or are concurrent.

1 The ongoing public awareness campaign for law reform

On 6 June 2007 the legal profession was given a timely reminder, in Flaux J's judgment in *Byrne v MIB & Secretary of State for Transport,*[77] that it was possible to challenge provisions in the MIB Agreements on the ground that they conflicted with superior European law in the form of the European Council's directives on

[75] Clause 17 of the Uninsured Drivers Agreement 1999; cl 6 of the Untraced Drivers Agreement 2003 and cl 6(2) and (3) of the Uninsured Drivers Agreement 2015.
[76] is *Parry v Cleaver* 1970 AC 1; *Lim Poh Choo v Camden & Islington AHA* 1980 AC 174 and *Page v Sheerness Steel* 1995 PIQR Q 26.

[77] [2007] EWHC 1268 (QB)

motor insurance[78]. This led to private discussions with the MIB which the author participated as a member of a working party set up by the Association of Personal Injury Lawyers in 2007. The primary concern was with the numerous procedural anomalies that provided insurers and the MIB with compensatory windfalls at the expense of third party victims. However, even at that stage the MIB was asked to ensure that its national law provision conformed to the minimum standards of protection required under the relevant Directives on motor insurance. Nothing came of those meetings. Consequently the author determined on raising awareness within the legal profession about the potential procedural pitfalls and substantive law irregularities to be found in the UK transposition of these directives through his lectures and articles[79]. Eventually this lead to a more holistic review of the UK's transposition of the Directive published in the New Law Journal in February 2013[80] that attracted the attention of the Law Commission[81]. The Law Commission later consulted the author who prepared a detailed paper setting out the infringements of European law and making recommendations. Unfortunately the Law Commission's further involvement was blocked by the Department for Transport.

2 The Department for Transport's Review of the MIB Agreements

In late February 2013 the Secretary of State for Transport published a consultation paper setting out his proposals for reforming the MIB Agreements. The proposals included some elements of the procedural changes that had been raised with the MIB back in 2007 but it failed to deal with the substantive law defects. A campaign was organised and a number of special interest groups responded supported the author's call for wide ranging reform right across the UKs national law measures implementing the directives on motor insurance. These were not acted upon. In July 2013 the Department for Transport issues a statement indicating that it was constrained in what it could do by its need to secure the cooperation of the MIB. Calls for a dialogue with the minister to discuss the need for reform were made by a number of parties, including the author, but these were ignored.

3 Infringement Complaint

When the Department for Transport failed even to implement its own proposals, the author filed a formal infringement complaint with the European Commission. The complaint was lodged in August 2013[82]. It presented a detailed comparative law analysis of the UK's transposition of the Directive and it set out and explained numerous instances where UK national law is inconsistent with the minimum standards of compensatory protection required under the Directive. It asked the Commission to persuade the UK Government to remedy these defects rather than take legal action.

The UK's failure to fully implement the Directive is a phenomenon that spans several decades and it undermines the legal entitlement of millions of citizens in the UK. The list of specific infractions has been updated from time to time and now exceeds 80 instances.

It is worth noting that various of the alleged breaches have since been vindicated in the clearest way: by the Court of Justice's rulings in *Csonka* and *Vnuk* and by the UK Court of Appeal's *Francovich* award in *Delaney v Secretary of State for Transport*.[83] The Commission communicated its concerns to the UK Government and embarked on a preliminary investigation. However, when the Secretary of State for Transport decided to approve the latest version of the Uninsured Drivers Agreement on 3 July 2015[84] and in doing so introduced additional unlawful provisions that breached the Directive as well as perpetuating numerous others, the

[78] Flaux J held that the strict and absolute three year time limit for applying to the MIB under the Untraced Drivers Agreement 1972 was not consistent with European law that required a limitation period no less favourable than that which applies to the commencement of proceedings by minors for personal injury in tort against a traced driver ie the limitation provision in s 28 of the Limitation Act 1980. See para 37.
[79] *Reforming the MIB*, Nicholas Bevan, Journal of Personal Injury Law issue 1 of 2011, *Why the Uninsured Drivers Agreement 1999 Needs to be Scrapped*, Nicholas Bevan, Journal of Personal Injury Law issue 2 of 2011.
[80] Published in serial form as four separate articles in the New Law Journal *On The Right Road?* Nicholas Bevan 8 -21 February 2013
[81] The Law Commission is an independent body created by the Law Commissions Act 1965 to keep the law under review and to recommend reform where it is needed.
[82] The complaint was registered under CHAP(2013)02537 and its reference under the EU Pilot scheme for handling complaints is 5805/13/MARK.
[83] [2015] EWCA Civ 17.
[84] See below under *Revisions to the Uninsured and Untraced Drivers Agreements.*

Commission was not informed; despite its ongoing discussions arising out of the complaint. In the writer's view, this exposed the minister's bad faith. By introducing new and clearly unlawful provisions and failing to rectify numerous longstanding infractions that he was warned about not only in response to his own consultation in April 2013 but also presumably once more by the Law Commission sometime in late 2013 or early 2014 and again by the Commission itself, he was effectively flouting the authority of the Commission and the European law it is tasked with enforcing.

4 Revisions to the Uninsured and Untraced Drivers Agreements

Any hopes of a Damascene change of mind by the Department for Transport in the wake of the *Vnuk* and *Delaney* decisions appear to have been misplaced. After a delay of more than two years from its aborted 2013 consultation, the Government announced on 6th July that it had agreed a new scheme with the MIB. The new agreement was presented as a *fait accompli;* coming into effect on 1 August 2015.

The new agreement was presented as the product of the 2013 consultation exercise, this is misleading. It is probably best described as a chimera made up of (i) the MIB's original proposals, (ii) the minimum changes necessary to implement the more obvious implications *Delaney* without risking an outright accusation of bad faith and (ii) new provisions that present the MIB with further opportunities for windfalls that clearly conflict with European law. The official statement announcing the changes studiously ignores the numerous calls for wide-ranging reform to bring the UK's statutory and extra statutory implementation of the European directive on motor insurance into line with the minimum standards of compensatory protection required under that law. Not only does this new scheme fail to remove all the clear and obvious obstacles to full compliance in its 1999 predecessor but it compounds its default by introducing entirely new infractions.

Some welcome changes

One significant innovation is the excision of the two unlawful passenger exclusion clauses which it was warned about in the consultation responses. Yet these are presented as being introduced so as to comply with the Court of Appeal's ruling in *Delaney*; as though to demonstrate the 2013 consultation was window dressing.

Other welcome changes include the curbing of some of the MIB's powers to strike out valid claims for the least trivial procedural infraction. For example, the draconian strike out rules for not providing the MIB with various notices as the claim progressed are removed, as is the bizarre condition precedent in cl 13 that barred any claim if the victim failed to report the uninsured driver to the police. The unnecessarily complicated claims process has also been simplified and brought much closer into line with a normal civil claim.

Claimants are no longer confronted by the misleading similar but subtly different notice requirements between s 152 and cl 9, which the MIB exploited for decades to full effect to reject numerous claims. The excision of these provisions is a positive step and they make what was a tediously prolix and Byzantine claims scheme that much shorter and simpler.

Whilst this is gratifying for those who have campaigned for the removal of these disproportionately harsh anachronisms, they should never have been permitted in the first place. No attempt has been made to revoke their application to the thousands of claims left to run under the current discredited regime that remains in force for all accidents predating 1 August 2015.

Serious flaws

Unfortunately the Uninsured Drivers Agreement 2015 contains a number of serious breaches of European law as well as some basic drafting blunders for good measure. These include a number of exclusions of and restrictions in the MIB's liability to compensate that are not only unjust, in so far as they prejudice the legal entitlement of accident victims, but they also conflict with European law. Take for example the unlawful provision in cl 6 that purports to allow the MIB to offset life assurance or other such payments, discussed above.

Then there is the flagrant introduction of the terrorism exclusion in cl 9, also mentioned above. It is hard to see how this makes any sense in policy terms. Presumably car bombs are the chief threat it envisages but as such use is clearly inconsistent with the normal function of a motor vehicle, we know from *Vnuk*, that it is excluded from the insurance requirement under European law anyway. It is hard to envisage what public good is achieved from the arbitrary distinction that allows a claim by a child cyclist who is grievously injured by an uninsured get-away driver escaping from a bank heist where a cashier has been murdered but not where the

uninsured driver is an anti-GM crop saboteur who has just fired a warehouse containing a consignment of GM seed corn.

There are also grave concerns about the way cl 17 removes the right to appeal the reasonableness of the MIB's decisions to the Secretary of State for Transport and substituting this with a paper appeal process to an arbitrator whose decision will be final and determined on the strict wording of the agreement without reference to the European law context. This offends basic rule of law and HRC principles.

5 Indecision by the European Commission

The Commission has been asked to escalate its investigation of the infringement complaint against the UK, to reach a determination and to enforce compliance of the Direction by legal action if necessary. No discernible progress has been made. The Commission's own protocol requires it to reach a determination on a complaint within one year of the complaint being accepted[85]; now over two years ago. Thus far the Commission has declined to express a view on any of the issues raised in the complaint.

One of the Commission's primary roles is to enforce compliance with European law. It can discharge this role in several ways. If persuasion fails, it can make a determination, issue an infringement action or refer an issue to the European Court of Justice. It has been confronted with longstanding and apparently deliberate failure by a member state to properly implement the Directive after having been exhaustively briefed on each and every defect. The issues raised concern readily accessible conflicts of law, they do not require extensive investigation, merely an appraisal of the comparative law analysis already undertaken on its behalf. So far all the Commission has done is to hold a series of private discussions and meetings with the UK officials. Further meetings are planned.

6 Possible consultation on the Untraced Drivers Agreement and the implications of Vnuk

In its July 2015 announcement the Department for Transport announced that it was in discussions with the MIB with a view to agreeing a new Untraced Drivers Agreement. There has also been some mention, unofficially, that the Department intends to consult on the implications flowing from the *Vnuk* ruling on the technical and mechanical scope of the insurance requirement. As indicated above, the UK has not elected to derogate any unusual vehicle types from the insurance obligation. Given that it was warned about this back in early 2013 and failed to act, no early announcement is anticipated.

7 Judicial Review

The Secretary of State on being informed that his 3 July revisions to the MIB Agreements included provisions that were unlawful chose to do nothing. His department wrote to indicate that there were no plans to introduce any changes.

Public law actions challenging a decision by the executive must be brought before the court very promptly. Fortunately, a road safety charity that had joined the author in calling for wide ranging reform of the UK transposition of the Directive back in 2013 agreed to apply to the Administrative Court for permission to judicially review the minister's actions.

The proceedings challenge his decision to approve the changes to the MIB Agreements without first undertaking a comparative law review of its entire implementation of the Directive and for authorising provisions that were unlawful. The author has an advisory role and is constrained from divulging any further particulars at this juncture other than to indicate that the application has been issued and the proceedings are ongoing.

8 Emerging issues

When a member state fails to properly implement a European directive in a way that impinges on the legal rights conferred on individuals so as to cause them loss, it is well established that there are three potential routes to redress under European law.

[85]See: *Updating the handling of relations with the complainant in respect of the application of Union law*, Brussels, 2.4.2012, COM(2012) 154 final, see subheading *8. Time limit for investigating complaints.*

The curative effect of consistent interpretation

The first recourse is to challenge the provision in the national courts by seeking a European law consistent interpretation, applying the *Marleasing*[86] principle as developed by *Pfeiffer*[87]. In this way a European directive is said to be capable of having indirect effect. *Churchill Insurance v Wilkinson*, considered above under the *Insurers' right of recovery* heading, demonstrates just how far a consistent interpretation can go in remedying an inconsistent domestic provision.

Unfortunately, the UK's track record in this area is inconsistent. Mention has already been made of *EUI v Bristol Alliance* above under the *Limitations in cover heading*. Other unsatisfactory outcomes are not difficult to find. In *Byrne v MIB & Secretary of State for Transport*,[88] an experienced High Court judge came to the erroneous conclusion that the court's duty to apply a *Marleasing* style purposive construction did not apply to the Untraced Drivers Agreement. His judgment is notable for its absence of any mention of *Pfeiffer*. In *Delaney v Pickett*[89] *Pfeiffer* was not considered either. Neither the first instance trial judge nor the three appellate judges thought it necessary to apply a European law consistent interpretation. One of the practical difficulties in enforcing a reliable and constant approach to interpretation of EU law in UK jurisprudence is the passivity rule that confines a judge's role to determining only those issues raised by the parties. The UK judiciary have limited training outside the extensive expertise acquired in their earlier careers as advocates. It is unclear whether a UK court has the power, of its own motion, to impose a European law consistent interpretation against the will of the parties.

Seeking compensation from the state

The second remedy is to bring a claim in damages against the UK Government, as occurred in *Byrne* and *Delaney*. However, for the average private citizen, this is an exceedingly time consuming, costly and uncertain endeavour. Funding such a claim is beyond the means of most private citizens, especially now that state funded legal aid has been all but abolished. It requires specialist expertise in public law and European law challenges and even if a claimant succeeds in establishing personal loss caused by a clear breach of a directive that is unconditional and sufficiently precise in its conferral of rights on individuals so that it is capable of having direct effect, his right to damages is still subject to extraneous considerations that determine whether the breach is sufficiently serious to warrant state liability; on this latter point, the observations of the Court of Justice in *Evans* are worth quoting:

> '[*86] In that connection, all the factors which characterise the situation must be taken into account. Those factors include, in particular, the clarity and precision of the rule infringed, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law...*
> *[87] Those criteria must in principle be applied by the national courts in accordance with the guidelines laid down by the Court...*'

In the UK these principles are to be found in the House of Lords ruling in *R v Secretary of State for Transport, ex parte Factortame Ltd*.[90] In Lord Clyde's judgment he sets out the following multi-factored objective test, it is a nuanced test *where no* one factor is likely to be decisive by itself. These factors include the following considerations:

- The importance of the principle breached
- The clarity and precision of the rule breached
- The extent to which the breach is excusable
- The existence of settled Court of Justice case law
- The behavior of the infringer, after it was clear that an infringement had occurred

[86] Case C-106/89*Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135 -
[87] Case C-397/01 to C-403/01, *Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV*; [2004] ECR 1-8835
[88] [2007] EWHC 1268 (QB).
[89] [2011] EWCA Civ 1532.
[90] [2000] 1 AC 524.

- The persons affected by the breach
- The position taken by a European Union institution

Clearly, a privately funded citizen will be at a significant disadvantage when confronted by the ample financial resources and expertise of that the State can call upon. He is unlikely to be able to discover, without considerable time and expense, the degree of compliance in other member states, whereas the State is likely to have this information at its finger tips. In the *Evans* case, the claimant was injured on Christmas day in 1991 by a hit and run driver but he did not receive his *Francovich* award for being wrongly refused interest on his award until after the Court of Justice's ruling of 4 December 2003; some 12 years later. The UK is celebrating the 800th anniversary of the Magna Carta this year and one of its principles seems particularly apt: '*that Justice delayed is Justice denied*'. There have been other litigation 'nightmares'[91] associated with bringing a *Francovich* claim against the state.[92] The technical ability to present a *Francovich* claim is no proper answer to a member state's failure to fully implement a directive or to satisfy legal certainty in so doing.

Direct effect against the authorised body

The third remedy is potentially even more problematic and is the subject of an ongoing reference to the Court of Justice[93]. This route involves seeking direct effect of all the rights conferred under arts 3 and 10 of the Directive against the art 10 compensating body, which in the UK is the MIB. This approach is capable of embracing not only those of its own provisions[94] that conflict within its proper role of compensating victims of uninsured and unidentified vehicles but also, indirectly, any other aspect of the member states' implementation such as the scope and extent of the insurance obligation and the terms of cover. This involves making the compensating body directly liable ('vicariously' so to speak) to compensate motor accident victims whose right to compensatory recovery has been prevented, not just by a European law inconsistent provision in one of its compensation schemes but also for legislation over which the compensating body has no constitutional authority to influence or control. The rationale being that if a person is injured in circumstances that ought properly to be covered the motor insurance obligation under art 3 of the Directive but is not, then it is *de facto* an uninsured event that falls within the province of the art 10 compensatory body. By this line of reasoning, the provisions within both the Uninsured and Untraced Drivers Agreements that restrict the MIB's role to compensating claims that are subject to the RTA 1988 definitions which prescribe the duty to insure under UK, are inherently unlawful as they adopt statutory definitions that conflict with the Directives' more generous scope: excluding as they do, for example, private property and vehicles not intended or adapted for road use. So this route has the potential to offer a more direct, proportionate and effective remedy that motor accident victims can resort to when applying to the MIB for compensation.

The chief difficulty with this alternative route to redress is that in June 2007 Flaux J, a High Court judge with considerable experience in public international law, ruled unequivocally that the MIB is not an emanation of state and that the Directive is not capable of having direct effect against it[95]. Furthermore, his decision drew on the weighty support of a number of authoritative *obiter dicta* by several senior appellate jurists.
That said, it is this author's view that the learned judge's decision is, quite simply, wrong. An article is in preparation[96] that argues that the judge failed to consider all of the relevant European law, that the European law principles he did apply[97] were subordinate to the superior governing principles he left out of account[98] and, in any event, they were applied too rigidly[99] and furthermore, that had he been properly appraised of the full facts

[91] In *Evans* v *Secretary of State for Transport* [2001] EWCA Civ 32 judge JL delivering judgment in the Court of Appeal described the case as an interminable nightmare for the claimant.
[92] See for example *Spencer v Secretary of State for Work and Pensions* [2008] EWCA Civ 750, which was a conjoined appeal in which Steven Moore's Francovich action was dismissed, 11 years after his running down injury, on the uncertain ground that the six year limitation period for bringing such a claim began at the date of the accident instead of the MIB's erroneous determination of his claim under the Untraced Drivers Scheme.
[93] *Elaine Farrell v Alan Whitty, The Minister for the Environment and the Attorney General* Case C-413/15
[94] i.e. within the Uninsured Drivers Agreements 1999 and 2015 and the Untraced Drivers Agreements 2003 as amended by five supplemental agreements.
[95] *Byrne v MIB & Secretary of State for Transport* [2007] EWHC 1268 (QB),
[96] Which the author commits to offer for publication in the British Insurance Law Association Journal.
[97] Case C-188/89 *Foster v British Gas* [1991] ICR 84.
[98] Case 8/81 *Becker v. Hauptzollamt Muenster-Innenstadt* [1982] ECR 53
[99] For the correct, nuanced, approach to applying the *Foster* guidelines, see Blackburn J Griffin *and others (plaintiffs) v. South West Water Ltd* [1995] IRLR 15.

and circumstances relevant to the proper classification of the MIB, he would have come to a different view, notwithstanding his strict adherence to the yardstick guidance he used to determine the issue.
It is also relevant to note that that this very issue[100], whether the art 10 authorised body is an emanation of state, is the subject of a referral by the Irish Republic's Supreme Court to the Court of Justice in *Elaine Farrell v Alan Whitty, The Minister for the Environment and the Attorney General*.[101] The injured claimant is no longer involved as she was fully compensated by the Irish MIB after Birmingham J ruled in the Irish High Court that the Irish MIB was an emanation of state. This enabled here to be compensated by the Irish MIB even though she was a passenger in part of a vehicle which under Irish national law did not require third party motor insurance cover. That decision was delivered in January 2008 and now in 2015 the remaining protagonists are the MIB and the Irish Government. The reason for this prolonged litigation probably arises from the fact that the remaining parties recognise the wider implications of Birmingham J's decision, especially following the *Vnuk* ruling which has exposed many member states implementation of the geographic and technical scope of art 3 as wanting. This is in fact the second reference to the Supreme Court in this case[102]. The Court of Justice's judgment is imminent but it is very unlikely to result in any decisive conclusion on the status of the Irish MIB. As it pointed out in the first reference in this case in its judgment of 19 April 2007, it is not the role of the Court of Justice to make findings of fact[103].

It is however worth ending this paper with Waller JL's observation, when he sought guidance from the Court of Justice back in July 2008[104]: '*It is difficult to think that a body such as the MIB or its equivalent should be an emanation of the state in one member country and not in another*[105].'

[100] On how to apply the guidance in *Foster v British Gas.*
[101] 1997/10802P.
[102] *Elaine Farrell v Alan Whitty, The Minister for the Environment and the Attorney General* Case C-413/15, which asks the Court of Justice to elucidate on how the *Foster* test is to be applied.
[103] Case C-356/05 *Elaine Farrell v Alan Whitty* & Otheres 2007, para 44.
[104] *McCall v Poulton* [2008] EWCA Civ 1263; this case was settled before the issue could be considered by the Court of Justice.
[105] Ibid, para 47.