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Motor insurers ignore the law, again

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ABSTRACT

At the 2020 AGM of the Chartered Insurance Institute it was conceded that COVID-19 had caused reputational damage to the sector because of its treatment of consumers during the current crisis. That, however, was at a time of public spotlight on only some of the underlying issues of corporate culture. An ongoing question that needs to be addressed is that of insurers' lack of fairness to claimants, particularly those injured by uninsured vehicles, and the failure or even refusal of governments to redress that imbalance. One aspect of that enquiry is addressed in this article.

Keywords: uninsured accidents; EU Directives; MIB; COVID-19; Brexit; contract; corrective justice.

INTRODUCTION

Trust in the insurance industry may be at an all-time low because of blanket refusals of claims by struggling businesses for financial losses following COVID-19, even where the contractual wording was crystal clear.[1] However, there are also other areas where the corporate culture of the insurance sector is in need of review, given its impact upon the corrective justice objective of tort.[2]

There are some motor accident victims in Northern Ireland who are being deprived of their compensation rights. If such declinatures were successfully challenged, those claimants could be entitled to

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1 In a test case by the Financial Conduct Authority, which was decided by the London Divisional Court in September 2020, most of the sample policy wordings were held to provide cover for business interruption losses following COVID-19 and the extent of coverage was actually extended by the UK Supreme Court in its decision of January 2021: *FCA v Arch Insurance (UK) Ltd & Ors* [2020] EWHC 2448 (Comm) and *FCA v Arch Insurance (UK) Ltd & Ors* [2021] UKSC 1.

2 S Hedley, 'The unacknowledged revolution in liability for negligence' in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), *Revolution and Evolution in Private Law* (Hart 2018).

Francovich damages for the refusals by the Motor Insurers' Bureau (MIB) to comply with European Union (EU) law.[3]

Matters relating to uninsured vehicles were fundamentally changed by the 2017 decision of the Court of Justice of the EU (CJEU) that the MIB of Ireland (MIBI) is an emanation of the state. It was held that the Bureau has the responsibility for ensuring that EU Motor Insurance Directives are fully complied with to the benefit of claimants.[4]

A year later in England, the High Court held that the MIB in that jurisdiction was an emanation of the state.[5] That finding was upheld by the Court of Appeal in 2019.[6] On 13 February 2020 the UK Supreme Court refused an application by the MIB to appeal further.[7] This issue also has post-Brexit implications.[8]

The wording of many MIB agreements in Ireland and in the UK must now be considered defective to the point where they may be considered invalid in several contexts.

FIRST PRINCIPLES

The fundamental challenge that arises with MIB is its apparent perspective that it is merely 'a fund of last resort', resembling a benevolence system operated voluntarily by motor insurers.[9] While that might have been its role when the original 'gentleman's agreement' between insurers and the Government was signed in 1946, it is contestable whether that has been an accurate assertion since the First EU Motor Insurance Directive of 1972, and it is certainly not so since the Second Directive of 1984.

If the MIB were 'a fund of last resort' then claimants would be obliged to exhaust all other avenues of recovery first. In contrast, victims of defectively insured, uninsured, untraced, or unidentified vehicles can directly sue the MIB without first proving that the person responsible is unwilling or unable to pay. This is made clear in recitals to the Third Directive:

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3 *Francovich v Italy* [1991] E R I-3061, [1995] ICR 722 and *Brasserie du Pecheur v Germany; R v SST ex p Factortame (No 4)* [1996] QB 405 ECJ.

4 The MIBI was first held in 1999 to be 'an emanation of the State' in the case of *Dublin Bus v MIBI* (29 October 1999) Dublin Circuit Court, Judge Bryan McMahon. This was subsequently confirmed by the 2017 decision of CJEU in *Farrell 2* – ECLI:EU:C:2017:745.

5 *Lewis v Tindale, MIB & Secretary of State for Transport* [2018] EWHC 2376.

6 *MIB v Lewis* [2019] EWCA Civ 909.

7 Lord Reed (President), Lady Arden and Lord Hamblen JJSC.

8 Under s 4 of the European Union (Withdrawal) Act 2018 a right under an EU Directive previously recognised in cases decided before exit day persists after Brexit.

9 Originally, the MIB granted *ex gratia* payments in 'hard cases' of severe injury but entirely at the unreviewable discretion of its board.

> Whereas, however, in the case of an accident caused by an uninsured vehicle, the victim is required in certain Member States to prove that the party liable is unable or refuses to pay compensation before he can claim on the body; whereas this body is better placed than the victim to bring an action against the party liable; whereas, therefore, this body should be *prevented from being able to require that the victim, if he is to be compensated, should establish that the party liable is unable or refuses to pay*.[10] (emphasis added)

In the absence of evidence of vehicle insurance, a claimant is exercising their rights under the EU Motor Insurance Directives and that trumps national law.

Such claims must be determined in a manner consistent with EU law as interpreted by the CJEU. The MIBs in Ireland and in the UK are obliged to handle those actions in accordance with established precedents on the assessment of damages in negligence at common law. There are very few exceptions permitted under the relevant EU Directives.

The Directives do not permit treatment by MIB that is less favourable to claimants than that which would apply to victims of other motor accidents where valid insurance is applicable to the vehicle. This is clear from the wording of the Sixth Directive of 2009 in the first paragraph of article 10 at chapter 4:

> Chapter 4 – Compensation for Damage Caused by an Unidentified Vehicle or a Vehicle for which the Insurance Obligation Provided for in Article 3 has not been Satisfied
>
> *Article 10*
>
> Body responsible for compensation
>
> 4 Each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by the body, without prejudice to any other practice which is *more favourable* to the victim. (emphasis added)

In this short commentary the focus is on just one category of claim where injured parties recover general damages for injuries but recovery for property damage losses such as vehicle repairs is refused because the culpable vehicle is deemed untraced. That approach by MIB is clearly not 'more favourable' than the law which applies to tort actions generally.

THE REAL ROLE OF THE MIB

The MIB is funded by law-abiding policyholders. It is not a voluntary levy on motorists, as it is hidden within the motor premium payable

10 The Third Directive became fully effective by 31 December 1995.

annually.[11] However, if they gave the matter any conscious thought, some consumers might consider it an additional cost worth paying lest they fall victim to an incident involving an uninsured driver.

The MIB is obliged to discharge a range of delegated responsibilities under EU Motor Insurance Directives. As summarised by the CJEU, these functions must be exercised in the public interest:

> Therefore, the task that a compensation body such as MIBI is required by a Member State to perform, a task that contributes to the general objective of victim protection pursued by the EU legislation relating to compulsory motor vehicle liability insurance, must be regarded as a task in the public interest that is inherent, in this case, in the obligation imposed on the Member States by Article 1(4) of the Second Directive.[12]

In contrast to the principles espoused in the passage above, where victim protection is the primary objective, my experience indicates that the priority of the MIB seems to be to curtail the exposure of insurers to the discharging of victims' legitimate rights under EU law.

There is an academic view that the courts may have been complicit in protecting the interests of insurers.[13] Alternatively, some judges have not been sufficiently alert to their own obligations to ensure that EU law rights are extended to claimants involved in motor vehicle accidents. Many of the existing precedents from the English and Irish courts must be treated with caution as being non-compliant with subsequent superior decisions of the CJEU.[14]

It is seriously arguable that the 2018 case of *RoadPeace* was wrongly decided to the extent that the starting point was the wording of the English Road Traffic Act 1988 rather than the EU Directives.[15] Additionally, the decision makes a number of references to the relevance of 'whether' the MIB is an emanation of the state when the reasoning of the CJEU in *Farrell 2* makes it clear that, if the MIBI in Ireland is an emanation of the state, the same must be so of the MIB in the UK.

Furthermore, the pre-condition to payment of property damage claims is currently the occurrence of a 'significant injury' which is defined as a minimum of four days' in-patient treatment, and this point was not determined in the *RoadPeace* case as is clear at paragraph 126

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11 Data published in 2020 by the Central Bank of Ireland as insurance regulator indicates that approximately 3 per cent of motor insurers' income is paid to the MIBI.

12 Para 38 of *Farrell 2* (n 4 above).

13 Richard Lewis, 'Insurers' agreements not to enforce strict legal rights: bargaining with government and in the shadow of the law' (1985) 48 Modern Law Review 275.

14 Some of these now defunct precedents are examined in my article in the December 2016 edition of the *Gazette* of the Incorporated Law Society of Ireland, 'Defective motor insurance, EU law, and victims' rights'.

15 *R (RoadPeace Ltd) v Secretary of State for Transport* [2018] 1 WLR 1293.

of the decision. The reasoning offered for the amendment in England, Wales and Scotland of the 2011 MIB agreement to the lower threshold in the 2017 agreement, where the criteria included out-patient treatment, was to reflect 'changes in medical understanding, treatment and duration of hospital stay'. It would be difficult to argue that similar medical advances have not been made in Northern Ireland and, therefore, there should not be a divergence between jurisdictions on the trigger for payment in respect of property damage by using different definitions of 'significant injury'.

It is also important to highlight that at paragraph 133 of *RoadPeace* Ouseley J concluded:

> Certainly, whether the MIB is an emanation of the state may be a lively issue, but is *one to be pursued where an actual claim depends on it*. No point was taken in relation to the standing of RoadPeace to raise the issues which it has raised. But that does not mean that interesting issues, which probably have no practical application should be pursued by it, especially as *such issues can be pursued by affected litigants* when they do have practical application. (emphasis added)

If the *RoadPeace* case had acknowledged that the MIB was an emanation of the state, then the reasoning would have been different, and it might not have been left to future claimants to resolve these 'interesting issues' in further litigation.

When the MIB was found to be an emanation of the state in 2018 by the English High Court in *Lewis*,[16] it was held at paragraph 131 that 'the effect of European law was to treat the designated compensation body as if the obligation imposed on the State had been delegated to it in full'. That finding was not overturned on appeal, although Flaux LJ commented that matters could be resolved 'by amendment to the RTA and/or the MIB Articles of Association'. By the end of 2020, neither of those required steps had been taken. That indicates that the UK was knowingly in breach of the Directives while still a member of the EU.

THE IRRELEVANCE OF THE MIB 'GENTLEMAN'S AGREEMENTS'

The fundamental error into which the MIB appears to fall is reliance on wording of the Northern Ireland 2011 agreement while ignoring its obligations to ensure compliance with the EU Motor Insurance Directives as interpreted by the CJEU.

It is a matter for the discretion of the member states what national law will hold to be the extent of civil liability. In Ireland and the UK this rests on negligence principles at common law with some statutory

16 *Lewis v Tindale, MIB & Secretary of State for Transport* [2018] EWHC 2376.

interventions. However, it is the EU Directives which mandate the extent of compulsory insurance coverage necessary to deliver compensation to the full extent of that tort liability. This is made clear by article 3, as below:

> Each Member State shall, subject to Article 5, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance.
>
> The extent of the liability covered and the terms and conditions of the cover shall be determined *on the basis of the measures referred to in the first paragraph*. (emphasis added)

While domestic law on liability and domestic legislation on prosecutions for driving without insurance are within the competence of the member state, the extent of insurance cover is not.

In 2001 the MIB agreements were held not be provisions of national law according to the House of Lords.[17] That raises the question as to the standing of the contract between motor insurers and the Governments of Ireland and the UK as member states of the EU. In strict technical terms, injured parties have no privity to sue for damages on the basis of those agreements.[18] Those contracts were entered into for the benefit of claimants, but claimants would lack any effective power of enforcement.

Since these MIB agreements are determinable by notice from either of the two parties who are signatories, it may also be questionable whether a compensation body has been set up at all in compliance with article 10 which contemplates a permanent standing entity. That requirement seems not to be satisfied if the agreements are merely voluntary rather than being enforceable under the requirements of the Directives and relevant decisions of the CJEU.

The classification of these agreements as not being part of domestic law could indicate a failure by the member state to enact 'laws, regulations and administrative provisions' to ensure that compensation consistent with the Directives is provided to claimants. Clearly, the cleanest solution would have been primary legislation to provide clarity on the rights of accident victims.

The overarching objectives of these Directives are free movement and the harmonisation of compensation entitlements and claims procedures throughout the EU arising out of the use of motor vehicles, without limiting any national procedures which are more favourable to a claimant. This applies even where the motor insurance is defective and such claims must be handled by the compensation body (the MIB). This is reflected in article 10.4 of the Sixth (consolidating) Directive as below:

17 *White v White* [2001] UKHL 9, [2001] 1 WLR 481, [22].

18 *Bowes v MIBI* [2002] 2 IR79.

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

There have been a number of enforcement actions by the European Commission against both Ireland and the UK where the transposition of EU law rights was held by the CJEU to be defective. For example, the failure by Ireland to correctly transpose the 1972 Motor Insurance Directive was found to be grounds for *Francovich* damages in *Farrell 2*.[19] It is relevant in the current context that liability for such damages rests with the insurance industry's MIB rather than being levied on the member state. It is not necessary to traverse the EU precedents here as the preciseness of the rights of claimants under the consolidating Sixth Directive means that these are currently directly effective rights.

The onus is upon national courts to give effect to the rights created by EU law, even where a variance exists as against national law and procedures. This has been reviewed in a number of CJEU precedents. The most frequently cited judgment is probably that of 13 November 1990 often referred to as *Marleasing*.[20] This case confirmed:

> that national courts must as far as possible interpret national law in the light of the wording and purpose of the Directive in order to achieve the result pursued by the Directive.

It was also held that national courts are required to:

> having regard to the usual methods of interpretation in its legal system, give precedence to the method which enables it to construe the national provision concerned in a manner consistent with the directive.

The onus rests upon the member state under article 5 of the Treaty of Rome to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation. This binds all the authorities of member states including, for matters within their jurisdiction, the courts.

As held in *Farrell 2*, the CJEU highlighted that the EU principle of equivalence and effectiveness of remedies, even for the victims of uninsured or unidentified vehicles, requires that the latter must not face barriers to 'the general objective of victim protection ... in the public interest'. Therefore, it seems to follow that national legislation,

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19 CJEU decision of October 2017 in *Farrell v Whitty & Ors* ECLI:EU:C:2017:745.

20 *Marleasing SA v La Comercial Internacional de Alimentacion SA*. Reference for a preliminary ruling: Juzgado de Primera Instancia e Instruccion no 1 de Oviedo – Spain. Directive 68/151/CEE – Article 11 – Consistent interpretation of national law. Case C-106/89. European Court Reports 1990 I-04135. ECLI identifier: ECLI:EU:C:1990:395.

such as the Road Traffic Acts and the litigation procedures, must be applied in a manner that is consistent with the Directives when it comes to victim compensation even if that is at variance with considerations under national law.

NON-COMPLIANCE BY THE UK AS A MEMBER STATE OF THE EU

Contrary to the objective of the EU Commission to harmonise claimant rights across the member states, the UK has introduced variances even within the geographical district of its own territory. There is a wide range of discrepancies, but only those relevant to the current focus are examined here.

The concept of 'significant injury' is not a term of art that acts as a threshold that must be overcome to commence a negligence action under English or Irish law. However, this barrier is defined in varying ways in the MIB agreements as summarised in Table 1.

The Isle of Man, which is not part of the UK nor of the EU, has an agreement with identical wording to that in Guernsey. Former overseas territories such as Hong Kong make no provision for victims

Table 1

Legal Jurisdiction	**Wording**
England, Scotland and Wales Dated 28 February 2017	Clause 7(2): The expression 'significant personal injury' in paragraph (1) means bodily injury resulting in— (a) death, or (b) 2 nights or more of hospital in-patient treatment, or (c) 3 sessions or more of hospital out-patient treatment.
Northern Ireland Dated 6 July 2011	Clause 3(a) amending 2004 Agreement: 'significant injury' means bodily injury resulting in death or for which 4 days or more of consecutive in-patient treatment was given in hospital, the treatment commencing within 30 days of the accident.
Gibraltar Dated 4 April 2003	Clause 5(1): This Agreement does not apply in the following cases—(a) where the applicant makes no claim for compensation in respect of death or bodily injury and the damage to property in respect of which compensation is claimed has been caused by, or has arisen out of, the use of an unidentified vehicle.
Guernsey Dated 26 September 2005	Clause 5(1): This Agreement does not apply where an application is made in any of the following circumstances … (a) where the applicant makes no claim for compensation in respect of death or bodily injury and the damage to property in respect of which compensation is claimed has been caused by, or has arisen out of, the use of an unidentified vehicle.
Jersey Dated 27 April 2005	Clause 5(1): This Agreement does not apply in the following cases—(a) where no death or bodily injury has been caused to any person and the damage to property in respect of which the application is made has been caused by, or has arisen out of, the use of an unidentified vehicle.

of unidentified vehicles, but they would not expect to be entitled to EU law rights.

Northern Ireland is not a separate member state of the EU and all citizens of the UK have identical EU law rights under the Motor Insurance Directives. There is no justification for the variances apparent in Table 1, nor is it permissible under EU law to accord more restricted rights to claimants in Northern Ireland. Claimants in Gibraltar, Guernsey and Jersey need only make a claim for personal injury to also recover for property damage caused by an unidentified vehicle. Indeed, in those jurisdictions both parts of such claims do not need to be made at the same time as two separate applications are permitted under those agreements.

In contrast, for claimants in Northern Ireland, the effectiveness of remedy is undermined for the victim of an unidentified vehicle by an unreasonable requirement of '4 days or more of consecutive in-patient treatment' because very few motor accidents result in such periods of hospitalisation. There is no provision under the Directives for more favourable treatment than in Northern Ireland to be accorded to citizens in England, Scotland and Wales where the threshold can be based on out-patient treatment as a trigger to also recover for property damage such as vehicle repairs.

Claimants in the Republic of Ireland are even more harshly treated in this context under the 2009 MIBI agreement as below:

> 7.1 The liability of MIBI for damage to property shall not extend to damage caused by an unidentified vehicle unless compensation for substantial personal injuries involving an inpatient hospital stay for five days or more has also been paid in respect of the event causing the damage subject to an excess of €500.

Research in the Republic of Ireland based on sample data indicates that for those who were hospitalised after road crashes 56.4 per cent had a length of stay of 1 to 2 days and an additional 15.5 per cent a stay of 3 to 4 days. Collectively, that represents 72 per cent of inpatients who would fall below the MIB hurdle before property damage could be recovered.[21]

As has been frequently stated in CJEU decisions, the aim of the Directives is:

> to guarantee that the victims of accidents caused by those vehicles receive comparable treatment *irrespective* of where in the European Union the accident occurred (see, inter alia, Case C-300/10 Marques Almeida [2012] ECR, paragraph 26 and the case-law cited).[22] (emphasis added)

21 'Admissions and costs to acute hospitals resulting from road traffic crashes' (*Irish Medical Journal,* 1 March 2012) .

22 This CJEU reference by Hungary related only to the First and Second Directives in the context of an insolvent mutual insurance company, but it explored the rationale of the Directives. Citation is from para 26 of *Csonka v Magyar* C-409-11 EU:C:2013:512 [2014] 1 CMLR14.

The wordings of the agreements in Table 1 are non-compliant with the Directives issued subsequent to 1984 in the context of unidentified vehicles. To quote from a CJEU decision in 2002, it is clear that such disparities should not exist:

> It is apparent from the third recital in the preamble thereto that the Second Directive was adopted in order to reduce the *major disparities* between the laws of the different Member States concerning the extent of the obligation of insurance cover. For that purpose, Article 1(1) and (2) of the Second Directive provides that the insurance referred to in Article 3(1) of the First Directive is to cover compulsorily both damage to property and personal injuries up to specific amounts.[23] (emphasis added)

These EU law rights of claimants have been progressively extended over time. The Second Council Directive of 30 December 1983 stated at article 1:

> 1 The insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover compulsorily both damage to property and personal injuries.

However, at that time it then proceeded to provide an exception at paragraph 4 of article 1:

> 4 Member States may limit or exclude the payment of compensation by that body in the event of damage to property by an unidentified vehicle.

The consolidating Directive of 16 September 2009 highlights specific provision for damage caused by unidentified vehicles based on the rationale set out at preamble 14 as below:

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

The 'danger of fraud' could arise where an owner causes damage to their own property and attempts to blame another vehicle when there was actually no such other party involved.

This points to a more fundamental challenge. The title of the MIB agreement refers to 'untraced drivers' whereas the Directives permit certain limited exclusions of property damage caused by 'unidentified vehicles'. This would be a classic 'hit and run' occurrence.

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23 Para 4 of *Withers v MIBI* Case C-158/01.

PURPOSIVE APPROACH TO LIMITED EXCLUSIONS UNDER EU MOTOR INSURANCE DIRECTIVES

A further complication is introduced by the mischief of cloned vehicles widely covered in the media.[24] The sophistication of these schemes has also been revealed during criminal trials.[25] To quote from an Irish Court of Appeal decision on 2 March 2020, dismissing a challenge to sentencing:

> The charges to which the appellant pleaded guilty arise out of a professional and commercial transnational criminal conspiracy to clone motor vans stolen in the United Kingdom and sell them on in Ireland. The basic modus operandi involved motor vans being stolen and then being modified so as to change their chassis numbers and other identification numbers to match those of similar vehicles which had not been stolen, and copies of whose registration documents had been obtained by deception. This enabled the vehicles to be sold on with ostensibly valid documentation to unsuspecting purchasers in Ireland. The value of eight of the eleven motor vans in question ranged between Stg£9500 and Stg£18,864. There was no value available for three of the eleven motor vans.

These are well-organised scams. Obviously, right-hand drive vehicles most likely come from the geographical region of the British Isles. It is the responsibility of member states to ensure that all vehicles are insured and any failure in that obligation, challenging as it may be, should not prejudice claimants. To cite from *Csonka*:

> Article 3(1) of the First Directive – as has been pointed out in paragraph 28 above – requires each Member State, subject to the derogations allowed under Article 4 of that directive, to ensure that every owner or keeper of a vehicle normally based in its territory takes out a policy with an insurance company for the purpose of covering, up to the limits established by European Union law, his civil liability arising as a result of that vehicle. Viewed in that light, the very fact that damage has been caused by an uninsured vehicle attests to a breakdown in the system which the Member State was required to establish and justifies the payment of compensation by a national body providing compensation.[26]

The restrictions noted above on property damage claims by victims of uninsured drivers are difficult to reconcile with this opinion.

The extent of uninsured driving in the EU is well known and in some jurisdictions is growing.[27] As the CJEU recorded at paragraph 39 of its

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24 As just one example: Rob Hull, 'Capital clones: how London is enduring a crime wave of cars with cloned plates creating havoc for owners and councils' (*This is Money*, 21 August 2019).

25 *Director of Public Prosecutions v Reilly* [2020] IECA 47.

26 *Csonka* (n 22 above) para 31 extract.

27 European Motor Insurance Markets Report, February 2019.

judgment in *Farrell* 'the intervention of (the Art 10 body) is designed to remedy the failure of a Member State to fulfil its obligation to ensure that civil liability in respect to the use of motor vehicles normally based in its territory is covered by insurance'.

It seems that, in the context of claimants in Northern Ireland, the UK is over-exploiting the limited restrictions on compensation provided for in the Third Motor Insurance Directive at preamble number 17, as below:

> The option of limiting or excluding legitimate compensation for victims on the basis that the vehicle is unidentified should not apply where the body has paid compensation for significant personal injuries to any victim of the accident in which damage to property was caused. Member States may provide for an excess, up to the limit prescribed in this Directive, to be borne by the victim of the damage to property. The conditions in which personal injuries are to be considered significant should be determined by the national legislation or administrative provisions of the Member State where the accident takes place. In establishing those conditions, the Member State may take into account, inter alia, whether the injury has required hospital care.

The term '*inter alia*' in the last sentence of the above passage is also important because it indicates a discretion and implies that other factors may also be taken into account.[28] The danger of fraud should not be assumed in every individual case.[29]

In the context of cloned vehicles, disputes about responsibility for lack of insurance can be informed by the Fourth Directive, which provides some guidance as to the designated jurisdiction. This 2000 Directive introduced the direct right of action in cross-border accidents provided in article 7 as below:

> If it is impossible to identify the vehicle or if, within two months following the accident, it is impossible to identify the insurance undertaking, the injured party may apply for compensation from the compensation body in the Member State where he resides. The compensation shall be provided in accordance with the provisions of Article 1 of Directive 84/5/EEC. The compensation body shall then have a claim, on the conditions laid down in Article 6(2) of this Directive:
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> (a) where the insurance undertaking cannot be identified: against the guarantee fund provided for in Article 1(4) of

28 The French language version of the Directive expresses the last two words in the passage above as *soins hospitaliers* which also translates to hospital care but in neither language does this equate to the higher barrier of in-patient treatment of four or more days.

29 Despite the relatively low number of prosecutions pursued, the federations of insurers across Europe collectively adopt the position that 10 per cent of all claim payments involve fraud. See 'Insurance fraud: not a victimless crime', November 2019.

> Directive 84/5/EEC in the Member State where the vehicle is normally based;
>
> (b) in the case of an unidentified vehicle: against the guarantee fund in the Member State in which the accident took place;
>
> (c) in the case of third-country vehicles: against the guarantee fund of the Member State in which the accident took place.

In cross-border accidents where there is doubt, then the compensation fund in the jurisdiction where the vehicle is normally based is mandated to deal with the claim. The Fifth Directive of 2005 extended the provisions of the Fourth Directive to all accidents in the EU.

If a cloned vehicle was displaying Northern Ireland registration plates it seems likely, on the balance of probabilities, that it was based in Northern Ireland.

Cloned vehicles must be distinguished from those involved in a 'hit and run' accident because they are not unidentified but rather are uninsured and resultant claims should be handled on those terms, which provide compensation for both injury and property damage. Even the guidelines to the Northern Ireland MIB agreement state at paragraph 11.2 that it can be unclear in some instances whether the Untraced Drivers Agreement or the Uninsured Drivers Agreement applies, and it advises claimants to make applications under both agreements. In any such cases of doubt the provisions which are more favourable to the claimant should apply in accordance with EU law. I have encountered untenable arguments by the MIB that a car bearing false registration plates was untraced and outside the terms of the agreement when that vehicle was still stuck into the side of a bus as recorded in photographic evidence.

Two further points can be highlighted at this stage.

It will be noted that the headings employed by MIB refer to 'Drivers' Agreement whereas the EU Directives focus on the vehicle and are silent on the traceability of the driver. This is an irreconcilable variance from the approach in mainland Europe because Ireland and the UK focus on driver use in legislation on compulsory motor insurance.

Secondly, in the wording of the Third Directive at Preamble number 17 cited above, it may be noted that the provisions are to be introduced in 'national legislation or administrative provisions of the Member State'. Again it is questionable whether the 'gentleman's agreement' with the MIB can be assigned such status within the canons of the separation of powers, and concerns about excessive delegation of legislative functions may arise.[30]

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30 Bruce Carolan, 'Separation of powers and administrative government' in E Carolan and O'Doyle (ed), *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008) 225.

UNWARRANTED RESTRICTIONS ON EFFECTIVE REDRESS

Claims against the MIB are standard civil actions for damages. It was necessary for that point to be clarified by the Irish High Court in the context of authorisation by the Personal Injuries Assessment Board before litigation could be commenced.[31] Relevant extracts from that reasoned decision are cited below:

> It is a canon of construction that words are primarily to be construed in their ordinary meaning or common or popular sense and as generally understood unless the context requires some special or particular meaning to be given: *Stephens v Cuckfield* R.D.C. 1962 All ER 716 at 719. Halsburys Laws of England Third Edition Volume 1 at paragraph 9 has this to say –
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> 'The popular meaning of the expression "cause of action" is that particular act on the part of the Defendant which gives the Plaintiff his cause of action.'
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> In this sense the cause of action against the uninsured Defendants is negligence. As against the Bureau there is strictly speaking no cause of action as the law does not confer upon a non-party a right to sue upon a contract: Bowes v Motor Insurers Bureau of Ireland supra. However it is the negligence of the uninsured Defendants that triggers the proceedings and without which act the proceedings could not be maintained even with the concession invariably made by the Bureau that an action is maintainable against it. For this reason I take the view that the cause of action against the Bureau is the same as that against the uninsured Defendants. While the relief claimed may be a declaration or specific performance in terms of pleading, the intention of joining the Bureau in an action is to recover damages for negligence awarded against uninsured Defendants.[32]

The reason that it is important to acknowledge that these are negligence actions for damages against the MIB is because MIB claimants are dealt with less favourably than other such tort plaintiffs. This is questionable relative to the equivalence rights of claimants under EU law, without prejudice to more favourable treatment, and may also offend the principles of natural justice and fair procedures.

As reflected in the wordings of the agreements, the MIB is operating in a quasi-judicial manner without any legislative base to ground its procedures.[33] The MIB purports to make binding findings of fact which

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31 *Campbell v O'Donnell & Ors* [2005] IEHC 266.

32 Paragraphs are not numbered but this appears at page 12 of the 14-page decision.

33 Cl 11(3).

impact on final determination of rights under domestic law quite apart from any EU dimension.[34]

The only redress available to dissatisfied claimants under the terms of the UK agreements is imposed arbitration.[35] That creates a number of difficulties.

Under the terms of the Consumer Rights Act 2015, an arbitration clause could be deemed unfair.[36] That Act at schedule 2 provides a list of terms that may be regarded as unfair under the categories below:

> 20 A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by—
>
> (a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions,
>
> (b) unduly restricting the evidence available to the consumer, or
>
> (c) imposing on the consumer a burden of proof which, according to the applicable law, should lie with another party to the contract.

The MIB also restricts the evidence available to consumers in Northern Ireland because it makes only a fixed contribution to legal costs rather than indemnifying at the rate which would apply to negligence actions.[37] The imbalance of power between the parties is then further stacked against the claimant who is hampered in seeking an expert opinion because any disbursements must be authorised in advance by MIB.[38]

Aside from these real financial and procedural burdens placed on MIB claimants, the difficulty with being deprived of a court adjudication of rights is that arbitration outcomes are confidential to the parties, so there is no public access to the reasoning.[39] This adjudication process prevents a publicly available jurisprudence emerging from which parties might better understand their rights. It also conceals from regulators the extent to which injured parties are being denied their rights when relying on financial services for protection.

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34 Cl 12(2).

35 Cl 15.

36 EU (then EEC) Unfair Consumer Contract Terms Directive 93/13/EEC, implemented in domestic law by Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) and replaced by the Consumer Rights Act 2015.

37 Cl 21 (contribution towards legal costs).

38 Cl 21(11)(a).

39 In the Irish MIB Agreement arbitration is only imposed (while still objectionable) to disputes about compliance with pre-conditions at cl 3 on notification procedures which are purportedly conditions precedent to liability.

The argument that MIB is providing a financial service finds some support from a number of sources. Of the four issues to be tackled in the next Motor Insurance Directive, two are specifically assigned to the Consumer Financial Services Plan.[40] Those two include the 'role and functioning of motor guarantee funds'. The Sixth Directive also places emphasis on enhancing the single market for motor insurance and has as an objective the removal of discrepancies which could present a barrier to cross-border services. A corollary of that assertion is that the MIB should be bound by Codes of Conduct issued by the Financial Conduct Authority. An additional benefit of that approach is that disputes in MIB claims would be referable by consumers to the Financial Services Ombudsman process which does not levy any fees for its investigation and adjudication services.

This is not just a theoretical matter of interest to the academic. Even post-Brexit it will be necessary to replace previous EU protection of claimants with mechanisms in domestic law that respect natural justice and fair procedures.

CONCLUSION

In the MIB Untraced Drivers Agreement, there is only one reference to EU Directives and that is at the penultimate page of a 42-page document. Compliance with the Directive is claimed as follows:

> This Agreement, being made for the purposes of Article 10 of the Consolidated Motor Insurance Directive 2009/103/EC of 16 September 2009—

As detailed in this article, that agreement is clearly non-compliant and knowingly so given the decisions of the CJEU.

In the 13-page MIB Uninsured Drivers Agreement, there is not a single reference to EU Motor Insurance Directives. Indeed, many clauses are clearly non-compliant and, again, knowingly so given the decisions of the CJEU.

As a further example of non-compliance, the wording of the agreement purports to limit the MIB liability to unsatisfied judgments as below:

> **MIB's obligation to satisfy claims**
>
> 3(1) Subject to the exceptions, limitation and preconditions set out in this Agreement, if a claimant has obtained an unsatisfied judgment against any person in a Court in Great Britain then MIB will pay the relevant sum to the claimant or will cause the same to be so paid.

40 EU Consumer Financial Services Plan (COM (2017)) 139.

That divergence with EU law has wide-ranging implications that extend beyond the scope of the succinct issue of recovery for property damage caused by unidentified vehicles and will be the subject of a subsequent article.

Placing the onus on claimants to secure judgments against culpable parties is directly contrary to the Third Directive. Placing 'exceptions, limitation and preconditions' on claimants is an unjustified attempt by a mere gentleman's agreement to subordinate the EU law reflected in CJEU decisions on the interpretations of the Motor Insurance Directives.

Citizens of the EU are entitled to harmonised rights. There is certainly no justification for the variances identified in this article between the rights of Northern Ireland claimants as compared with those in England, Scotland and Wales, nor for the gap between the EU provisions and domestic law and practice.

Of course, now that the UK has ceased its membership of the EU it can remove rights that citizens have under the Directives and CJEU decisions, some of which have been reviewed in this article. However, such reduced entitlements will only apply to motor accidents from some future date upon which such national legislation is commenced.

One step in that direction has been taken by the publication on 21 June 2021 of a Private Members' Bill to amend retained EU law.[41] The objective is to roll back on the 2014 CJEU decision in *Vnuk* where the accident involved a tractor on a farm and that interpretation of article 3(1) of the First Directive (71/166/EEC) extended compensation rights to victims of occurrences on private lands to which the public had access.[42] The amending Bill reached second reading in the House of Commons on 29 October 2021 and has now been sent to a Public Bill Committee. The proposed mechanism is to insert a new section 156A after section 156 of the Road Traffic Act 1988 to confine compulsory insurance requirements to public roads for what might be regarded as the traditional definition of motor vehicles. The current draft wording is as below:

156A Retained EU law relating to compulsory insurance

(1) To the extent that Article 3 of the 2009 Motor Insurance Directive (as it had effect at any time) is relevant to any question as to the interpretation or effect of any provision of this Part, references in that Article to liability in respect of the use of vehicles are to be read as not including liability in respect of the use in Great Britain of vehicles—

41 Motor Vehicles (Compulsory Insurance) Bill 2021.

42 *Damijan Vnuk v Zavarovalnica Trigalev* (C-162/13).

(a) other than motor vehicles, or

(b) otherwise than on a road or other public place.

(2) Subsection (1) does not apply in relation to any question for the purposes of section 145(3)(aa) or (b) as to the interpretation or effect of the law on compulsory insurance of, or applicable in, a Member State or Northern Ireland.

(3) Relevant section 4 rights cease to be recognised and available so far as they relate to compensation in connection with the use in Great Britain of vehicles—

(a) other than motor vehicles, or

(b) otherwise than on a road or other public place.

(4) Accordingly, to the extent that it is inconsistent with subsection (1) or (3), retained case law ceases to have effect.

(5) In this section—

"the 2009 Motor Insurance Directive" means Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability;

"relevant section 4 rights" means section 4 rights which—

(a) are recognised and available in the law of England and Wales or the law of Scotland, and

(b) derive from the obligation imposed on the United Kingdom by Article 10 of the 2009 Motor Insurance Directive as it had effect immediately before IP completion day (which relates to compensation in connection with the use of vehicles in cases where drivers are uninsured or untraced);

"retained case law" has the same meaning as in the European Union (Withdrawal) Act 2018 (see section 6(7) of that Act);

"section 4 rights" means rights, powers, liabilities, obligations, restrictions, remedies and procedures which continue to be recognised and available in domestic law by virtue of section 4 of the European Union (Withdrawal) Act 2018 (saving for rights etc under section 2(1) of the ECA), including those rights, powers, liabilities, obligations, restrictions, remedies and procedures—

(a) as modified by domestic law from time to time, and

(b) as they apply to the Crown.

> (6) Nothing in this section applies in relation to the use of a vehicle before the day on which section 1 of the Motor Vehicles (Compulsory Insurance) Act 2021 comes into force.[43]

Two points warrant emphasis. First, the very existence of this Bill puts beyond doubt that rights secured by claimants under EU law still apply to motor accidents in the post-Brexit era until such time as national legislation alters that position. Secondly, it will be noticed that this Bill does not apply to Northern Ireland and such 'jurisdictional' variances are only possible after the end of the transition period because the UK was a single Member State bound throughout by the provisions of the 2009 and previous Directives as interpreted by the CJEU. Legal practitioners will need to be mindful of the litigation minefield that is likely to be created by the parallel frameworks as between national and EU law and as between Northern Ireland compared to England, Scotland and Wales.

43 Motor Vehicles Bill (n 41 above).