12
King's Bench Walk

Next Talk: 14:00 – 14:40

Motor Insurance and Indemnity Update

Patrick Vincent QC
Vincent@12kbw.co.uk

Isaac Hogarth
ihogarth@12kbw.co.uk

The basics: the framework

- Compulsory motor insurance has been a statutory requirement in the UK since the Road Traffic Act 1930
- The nature of the statutory insurance framework has changed over time and has become factually (if not legally) entwined with the obligations of the MIB
- The current statutory regime in the Road Traffic Act 1988 was enacted to ensure compliance with the European Directives but in certain aspects it does not achieve that goal
- So on the basis of the CJEU decision in *Vnuk;* motor insurance should be compulsory even on private land but sections 143 and 145 of the RTA do not require that so the RTA is non-compliant with the European Directives
- Similarly the CJEU case of *Fidelidade* decided that the European Directives do not permit insurers to avoid their obligations to injured parties by avoiding the insurance contract.
- The result is that section 152 has been amended to remove the right to a declaration – see below

The basics: the framework

- The problem is that the modern statutory framework and its relationship to the MIB does not follow a logical or easily comprehensible system

- Nor is it easy to understand in the context of the Directives

- Motor insurance in the UK generally insures specific individuals to drive specific cars for specific purposes and there may be many instances when the insurer is not contractually liable to indemnify and the question becomes whether it has a statutory obligation to meet the claim or whether the obligation rests on MIB

The basics: the framework

- In contrast, in most EU countries vehicles are insured for any driver in any circumstance with the result that a vehicle is insured (in which case the insurer meets the claim) or it is not insured (in which case the claim is met by the safety net body equivalent to MIB)

- This obviates arguments about the status of an insurer which is so much a part of the law in the UK

- The Directives were drafted principally by reference to the European model and that is why it is often difficult to apply the terms of the Directives to particular problems which arise under UK law

The basics: the framework

- The first motor insurance directive was in 1972.
- The Sixth Directive (2009/103/EC) is a consolidating directive: It
  - Requires Member States to make motor insurance compulsory
  - Requires Member States to establish a body to provide compensation to the victims of uninsured or unidentified drivers
  - Permits Member States to exclude the payment of compensation by that body to an injured person who voluntarily entered the vehicle which caused the injury when that person knew that the vehicle was stolen (if an insurer is paying) or uninsured (if the MIB is paying)

The Position before Brexit

- The Road Traffic Act 1988 was enacted to give effect to the Motor Directives

- Both the RTA and motor insurance policies have been construed by the English courts by reference to the Directives and those courts have had to wrestle with the difficulty of incorporating the concepts underpinning the Directives to the different philosophy underlying the workings of motor insurance in the UK
- The English courts have been required to follow the decisions of the Court of Justice of the European Union (CJEU) on issues concerning the meaning and effect of the Directives
- In cases of ambiguity or uncertainty the English courts (particularly the Court of Appeal and Supreme Court) have referred cases to the CJEU and then followed the guidance provided by the CJEU when determining English cases.

What is the Position Now - 1

- It is governed by the European Union (Withdrawal) Act 2018 as amended ("the EUWA").
- The effect of the EUWA is to convert the body of EU law as it applied to the UK before 31st December 2020 into domestic law.
- This is termed "retained EU law" and there are 5 categories which include (1) direct EU legislation (2) directly effective rights (3) EU derived domestic legislation (4) retained case law and (5) retained principles of EU law.
- Since the RTA 1988 was implemented to give effect to the Motor Directives it is "EU derived domestic legislation" and the Motor Directive elements of it remain effective.
- It is arguable whether the Directives themselves are retained EU law. It is probable that they are to the extent that the rights contained within them have been recognised by the CJEU or the English courts
- If a principle of EU law was recognised as a general principle of EU law by the CJEU in a case decided before the withdrawal day then that principle will form part of the retained EU law after exit day as a retained principle of EU law

What is the Position Now - 2

- Similarly EU law which has been assimilated into English law by virtue of decisions of English courts before the withdrawal day will be retained EU law.
- By section 6 (3) of the EUWA the meaning and effect of any retained EU law is to be decided in accordance with retained case law and retained general principles of EU law by the lower English courts
- However the EUWA empowered Ministers to make regulations to permit a "relevant court" to depart from retained EU law. That power has been exercised and the "relevant courts" are the Court of Appeal and the Supreme Court but in deciding whether to take that course the *"relevant court must apply the same test as the Supreme Court would apply in deciding whether to depart from the case law of the Supreme Court"*
- The English courts are not bound by any decisions of the CJEU after the withdrawal day but the court may "have regard" to any later decision of the CJEU
- The English courts can no longer refer any issue to the CJEU

The Effect of the EUWA - 1

- The precise terms and effect of sections 2-6 of the EUWA take some time to digest and they will require some consideration and explanation by the Courts before we become familiar with how they will be applied.
- There is already some assistance from the CA in *Polakowski v Westminster Magistrates Court [2021] EWHC 53 (Admin)* (and extradition case) and *Lipton v BA City Flyer [2021] EWCA Civ 454* (a case concerning the interpretation of EU Regulations about compensation to passengers for delayed flights). Both are worth a look and the judgment of Green LJ in *Lipton* is particularly useful in understanding the EUWA and how the courts will interpret it.
- But in English motor insurance law general EU principles derived from the Motor Directives are already embedded and there is a large body of case law which has interpreted and implemented EU law as part of English law.
- For example:-

(1) In *Vnuk* the CJEU decided that the obligation to have insurance for motor vehicles had no geographical limits and included private land. This has been accepted as the law in a number of English cases and by the government although the government has no actually amended the RTA to reflect *Vnuk* (and probably won't post Brexit)

(2) In *Roadpeace v Secretary of State for Transport [2017] EWHC 2725 (Admin)* the government publicly acknowledged that section 152 of the RTA was incompatible with the CJEU decision in *Fidelidade* and section 152 has now been amended to remove the right of insurers to obtain declarations that they are not the RTA insurer

The Effect of the EUWA – 2 Greenaway v Parrish & Covea

- So in simple terms English motor insurance law will continue to be interpreted by reference to the Motor Directive and already decided CJEU and English cases on specific points will continue to apply to that interpretation.
- Any departure from that position is only likely to occur if the CJEU provides judgments in the future on new points which the English courts can have regard to but are not bound to follow or where the CA or Supreme Court decide to depart from retained EU law and take a different path
- But the recent case of *Greenaway v Parrish & Covea & MIB* [2021] 4 WLR 97 illustrates one issue which has already arisen post-Brexit
- In *Greenaway* 4 lads aged 16 took one of their father's cars without permission onto a road and D1 crashed it injuring 2 of the lads (Greenaway and Rocks). In the claim against the insurers of the car under section 151 Covea contend that the claim is an excluded liability under section 151 (4) of the RTA because the claimants knew that the vehicle had been unlawfully taken. It is common ground that the vehicle had not been "stolen" within the meaning of the Theft Act 1968 because there was no intention permanently to deprive.
- The Claimants argue that the only permitted exclusion in the Motor Directive is if the vehicle has been "stolen" and that this word should be interpreted narrowly and in accordance with the Theft Act definition.
- Covea disagrees and contends that pre-Brexit the issue would almost certainly have been referred to the CJEU for a decision since the construction of the word "stolen" in the directive is relevant to all EU states but since that is no longer possible the Court should permit the parties to call expert evidence as to the meaning of the word "stolen" under the law of different EU states (evidence which the CJEU would have had on a referral) and which the English court may find helpful in construing the meaning of word in the Directive. The Master refused permission but the judge allowed Covea's appeal and permitted both parties to adduce the evidence of foreign law in 4 EU states.

The Insurance Obligation - Use

- Article 3 (1) of the Sixth Motor Directive provides that:-
- “each Member State shall….take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance”
- Section 143 of the RTA states that a person must not use a motor vehicle on a road or other public place unless the vehicle is insured.
- Section 145 (3) of the RTA specifies the insurance requirement that the policy “must insure…..in respect of any liability……in respect of the death or bodily injury to any person or damage to property caused by, or arising out of, the use of the vehicle on a road or other public place”
- So the obligation to insurer both under the Directive and under the RTA relates to the “use” of the vehicle.
- What does “use” mean?

Use – The European Cases

- The European cases have taken a broad view of “use”
- In the seminal case of *Vnuk v Zavarovalnica Triglav* (C/162/13) a tractor knocked a man off a ladder on a farm. The CJEU decided that the Directives had no geographical limitation on the extent of the obligation to insure and that obligation included private land. The court also decided that the concept of the use of vehicles covers any use of the vehicle that is consistent with the normal function of that vehicle.
- The driving of a tractor on a farm was consistent with the normal function of that vehicle and that use required insurance.
- Similarly in *Torreiro v AIG Europe Limited* (C334/16) the insurers of an all terrain military vehicle used during a Spanish military exercise were required to provide compensation when it overturned and injured soldiers because that use was an ordinary use of the vehicle as a means of transport

Use – The European Cases (continued)

- In *BTA Baltic Insurance v Baltijas* (C-648/17) a passenger opened a car door and damaged another car. The question for the CJEU was whether the act of opening a car door was *"use of a vehicle consistent with its normal function".*
- The CJEU held that it was and that it was a use which was required to be insured.
- Contrast that with the English case of *Brown v Roberts [1965] 1 QB 1* where the English court decided that a person does not "use" a vehicle so as to require insurance unless there is in the alleged user some element of *"controlling, managing or operating"* the vehicle at the relevant time.
- Another European case which is more conservative in its interpretation of "use" is *Andrade v Salvador* (C-514/16) where an employee was killed when a stationary tractor which powered a spraying device fell down a terrace.
- The CJEU held that the use of the vehicle at the time of the accident was not a use consistent with its normal function as a means of transport (rather than as a crop sprayer) and therefore that use did not require insurance
- The latest from the EU is that vehicles intended solely for Motorsport are likely to be excluded from compulsory insurance.

Use: The English Law - R&S Pilling (T/A Phoenix Engineering) v UK Insurance Limited [2019] UKSC 16

- The facts:
  - Mr Holden was a mechanical fitter employed by Phoenix. He was at work (with his employer's permission) welding some plates to the underside of his own car in an effort to get it to pass an MOT
  - Sparks from the welding ignited seat covers and other material inside the car, which then spread to a pile of rubber mats and eventually caused substantial damage to Phoenix's premises and those adjoining
  - Phoenix was insured by AXA, who paid out over £2m and then sought an indemnity from Mr Holden
  - Mr Holden's own motor insurance was provided by UK Insurance, who sought a declaration that they were not liable to indemnify Mr Holden
  - The policy wording did not restrict cover to use of the vehicle on a road or other public place and so the location of the accident was not significant. The issue was whether the accident arose out of Mr Holden's 'use' of his car

Use: Phoenix

- At first instance, HHJ Waksman QC in the QBD found:
  - "the repair being undertaken to Mr Holden's car was clearly not using it. It was not being operated in any way at all but was immobile and indeed partly off the ground so that it could be worked on".

- Phoenix appealed to the CA, who unanimously allowed the appeal. The Master of the Rolls said:
  - "[59] … I consider that the repair work carried out by Mr Holden, in order to put his car into a safe and good working condition and so enable his car to pass its MOT, which it had just failed, and so enable him to continue to drive it, was a use of the car consistent with its normal function, applying a purposive interpretation to section 145(3)."

  - "[61] I consider that it follows that the repair of a car, which the owner was driving but due to disrepair cannot be lawfully and safely driven, and which the owner wishes to effect as soon as possible in order to be able to drive the car lawfully and safely, is "use" of the car within section 145(3)(a) of the RTA, being an activity consistent with its normal function for the purpose of that statutory provision. "

Use: Phoenix

- On appeal to the UKSC, the Supreme Court said:
  - Applying the purposive interpretation to section 145(3)(a) sought "would go against the grain and thrust of the legislation, because it raised policy ramifications which were not within the institutional competence of the courts, and because it would necessarily impose retrospective criminal liability under section 143"
  - The Court needed to consider not only "use of the vehicle" but the words "caused by or arising out of" the use of the vehicle on a road or other public place. Those words mean there must be a causal link between the use of a vehicle on a road and damage resulting from that use which occurs elsewhere, as in the case of a car which skids off the road and injures a pedestrian on the pavement
  - It is artificial to say that the property damage which Phoenix suffered was caused by, or arose out of, the use of the vehicle. The cause of the damage was Mr Holden's negligence in carrying out the repairs, and not the prior use of the car as a means of transport

Is *Phoenix* Correctly Decided - *Linea Directa Asegurador v Seguracaixa* (C-517/2019)

- In *Linea Directa v Seguracaixa* a parked and unattended vehicle caught fire in a garage due to an electrical fault
- In Spain the compulsory insurance obligation did not cover cases where a vehicle caught fire when stationary and protected by frost covers
- The question for the CJEU was : whether a vehicle parked in garage of a private dwelling with engine off, with no direct connection with use, and when it posed no risk to road users, required insurance so as to render the Spanish motor insurers liable for the consequences of the fire?
- The CJEU answered: Yes
- It held that following *Torreiro* and *BTA Baltic* the parking and immobilisation of the vehicle were natural steps forming part of the use of the vehicle as a means of transport and it was irrelevant which part of the vehicle caught fire since they were part of the vehicle which was required to be insured.
- The decision in *Linea Directa* came after the Supreme Court decision in *Phoenix.*

Is *Phoenix* Correct?

- Can the decision in Phoenix be reconciled with *Linea Directa?*
- The answer is: Perhaps
- In *Linea Directa* the fire was spontaneous as a result of a defect in the vehicle. Since a parked vehicle can be in use (per *BTA Baltic*) then a fire in a component of the vehicle is a fire caused by its "use"
- In contrast in *Phoenix* the fire was not caused by the "use" of the stationary vehicle it was caused by the repairs that were being carried out to it
- But the distinction is a fine one and there is little doubt that *Phoenix* is now open to doubt as a matter of European law.
- Post Brexit it would be interesting to see how the CA or Supreme Court might deal with this issue if it arises . The court might consider that *Phoenix* and *Linea Directa* are compatible based on the distinction we have suggested. Or it might find that in the light of *Linea Directa, Phoenix* is wrong and should not be followed. Or it might decide that *Linea Directa* forms part of retained EU law but that the court should depart from it in favour of the reasoning in *Phoenix* pursuant to the power granted to the CA and Supreme Court to do so.

The Effect of the Amendment to Section 152 of the RTA

- As a result of amendments to section 152 of the RTA; since 1st November 2019 an insurer can no longer obtain a section 152 declaration that it is entitled to avoid a policy for misrepresentation or non-disclosure and thereby reduce its status from section 151 insurer to Article 75 insurer.

- Reduction of status is a critical factor in the ongoing battle between different insurers potentially involved after an accident to determine which of them should pay the claim.

- Since 1st November 2019 an insurer can only avoid a section 151 liability and downgrade its status to Article 75 if:-

- (1) before the accident the policy has been cancelled by mutual consent or by virtue of a provision contained in it (section 152 (1)) OR

- (2) the use of the vehicle at the time of the accident fell outside the use permitted by the policy

The Effect of Downgrading Status

- If a contractual or section 151 insurer can downgrade its status to Article 75 insurer then it no longer has any direct liability to meet a judgment obtained by a claimant.
- That is because after the downgrading of status there is no longer any insurance covering the driver at the time of the accident with the consequence that the liability to meet a judgment devolves on MIB under the Uninsured Drivers Agreement.
- The fact that the insurer will, in fact, have to pay the claim as Article 75 insurer is a consequence of the internal arrangements of the members of MIB through its Articles of Association. It does not affect the fact that the legal obligation to meet the judgment is on MIB not the Article 75 insurer.
- This means that where a claimant is pursuing an Article 75 insurer the correct defendant is MIB not the insurer although this can (and often is) be dealt with by the Article 75 insurer agreeing to act as agent for MIB so that it can be sued in its own name and then deal with the claim as Article 75 insurer

The Benefits of Downgrading Status

- There are 4 principal benefits from downgrading status to Article 75
- Firstly; since the liability of the Article 75 insurer is legally the liability of MIB the Article 75 insurer can take the benefit of the fact that MIB is not liable if there is another liable insurer. So if there are 2 insurers who are liable in respect of the same defendant (e.g. one in respect of the vehicle and one in respect of the driver) then the insurer that can downgrade its status to Article 75 can avoid any liability and the claim will have to be met by the other contractual or section 151 insurer.
- Secondly; if there is more than one tortfeasor then the insurer of the tortfeasor who has contractual or section 151 status will have to meet the whole claim even if the other tortfeasor is partly or even mainly to blame for the accident. This is known as the rule of "meaningful degree". In this scenario the Article 75 insurer gets off the hook because its liability is really an MIB liability and MIB has no obligation to pay a judgment if there is liability on another tortfeasor whose insurer has contractual or section 151 status.
- Thirdly; the Article 75 insurer can rely on all the terms and exclusions of the Uninsured Drivers Agreement (UDA) in the same way as MIB itself. Until the recent case of *Colley v Shuker [2020] EWHC 3433 (QB)* it was generally thought that an Article 75 insurer who can prove that the claimant knew the driver was uninsured can rely on the exclusion to that effect in Clause 8 (1) (b) of the UDA (although this view is probably inconsistent with observations in *Churchill v Wilkinson [2013] 1WLR 1776*). Since *Colley* the position is arguably different (see below)
- Fourthly; the Article 75 insurer can rely on Clause 14 of the UDA and require the claimant to join another driver or another insurer or the police (in a car chase case) in order exert tactical pressure or argue for a meaningful degree of negligence in circumstances where the claimant would not otherwise do so because he has a cast iron case against D1

Cancellation of the policy

- Cancellation of the policy before the accident under section 152 (1) *"..by mutual consent or by virtue of any provision contained in it"* will reduce the insurers status from section 151 to Article 75 insurer
- Now that there is no possibility of downgrading status by obtaining a declaration; insurers will have to look much more carefully at the wording of their policies in relation to cancellation
- The provisions of section 152 (1) only apply if the cancellation has taken place before the accident and has been by mutual consent of the insured and insurer (eg. "I want to cancel the policy because I've found a cheaper one) or where the cancellation was *"by virtue of any provision contained in* [the policy]"
- This means that the term of the policy which gives the insurer the right to cancel must be clear (a) as to the circumstances in which the right can be exercised (e.g. for failure to pay the premium) and (b) as to how the cancellation is to be effected and communicated to the insured. If the term is not clear or the cancellation is not strictly in accordance with how the cancellation should be achieved then section 152 (1) will not be satisfied
- Problems are most likely to arise where there is another insurer who is potentially liable. If an insurer is relying on a cancellation before the accident to downgrade its status the other insurer is likely to crawl all over the policy terms and the cancellation process to see whether it satisfies the requirements of section 152 (1)

Cancellation of the policy

- It is important to remember that if the cancellation is done before the accident (and it is done properly) then if the MID has been updated before the accident to show that the policy has been cancelled the insurer will not be an Article 75 insurer either and will be free of any liability (see Article 75 (2) (2) (iv). The liability to meet any judgment will then devolve upon the MIB central fund.

- For that reason it is vital that insurers in-house procedures for cancellation also make provision for updating the MID

- Beware the trap for claims handlers of avoiding the policy as a knee jerk reaction and then trying to cancel it. The amendments to section 152 to do not prevent insurers from avoiding policies they only prevent them from obtaining declarations to avoid their section 151 liability to the claimant.

- The trap is that if a policy has been avoided then there is no policy to cancel so the insurer cannot then rely on the cancellation provisions of section 152 (1) to get out of its section 151 obligations

Status of MID: *Nagorski v Nikolics*

- In the recent County Court decision of Recorder Parrington at Liverpool, the question arose as to whether an insurer on the MID remains liable as section 151 insurer after a vehicle has been sold
- The insurer argued that the MID is a useful tool, but is only a database and is not conclusive
- C argued that the entry of a vehicle on the MID places automatic and unconditional obligations on insurers to satisfy judgments under section 151
- Judgment:
  - The MID is a database designed to assist the police and others in identifying insurers, but it is not conclusive (para.37)
  - Under the terms of the policy, there was no cover (although there is surprisingly little in the judgment about this or the relevant policy terms)
  - So no section 151 liability
- Comment:
  - The Court was not taken either to *Tattersall v Drysdale [1935] 2 KB 174)*, which is useful authority to support the proposition that there is no insurable interest in a vehicle which has been sold, or *to Dodson v Dodson Insurance Services* [2001] 1 Lloyd's Rep 520, where the Court of Appeal held that a DOV extension on a policy did not come to an end on the sale of the insured vehicle

Other arguments re 151: *Sarfraz v Akhtar*

- Recent case of *Sarfraz v Akhtar* [2020] EWHC 782 (QB) was an application by an insurer to strike out a claim (or for summary judgment) on the basis that C was "allowing himself to be carried" in a car knowing that it had been "unlawfully taken" per section 151(4) RTA 1988
- Facts:
  - C and D1 had been drinking with friends
  - D1 then drove C's car, which he was not insured to drive
  - C travelled as front seat passenger
  - It was agreed that C not give D1 the keys, that D1 took them from his pocket, but that C was too drunk to resist, and reluctantly got into the car as an unwilling passenger
- The arguments:
  - The insurer (D2), argued that because C had not consented to D1 taking the keys and driving, that he got into the car knowing that it had been unlawfully taken
  - C argued that (1) he had no reason to believe the car would be unlawfully taken until after the commencement of the journey (2) once the journey had started, he could not reasonably have been expected to alight, and (3) he did not "allow" himself to be carried in the car

Other arguments re 151: *Sarfraz v Akhtar*

- Judgment of Pepperall J:
  - It was "properly arguable that the car cannot be said to have been "unlawfully taken" until it was driven away, and that taking possession of the keys, sitting in the driver's seat and even turning the key are all acts that fall short of actually taking the car" (para.24)
  - The test for "allowing" oneself to be driven is not mere presence in the car (para.30)
  - For the purposes of a SJ application, the judge accepted that C's sole purpose in getting into the car was to prevent D1 from taking it, and was not therefore allowing himself to be driven (para.32)

Downgrading Insurance Status on the Basis of the Type of Use

- The inability of insurers to obtain section 152 declarations to reduce their status to Article 75 insurer will mean a far greater consideration of whether the use at the time of the accident (whether by an insured or uninsured driver) was within the use permitted by the policy
- The certificate will describe the use of the vehicle which is permitted by the policy e.g. social, domestic and pleasure. It may also describe uses which are specifically prohibited e.g. use for hire or reward. The terms of the policy may expand the meaning and extent of uses that are permitted and those which are prohibited. So the exclusions section of the policy may stipulate that any use which is not a use expressly permitted by the certificate is an excluded or prohibited use. Or the policy may include a specific exclusion in respect of use of the vehicle for particular purposes e.g. to cause deliberate injury or damage.
- In *EUI v Williams [2013] QB 806* the Court of Appeal held that if the use of the vehicle at the time of the accident was not a use permitted by the policy (in that case deliberate damage) then the insurer had neither a contractual liability to indemnify nor a section 151 liability to meet a judgment.
- So if the use at the time of the accident is outside the terms of the policy the insurer can automatically reduce its status to Article 75
- This applies whether the use is by an insured driver or by a driver who is not insured by the policy (e.g. a thief). If the policy only permits SDP use and the thief of the vehicle is using it for business purposes (e.g. drug dealing) then the use will fall outside the scope of the policy and the insurer's status will reduce to Article 75

What is the approach to Use at the time of the Accident?

- To determine whether the use to which the vehicle is being put at the time of the accident is a use permitted by the policy it is necessary to examine the facts to decide on the overall or primary purpose of the journey.
- The leading case is *Seddon v Binions [1978] RTR 163* in which the CA said that it is necessary to examine *"..the essential character of the journey in the course of which the...accident occurred"*
- What is important is the insured/drivers purpose at the time of the accident.
- In *Keeley v Pashen [2005] 1 WLR 1226* a cab driver ran over some passengers. His insurance policy did not permit use for hire or reward. However the driver had finished his shift at the time of the accident and was returning home. The CA held that since he was no longer working and was on his way home the use was SDP use which was a permitted use under the policy.
- In *AXN v Worboys [2013] 1 Lloyds Rep 207* (the taxi rapist) Silber J held that the essential character of the journey (looked at from Worboys point of view) changed when he sedated his passengers and assaulted them. The judge found that the use of the vehicle for those purposes did not fall within either of the uses permitted by Worboys policy ("public hire" or SDP) and so there was no cover.

The limits of use: *Carroll v Taylor*

- In the recent case of *Carroll v Taylor* [2020] EWHC 153 (QB), a drunk passenger had been robbed and then abandoned by a taxi driver. He then tried to walk home, but fell off a motorway bridge and sustained catastrophic injury
- There were two questions:
  - 1. Did C's injuries arise out of the use of the taxi on a road or other public place?
  - 2. What was the relevance of D1's deliberate criminal acts?
- Judgment of Tipples J:
  - On Q1:
    - "Once a journey is at an end, what may or may not happen to a passenger after the journey has been completed is not a relevant consideration in determining whether a person's injuries arise out of the use of a vehicle on a road under section 145(3)(a)" (para.73)

The limits of use: *Carroll v Taylor (cont)*

- On Q1 (cont):
  - "the Claimant's injuries had nothing whatsoever to do with "the use of the vehicle on a road"… the injuries occurred where they did, and when they did, because the claimant had decided to make his way home on foot and these injuries were not in any sense closely linked with the use of the taxi" (para.82)
  - He said that given that UKSC in *Phoenix* considered that *Dunthorne v Bentley* was "close to the line", the facts of the present case were so far removed from those in *Dunthorne* that it was nowhere near the line
- On Q2:
  - The taxi was being used for criminal enterprise throughout, and therefore the use did not fall within SDP or business and the policy did not engage (per *Keeley v Pashen*)

Another Use Case – *Axa v EUI*

- In *Axa Insurance v EUI Ltd T/a Elephant Insurance [2020] EWHC 1207 (QB)* the Defendant had a policy with Elephant. His car was damaged and he was lent a courtesy car by the garage. The courtesy car was insured by Axa.
- The Elephant policy had a DOC extension which provided cover for SDP only and only covered the driving of " a private car".
- The Axa policy covered SDP and business use.
- The Defendant had been working as a security guard on a night shift. At the time of the accident he was on his way home but he was going to divert to pick up a friend and take him home.
- Foster J held that the essential character of the journey at the time of the accident was driving home from work and that this was not altered by the intention to divert to pick up the friend. That essential character was not social, domestic or pleasure but "commuting" home from work or business use neither of which was covered by the SDP only cover provided by the Elephant policy
- The judge also found that a courtesy car owned by a garage was not a "private" car for the purposes of the DOC extension in the Elephant policy
- So on both grounds Axa was solely liable to meet the claim
- Both points are interesting but the case is important because it seems to be the first case to say that "commuting" does not fall within SDP cover

What use can be excluded?

- The importance of policy use exclusions as a way of downgrading status has meant that some insurance policies have been rewritten to extend the variety and type of excluded use and where there is more than one potential insurer both will look very carefully at the facts of particular cases and at the wording of their rivals policies.
- Most policies have a racing exclusion. In *Pinn v Guo, Zenith & AIG (Swansea County Court: 11th April 2014)* Zenith insured D1 and AIG insured D3.
- Zenith obtained a section 152 declaration and downgraded its status to Article 75 but the AIG policy use clause excluded cover *"whilst the automobile is used for….racing, pacemaking, speed-testing…".* This is a fairly standard clause in many certificates and policies.
- D1 and D3 arranged a race. There were about 100 spectators. The vehicles lined up side by side on a long, deserted factory road and were started by a person who stood between the cars and started the race. D1lost control and hit some pedestrians. Both D1 and D3 were liable for the accident
- Perhaps not surprisingly the judge found that this was "racing" as defined in the AIG policy and there was no cover. So AIG's status was reduced to Article 75 and they shared the claim with Zenith since both were Article 75 insurers

What use can be excluded?

- *Pinn* is a relatively easy case to understand but many insurance policies now have extended exclusions which typically exclude use *"..for racing, whether formal or informal, against another motorist and whether on a track or public road".*
- Does this permit the insurer to refuse cover after an accident resulting from a "burn up" away from traffic lights between 2 motorists who are strangers when one or both of them crashes and injures pedestrians? If one insurer has such a clause in its policy and the other doesn't -successful reliance on that clause would reduce one insurers status to Article 75
- As yet there is no authority on this. Is such a clause a proper and permissible exclusion of use or is it really an impermissible attempt by the insurer to avoid the consequences of bad driving on the part of the insured in the guise of a use exclusion? How would such a clause be interpreted by reference to the Motor Directive post-Brexit?
- Many policies also have specific exclusions in respect of use *"for criminal purposes"* and some extent the exclusion to say *"including avoiding lawful apprehension"*
- Does this mean that if the vehicle crashes whilst the driver is trying to escape from the police that the insurer can downgrade its status to Article 75 and then, perhaps, try and blame the accident on the police?
- Is a criminal purpose exclusion incompatible with the terms of the Directive as the CA found against MIB in relation to its exclusion for use of the vehicle in the course or furtherance of a crime – see *Delaney v Secretary of State for Transport [2015] 1 WLR 5177*
- It is unclear how the courts will deal with these issues but there is no doubt that the expansion of the concept of "use" and excluded use beyond the well recognized categories of SDP, business use, motor trade use etc does not make it easy to resolve the issues by reference to older authorities and the concept of "the essential character of the journey

The Position of MIB: *Lewis v Tindale* *Colley v Shuker*

- Recent developments in motor insurance law have also had a major impact on the obligations and liability of MIB
- In *Lewis v Tindale [2019] 1 WLR 6298* the Claimant was seriously injured when walking on private land when D1 ran him down. D1 was uninsured. MIB did not contest D1's liability but it contended that it had no contingent liability to C pursuant to the Uninsured Drivers Agreement 1999 because the accident and injuries were not caused by nor did they arise out of the use of the vehicle on a road of other public place with the result that insurance under the RTA was not compulsory.
- The judge at first instance and the CA held that the accident did not fall within the compulsory requirements for insurance under section 145 of the RTA and nor was it possible to apply *Marleasing* principles to read down section 145 (3) in order to comply with EU law following *Vnuk*
- But applying *Farrell v Whitty (No 2)* in which the CJEU had decided that MIB Ireland was an emanation of the state; MIB was also an emanation of the state and as such it was directly liable to the Claimant as a result of the UK governments failure to implement the Directive properly to make motor insurance on private land compulsory

The Impact of *Lewis*

- This decision has major implications for MIB and its members (the motor insurance industry)
- In any off-road accident and in respect of any vehicle which is a “vehicle” as defined in the Directives (which includes ride on lawn mowers and golf carts) claimants will probably pursue MIB directly
- The obligation on MIB to pay those claims will not be an obligation under the UDA or UtDA because those agreements only apply to liabilities which are require to be covered by the RTA (which only includes on road accidents)
- MIB is likely to try and pass this liability onto the Secretary of State for Transport but the outcome of that is uncertain
- The insurance industry might reasonably say: why should we pay for liabilities outwith the English law embodied in the RTA 1988 when we did not contract to do so and have not taken any premium for the risk?

Other Implications of *Lewis*

- What is the position of the insurer who insures the vehicle only for use on the road which then causes an accident when being used off-road? If MIB has to pay the compensation as a result of *Lewis* can it look to the individual insurer to pay as Article 75 insurer?
- Probably No: the obligations of an Article 75 insurer derive solely from the requirement of the insurance to satisfy the RTA. Offroad use it is not required to be insured under the RTA so any liability for offroad use is not an Article 75 liability.
- MIB's liability as a result of *Lewis* is a liability consequent upon the Directives and its position as an emanation of the state. It is arguable that it cannot pass that liability on to an Article 75 insurer.
- What is the limit of the amount for which MIB can be liable following *Lewis?*
- Under the RTA the liability of the insurer is unlimited in relation to personal injury

- Under Art.9 of the Directive (as amended), the requirements are:
  - At least €1.22m per injury or €6.07m per claim (whatever the number of victims
- In a claim against MIB on a *Lewis* basis <u>can MIB rely on the minimum requirements under the Directive</u>?
- Uncertain: Watch this space!

Colley v Shuker (2019)

- In Colley v Shuker the Claimant (C) was injured in an RTA in a vehicle driven by Daniel Shuker (D1). The vehicle had been insured by D1's father with UKI but D1 was not insured to drive under the policy and C knew that he was uninsured. UKI obtained a declaration under section 152.
- C brought a claim against UKI on the basis that following *Fidelidade* the Court should determine (a) that UKI's declaration under section 152 was incompatible with the Directive and (b) use *Marleasing* principles to prevent UKI avoiding its liability to C under section 151
- It is unclear why C did this rather than proceeding directly against MIB but the reason may have been that C's legal advisers were concerned that the claim against MIB would be defeated by the exclusion in the UDA where the claimant knows that D1 is uninsured
- The claim was dismissed by O'Farrell J (see [2019] EWHC 781 (QB) on the basis that whilst it is well arguable that section 152 is incompatible with the Directive any such incompatibility cannot be resolved by any permissible *Marleasing* interpretation and since UKI is a private body and not an emanation of the state the court cannot disapply the domestic legislation in relation to a claim against it

Colley v Shuker (2020)

- In the original action MIB had been D3.
- When the claim against UKI (D1) failed C then pursued MIB as an emanation of the state (following *Lewis v Tindale*) on the basis that C's inability to pursue D2 resulted from the UK governments failure properly to implement the Directive which made MIB liable to compensate as an emanation of the state.
- MIB argued that it had no liability to compensate as an emanation of the state where the obligation to insure the vehicle as required by the Directive had been fulfilled even if at some later stage the insurer could avoid the policy.
- Freedman J found against MIB (see [2020] EWHC 3433 (QB)) on the basis that MIB is obliged to meet judgments obtained by innocent victims in any scenario where the system has broken down whether because the vehicle is uninsured or because of the provisions of national legislation (eg. a section 152 declaration)
- MIB also argued that it was not obliged to compensate C because C knew that D1 was uninsured.
- That argument also failed. Freedman J found that in order to be able to rely on the exclusion permitted by the Directive it was necessary for MIB to show that at the time of the accident the vehicle was uninsured. It was not sufficient that the driver was uninsured. In this case the vehicle was insured at the time of the accident and only became "uninsured" when UKI later avoided the policy.
- So again MIB had to pay a claim in circumstances arising from the government's failure properly to implement its EU obligations.
- MIB has sought permission to appeal but, at present, this decision is now retained EU law and will continue to apply post-Brexit.
- MIB has continuing litigation against the Secretary of State in Colley to get an indemnity or contribution.

Colley v Shuker

- The second limb of the decision of Freedman J in *Colley* has potentially significant implications for Article 75 insurers.
- An Article 75 insurer cannot be in a better position than MIB because the Article 75 liability is, in reality, an MIB liability.
- If MIB cannot rely on the claimant's knowledge of no insurance for the purposes of Clause 8 (1) of the UDA when the vehicle was insured then it is arguable that nor can the Article 75 insurer.
- If Article 75 status is achieved on the basis that the use at the time of the accident was not permitted or was excluded then the vehicle was nonetheless insured (even if not for the use at the time of the accident) and the insurer cannot rely on the claimant's knowledge that the driver was uninsured because of the decision in *Colley.*
- The question of whether, in those circumstances, the liability should be met by the Article 75 insurer or by the MIB central fund because the liability arises as a result of the fact that MIB is an emanation of the state is something that may need to be resolved under the Article 75 procedure.
- The short point is that where an insurer downgrades its status to Article 75 insurer on the basis of use it may find that a claimant will refuse to accept that he is precluded from compensation even if he knew that the driver was uninsured.

The Overall Position

- The underlying purpose of the Motor Directives is that no innocent victim of a car accident will go uncompensated. That purpose is part of retained EU law and will continue to form the framework of English insurance law unless and until it is changed by statute or (perhaps) a contrary decision of the CA or (more likely) the Supreme Court.
- The rule of thumb is that if an insurer has taken a premium (or was entitled to take one even if one was not paid) then it will have to pay any judgment obtained against the driver of the insured vehicle as contractual, section 151 or Article 75 insurer.
- Where there is more than one potential insurer then the liability to pay is likely to depend upon the relative positions of each insurer with the insurer which can downgrade its status to Article 75 insurer being in the best position.
- Where all else fails because of incompatibility between the Directive obligations and English law; MIB is likely to have to meet the claim as an emanation of the state.