Litigating motor claims: how has Europe changed the landscape?

1. For 80 years from 1930 to about 2010 the law in relation to motor insurance remained largely unchanged.

2. There was some tinkering following the UK joining the EU in 1972, and the creation of the various motor insurance directives thereafter – but nothing radical.

3. In that 80 year period:-

   (a) A vehicle was a motor vehicle, i.e. car/lorry – not a lawn mower.

   (b) Insurance was only compulsory on a road or public place.

   (c) The RTA permitted RTA insurers to refuse all compensation to policyholders who were injured in their own vehicle when the driver was uninsured.

   (d) The RTA also permitted RTA insurers to refuse compensation to claimants who were in a vehicle they knew to be stolen or unlawfully taken.

   (e) Insurers could avoid an RTA liability by validly avoiding a policy for misrepresentation after a relevant accident.

   (f) The MIB could avoid paying out where the Claimant was in a vehicle he or she knew to be uninsured and "Uninsured" meant not insured to drive the vehicle even if a policy covering the vehicle was in place.

4. The EU Motor Insurance Directives affected all these propositions – but it took decades for the effects to bubble to the surface.

5. It started with *Wilkinson v Churchill*[1] in 2012. This radically altered the wording of section 151(8) of the RTA so that policyholders injured in their own car driven by someone not covered by the policy could not automatically be deprived of their compensation. 10 years later there is still no reported case as to how much of their compensation they could be deprived of.

6. We then had *Vnuk* (2014)[2] which established that EU law required vehicles to be insured on private and public land, that the term "vehicle" captured all sorts of motorized vehicles not usually seen on the road and that the concept of "use" was potentially very wide. A rash of further CJEU cases consolidated *Vnuk*.

7. *Fidelidade* (2017)[3] then established that it was incompatible with EU law for insurers

1 [2012] EWCA Civ 1166
2 *Vnuk v Zavarovalnica Triglav dd* (C-162/13) [2016] RTR 10
3 *Fidelidade-Companhia de Seguros SA v Caisse Suisse de Compensation* (C-287/16) [2017] RTR 26

to be able to escape liability to claimants by relying on "contractual terms" or misrepresentations.

8. *Colley v Shuker* (2020)[4] established that a compensation body could not rely on the "knew the vehicle was uninsured" exception to its obligation to compensate an injured claimant unless there was no insurance at all covering the vehicle - it is not good enough for there to be a policy which doesn't cover the driver.

9. In the midst of all this Brexit happened and several cases (e.g. *Pilling v UK Insurance*[5] *and Cameron v Hussain*[6]) attempted to grapple with the effect of European Law on our domestic motor insurance law.

10. Nothing changed when the UK eventually left the EU at the end of 2020. By virtue of the European Union (Withdrawal) Act 2018 ('EUWA'), all EU law as it applied to the UK prior to 31 December 2020 were incorporated into domestic law. This meant that (insofar as they previously applied), the Directives as well as the EU decisions relating to them form a part of the retained law.

11. However, legislation has now been passed – to a great fanfare – attempting to reverse *Vnuk*. This is in the form of The Motor Vehicles (Compulsory Insurance) Act 2022.

12. There doesn't appear to be any further legislation on the horizon. Where are we now? What questions remain unresolved? What EU derived changes may stay or go?

13. What do you need to look out for in the changed landscape?

Is an insurer contractually obliged to indemnify the tortfeasor?

14. The answer to this question has significant legal and practical consequences for both sides.

15. If Yes:-

    (a) Claimants don't need to worry about public/private land as almost all policies are not geographically restricted.

    (b) Claimants don't need to find and serve elusive Defendants as there is a direct right of action against the insurer under the 2002 Regulations.

    (c) Claimants cannot be forced to sue other potential tortfeasors (although it may be sensible to do so).

    (d) Claimants do not have to give RTA section 152(1) notice of bringing proceedings

4 [2020] EWHC 3433 (QB)
5 *R&S Pilling (t/a Phoenix Engineering) v UK Insurance Ltd* [2019] UKSC 16
6 *Cameron v Liverpool Victoria Insurance Co Ltd*]2019] UKSC 6

(although always sensible to do so).

(e) Defendant insurers can conduct the litigation in the name of the insured and bring Part 20 claims in their name.

(f) Defendant insurers may be able to bring contribution proceedings against other insured tortfeasors but are unlikely to get contributions from other insurers if their liability is only as a result of the RTA, and will not (or should not) get any contribution from the MIB.

16. If No:-

(a) Unless the tortfeasor is good for the money, Claimants face additional complications.

(b) Now that *Vnuk* has gone, the alternative routes to compensation are only available where the liability arose on a road or other public place. The Motor vehicles (Compulsory Insurance) Act 2022 is not, however, retrospective, so there will remain a large backlog of cases where *Vnuk* arguments can still be deployed.

(c) The routes to compensation require there to be a judgment against the tortfeasor. That means serving the tortfeasor (*Cameron*) which is not always easy or possible.

(d) The MIB (or an Article 75 insurer) can force a Claimant to sue other parties, and RTA insurers may effectively force this by being difficult.

(e) RTA section 152(1) notice must be given, or the MIB properly notified.

(f) Insurers can cast around to find other indemnifying insurers on whom to offload their liability.

(g) Insurers will investigate what the Claimant knew about the vehicle (stolen?) and its insurance status.

Key Points in the Post-Brexit Landscape

17. If you act for a Claimant and an insurer will not confirm indemnity, don't ignore it and assume everything will be OK because there is or was a policy somewhere. Probably 50% of the Particulars of Claim to which we draft Defences get it wrong as to the insurer's status, the availability of a direct right of action etc.

18. Insurers sometimes take the stance that an accident is nothing to do with them because of indemnity issues. Sometimes they have a point, but sometimes it is just bluster in the hope that you give up or pursue someone else.

19. Service on elusive Defendants post-*Cameron*:-

(a) Seems to have been less of an issue than it could have been.

(b) Probably because most insurers taking a sensible view and avoiding costly and probably successful applications for service by an alternative method.

(c) But for a Claimant – assume nothing. If there's any question over indemnity start trying to find the Defendant early.

20. Road or public place:-

(a) Post–*Vnuk* back to the common law cases where it matters i.e. indemnity issues.

(b) But wouldn't be surprised to see attempts to push the boundaries.

21. Knew vehicle was stolen/unlawfully taken (relevant to RTA claims):-

(a) Current disputes as to whether the Directives permit "unlawfully taken" as well as stolen.

(b) The relevant part of the Directive is not affected by the 2022 '*Vnuk* Extermination Act'[7].

(c) Watch this space.

22. Knew vehicle was uninsured:-

(a) For practical purposes this argument is not available in most cases because MIB didn't appeal this part of the *Colley v Shuker* judgment.

(b) How can anyone "know" that a vehicle is covered by no policy at all (rather than just that the driver is not insured to drive it)? Maybe if they undertook a MID search before getting into it…?!

23. Use not permitted:-

(a) Since the demise of section 152(2) declarations, this is the only way for an insurer to avoid an RTA liability.

(b) There is a *Shogun Finance v Hudson*[8] argument in fraud cases but no one has run it.

(c) As a result, "use" has assumed more importance. Increasing attempts by insurers to divide conventional uses into sub-divisions e.g. "commuting" rather than business use.

7 The Motor Vehicles (Compulsory Insurance) Act 2022
8 [2003] UKHL 62

(d) All of this relies on *Bristol Alliance*[9]. Would it be decided the same way now post *Fidelidade*?

24. Bear in mind:-

(a) Except in respect of "motor vehicles" and "otherwise than on a road or other public place", the 2022 Act does not prevent reliance on retained EU law within England and Wales.

(b) Therefore, on issues save for those covered in the new 2022 Act, the directives and EU case law remain part of the English and Welsh law (by virtue of the European Union (Withdrawal) Act 2018, as amended).

Patrick Vincent QC

Isaac Hogarth

12 King's Bench Walk

May 2022

9 *Bristol Alliance Ltd Partnership v Williams* [2012] EWCA Civ 1267