Butterworths Personal Injury Litigation Service

Bulletin Editor
Nicholas Bevan

This bulletin has an exclusive motor claims theme. Non-motor cases will be picked up in bulletin 120.

HIGHWAY AUTHORITY

Foulds v Devon County Council [2015] EWHC 40 (QB)

Highway authority not liable for weak railing that failed to save cyclist.

(Juge Cotter QC)

The facts:

Benjamin Foulds was very seriously injured when riding home on his bike. He lost control of his bike as he was riding down a hill on his way home at dusk after attending college. He crashed into some old wrought iron railings on his nearside that shattered on impact, causing him to fall over them and down a 4.54-metre drop the other side onto a pavement. The top of the railings on his side were approximately 1.5 metres from ground level and they had been installed in the 1930s when the land was privately owned. It was not established how fast he was riding or what caused him to lose control.

The road surface was in a reasonable state of repair and so no claim was brought under s 41 of the Highways Act 1980 against the local highway authority. Instead the claim was made at common law.

The claimant's case was that the highway authority owed a common law duty of care to ensure that railings were in place of sufficient strength and structural integrity to prevent a pedestrian or cyclist, from falling over the retaining wall to the ground below ie to cope with the potential impact from a pedestrian or cyclist.

The defendant relied on *Gorringe v Calderdale MBC* [2004] WLR 1057 to the effect that it owed no duty in this regard to the claimant. It could not be held liable for non-feasance, merely for failing to exercise a statutory power to maintain the fence, in contrast to its statutory duty under s 41 of the 1980 Act. Neither did the relatively weak state of the railings constitute a trap or danger.

The judge also quoted from Lord Scott's judgment in *Gorringe,* at para 76, '*Drivers are first and foremost themselves responsible for their own safety*' and said that the same was true of cyclists.

The judge referred to the House of Lords ruling in *Stovin v Wise* [1996] AC 923 which laid down the rule that a highway authority owed no duty to exercise its power to maintain to improve the visibility at a dangerous road junction, even though the poor visibility there was an acknowledged hazard. Nor was this a case where the local authority had acted negligently in the exercise of a power, as in *Yetkin v Newham* [2010] EWCA Civ 776 where a local authority had failed to maintain shrubs it had planted which obstructed a pedestrian's view and thus constituted a foreseeable hazard.

The decision:

The judge dismissed the claim.

He held that there was a '*world of difference between a pedestrian stumbling and putting an arm on railings to steady him/herself and the sort of considerable force that was very likely to have been involved in this accident. As a result and after careful consideration of the evidence I simply do not see the relevant act or undertaking of responsibility on the part of the Defendant as regards the prevention of the fall to the road below if a cyclist crashed into the railings at speed and with force*'.

The judge indicated that he would have found the claimant to be 66% contributorily negligent had he found the defendant to be in breach of its duty of care.

MOTOR INSURERS BUREAU

Moreno v Motor Insurers' Bureau [2015] EWHC 1002 (QB)

(Gilbart J)

The Facts: C, who was domiciled in England, sustained grievous injuries to her legs when she was hit by an uninsured driver whilst holidaying on the island of Zakynthos in Greece. One of her legs was amputated through the tibia. She had an extensive claim that included future loss of earnings and handicap in the labour market.

The issue: C contended that the Motor Insurers Bureau, who are obliged to compensate victims of accident's abroad in the European Union where the driver responsible is uninsured or untraced, should compensate her at United Kingdom levels, applying UK law.

The relevant law:

The primary source of law governing an injured victim's entitlement to a compensatory indemnity where the driver responsible is uninsured is to be found in article 10 of the 2009 Directive. This confers on the MIB '*the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a*

vehicle for which the insurance obligation provided for in Article 3 has not been satisfied'. This right is extended to victims of accidents in foreign EEA states by arts 20–26 of the 2009 Directive. Of particular note:

Article 25 – Compensation

1. If it is impossible to identify the vehicle or if, within two months of the date of 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 Articles 9 and 10. The compensation body shall then have a claim, on the conditions laid down in Article 24(2):

….

Our national law implementation of this is to be found in reg 13 of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003, referred to above. This UK provision expressly provides that the MIB '*shall compensate the injured party in accordance with the provisions of Article 1 of the second motor insurance directive*[1] *as if it were the body authorised under paragraph 4 of that Article and the accident had occurred in Great Britain*'[2]. The plain and ordinary meaning of this wording is that these victims are entitled to an equivalent level of compensation to that they would expect to receive from an insured driver in the UK.

1. Now art 10 of the 2009 Directive.

2. See reg 13 (2)(b) of the 2003 Regulations.

However this aspect of the 2003 Regulations appear to be inconsistent with of Regulation (EC) No 864/2007 of the European Parliament and Council on the law applicable to non-contractual obligations ('Rome II') which is an EU regulation that is part of the law of the United Kingdom without the need for any domestic legislative steps to bring it into effect. Articles 4 and 15 of Rome II provide in effect that in a case falling within the circumstances where reg 13 applies, the court must now assess compensation in accordance with the law where the accident happened (*lex loci delicti*) and not that of England and Wales.

The defence case: The MIB was concerned that it prospects of recovering the substantial difference in outlay[3] was prevented by an intra-bureau agreement[4] it had entered into that restricted its right to recoupment from its Greek equivalent to the levels pertaining at the accident location. Accordingly it sought to revisit a challenge it had previously lost in *Jacobs v Motor Insurers Bureau* [2010] EWHC 231, where the Court of Appeal had ruled that the law by which the assessment of compensation is to be made is that of England and Wales. It held that the right to compensation arose under the Regulations. This approach was later endorsed in *Bloy and Ireson v MIB* [2013] EWCA 1543. The MIB argued that as the accident occurred abroad Rome II

choice of law considerations applied with the effect that the MIB's duty to compensate was limited to the lower levels prescribed under Greek law.

3. Permitted under art 24 of the Directive.

4. The *Comité Européen Des Assurances* Agreement, dated 29 April 2002.

The MIB argued that *Jacobs* was wrongly decided. The MIB's argument in *Moreno* is that the effect of Rome II on the issue, is any claim against either the principle tortfeasor, or the insurer of a tortfeasor, must now apply the law of the state where the damage occurred as determined by art 4, irrespective of any consequential losses. This means the law of the state where the accident occurred which caused the injuries applies (ie Greece in this case), unless one of the exceptions in art 4.2 or 4.3 apply. The compensatory awards under Greek law are much less generous than under UK law. There is some force in this argument.

The MIB sought a purposive interpretation of the reg 13(2) of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003. The High Court has authorised the issue to be leapfrogged to the Supreme Court.

It seems likely that whatever the outcome of this appeal, the government is likely to accommodate the MIB by amending reg 13 of the 2003 Regulations as a concession for introducing the other imminent reforms in this area made necessary by the *Vnuk* and *Delaney* rulings and the European Commission's current investigation, see above in Part I of these notes.

CONTRIBUTORY NEGLIGENCE

Sinclair v Joyner [2015] EWHC 1800 (QB)

(Mrs Justice Cox)

The facts: A 58-year-old lady cyclist sustained a serious head injury when she toppled sideways off her bike after her front tyre clipped the rear offside tyre of a Volvo 4x4. The defendant driver initially contended, supported by her accident reconstruction expert, that there had been no contact at all between the vehicles; this was modified to a contention that the cyclist had simply lost her balance and toppled into the side of her car as it passed her. The cyclist was not wearing a cycle helmet. Her injuries were such that she was unable to recall the incident.

The accident occurred in a country lane near Tumbridge Wells that was approximately 5 metres wide, too narrow for road markings. A 60 mph speed limit applied. Although the accident occurred at 6:08 pm it was a bright sunny day in July.

The defendant and her husband were driving in the opposite direction to the claimant. The judge found that immediately before the collision the cyclist had been standing up on her pedals and apparently in some difficulty. As the defendant approached a left hand bend she was presented a bike and rider in the centre of the lane ahead emerging from the left hand bend into a straight

section along which that the defendant had approached. The defendant had observed that the claimant was in some difficulty and has seen enough to form the view that the claimant was 'not a serious cyclist'.

The experts agreed that there would have had a mutual line of sight of at least 60 metres. The defendant said she had reduced her speed from 35 mph to 20 mph by the time she passed the claimant. On the evidence, there was enough room ahead for her to have stopped safely ahead of the cyclist to allow her to recover full control; only she didn't stop but carried on. The defendant's belief that there was sufficient room for her to pass the cyclist was clearly a mistaken one.

Legal principles: Cox J noted the defendant's representation that the court should avoid 'a counsel of perfection' when considering the standard of the reasonable driver and the Court of Appeal's critical observation, in *Ahanonu v South East London & Kent Bus Co Ltd* [2008] EWCA Civ 274 that the duty to take reasonable care can sometimes look more like a 'guarantee of the Claimant's safety' when evaluated by reference to '… fine considerations elicited in the leisure of the court room, perhaps with the liberal use of hindsight'. Against this she considered Latham LJ's comment in *Lunt v Khelifa* [2002] EWCA Civ 80 that a car is '… potentially a dangerous weapon'.

The claimant referred the court to guidance on the requisite standard of care which was to be found in the Highway Code (Revised 2007 edition), in the section dealing with 'Road users requiring extra care' which draws attention, at para 204, to cyclists as among those who are to be regarded as 'the most vulnerable road users'. Reliance was also placed upon the advice given to motorists at para 212, namely '*When passing motorcyclists and cyclists, give them plenty of room*.', which in the claimant's contention was not confined to overtaking manoeuvres; something the judge felt to be particularly pertinent.

In this case the claimant's case was based on the defendant's decision to proceed rather than stop to allow the claimant time to recover control of her cycle.

Limits of expert evidence: The judge was critical of the partiality in the defendant expert's evidence, the way he ignored the physical evidence presented by the scuff marks found on both vehicles tyres. He later abandoned his original thesis that there had been no contact between the vehicles. Furthermore his evidence strayed into discussing possible scenarios that might explain the claimant's difficulties which strayed beyond his expertise in to the realm of hearsay and conjecture. The Court of Appeal's strictures of the limits of expert evidence in motor collision cases in *Liddell v Middleton* [1996] PIQR P 36 was referred to, as well Coulson J's observations in *Stewart v Glaze* [2009] EWHC 704 (QB), as to the dangers of expert accident reconstruction evidence exceeding its proper parameters.

The decision: the defendant driver was liable for her negligent decision to proceed when there was clearly insufficient space for her to safely navigate past a cyclist who was in evident difficulties.

Contributory negligence: the judge found that in riding her bike in the centre of a narrow country lane the claimant materially contributed to the injury that resulted. Although the defence contended for a reduction on account of her failure to wear a safety helmet and although a court has come close to finding that failing to wear a helmet actually amounts to negligence in *Smith v Finch* [2009] EWHC 53 (QB), the defence had adduced no medical evidence to establish that this was a causative factor in her injury, so it was not established. The judge, mindful of the causative potency of the defendant's negligence, *in Eagle v Chambers* above, held that the claimant was 25% contributorily negligent.

MOTOR LIABILITY

MacLeod (a protected party suing by his litigation friend Barbara MacLeod) v Metropolitan Police Comr [2015] EWCA Civ 688

Liability of emergency response vehicles

(Lord Justice Jackson, Lord Justice Tomlinson and Lord Justice)

(First Instance Judge McKenna)

The facts

An experienced cyclist riding in London at night with lights illuminated, wearing a helmet and high visibility jacket was struck by a police car attending an emergency call. The car was carrying four officers, including the driver. The car was operating its 'blues and twos' and its incident data recorder indicated that it was travelling at 55 mph (in a 30 mph zone) when it entered the mini roundabout. He was so badly injured that he was unable to give evidence at the trial.

Section 87 of the Road Traffic Regulation Act 1984 provides a statutory exception in cases where, as here, a police vehicle is responding to an emergency call.

The police claimed that the cyclist had emerged into his path at a crossroads with a mini roundabout.

The damage to the bicycle and to the police car indicated that contact occurred between the right handlebar and the front left side panel of the police car.

The issues at first instance

- Where and how the accident occurred.
- To what extent was contributory negligence a factor.
- To what degree was it relevant that the police car was responding to an emergency.

On the third issue, as to what latitude is extended to public servants responding to an emergency call, the key authority comes from Lord Justice Judge's judgment in *Keyse v The Commissioner of Police of the Metropolis* [2001] EWCA (Civ) 715:

> *'29 In my judgment, even in an emergency, a driver is required to drive reasonably carefully in all the circumstances. One significant feature of such cases where the vehicle in question is deployed by one of the emergency services, is that the driver is normally entitled to assume that other road users will not ignore the unmistakable evidence of its approach, and where appropriate, temporarily at any rate will use the road accordingly. Pedestrians can usually be expected to follow the relevant advice in the Highway Code …. Depending on all the circumstances, the speed at which such a vehicle may reasonably be driven is likely to be faster either than that of a vehicle not being deployed in an emergency, or a vehicle in an emergency, which does not or cannot highlight that it is being used for such a purpose. For example, the driver of a civilian vehicle, taking a child to hospital in an emergency knows that however dire the emergency, that fact cannot be apparent to any other road user. Accordingly, in relation to civil liability, and if a prosecution should follow, ignoring defences of necessity or rescue which may be available, he should not drive on the basis that it is.*
>
> *31 … in my judgment, although drivers should allow for the unexpected when they are at the wheel of a car, it would inhibit the valuable work done for the community as a whole, if drivers in the emergency services were not allowed to drive their vehicles on the basis that pedestrians would recognise their warning lights and sirens and give them proper priority by keeping out of their paths.'*

In essence, whilst some allowance is to be made for a policeman or ambulance driver in attending the scene of an emergency, this should not come at the cost of an avoidable risk of catastrophic injury caused by negligently driving to the scene of the assault.

The decision

The evidence indicated that claimant had in fact been travelling in the same direction as the police car that hit him (not across its path) and that the collision took place in the vicinity of the mini roundabout where the police car was travelling at nearly twice the speed limit.

Contributory negligence was not a factor – the claimant did not owe a duty to take evasive action just because a police car was approaching from behind with its lights flashing and siren wailing. The cause of the accident was the lack of care and attention of the policeman driving the car, for failing to drive at a safe speed or to pay sufficient attention to or care of other road users.

The defendant was fully liable.

The appeal

On appeal, the defendant argued (i) the judge's findings of fact had been against the weight of the evidence; (ii) the judge had erred in rejecting expert evidence that the accident could have occurred by way of an alternative scenario; and (iii) the judge had erred in making a finding that the claimant had turned to his right before the collision when there was no evidence to support such a finding and it had not been part of the claimant's case at trial.

The decision

The appeal was dismissed. The judge had been entitled to rely on his common sense and experience when evaluating the witnesses' testimony.

Where a trial judge's decision is based on the primary facts, an appellate court will rarely interfere unless the judge's conclusion was one: (i) which there was no evidence to support; (ii) which was based on a misunderstanding of the evidence; or (iii) which no reasonable judge could have reached.

NEW UNINSURED DRIVERS AGREEMENT

After a hiatus of over two years from its February 2013 consultation on the MIB Agreements the Department for Transport (DfT) finally announced just before the Summer vacation that it had agreed the terms of a new Uninsured Drivers Agreement with the Motor Insurers Bureau. The 2015 version, which comes into force on 1 August, along with a revision made to the Untraced Drivers Agreement 2003 can be downloaded from the newly revamped MIB website.

The new Uninsured Drivers Agreement (UDA) reflects the DfT's original proposals that were set out in its consultation paper but it also includes some significant changes that were not mentioned in the consultation. One notable change is the removal of two unlawful passenger exclusion clauses which it was informed infringed the European directive on motor insurance (2009/103/EC) by several respondents to its own consultation back in 2013. The DfT's press release is at pains to emphasise that these changes are only the result of the Court of Appeal ruling in *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172, even though that decision clearly validates the respondent's earlier warnings.

Some welcome changes

Other welcome, if long overdue, changes include the removal of the MIB's ability to strike out valid claims for trivial procedural infractions and the simplification of the claims process, which are both positive steps and they make the agreement that much shorter. However, these unjust provisions should never have been permitted in the first place. They were anachronisms when they were first introduced as they ignored the procedural sea change wrought by the Civil Procedure Rules 1998 and nothing has been done to revoke their application to the thousands of claims left to run under the terms of the 1999 Agreement as that badly defective scheme remains in force for all accidents predating 1 August 2015.

Serious flaws

Unfortunately the UDA contains a number of serious flaws. The minister has failed to act on the advice received from a number of respondents to his own consultation that he must ensure that the new agreement complies with the minimum standards of compensatory protection required under European law; it doesn't.

The new agreement contains a number of exclusions and restrictions to the MIB's liability to compensate which are not permitted under European law; some of which have been retained from the UDA 1999 or reframed so they have a wider effect, yet others are entirely new.

Leaving to one side the fact that the UDA conspicuously fails to implement the wider geographic and technical scope of the insurance requirement required following the CJEU's ruling in *Damijan Vnuk* 2014 Case C 162/13; now one year past, the following examples suffice:

The complete failure to compensate unauthorised use of vehicles derogated from the duty to insure under s 144 of the Road Traffic Act 1988 (RTA 1988).

In clauses 7 and 8, the deliberate flouting of the House of Lords ruling in *White v White* [2001] UKHL 9 by the reintroduction of constructive knowledge in its exclusion of liability for guilty knowledge, in circumstances where the CJEU has expressly stipulated that actual knowledge is required.

In clause 7 the unlawful exclusion of property damage claims for any victim who knew or had reason to believe the driver was uninsured.

In clause 6 the widely scoped provision that purports to give the MIB the right to offset sums received from other sources, which appears to be intended to catch health or life insurance policy payments that are ignored under the common law for sound public policy reasons.

In clause 9 the bizarre terrorism exclusion that not only fails to address its presumed objective (of excluding liability for car bombs, since the CJEU ruling in *Vnuk* confirms that such functional misuse is incapable of falling within the third-party insurance requirement) but it is drafted in such a way as to produce absurd anomalies. So that clause 9 seeks to deny any compensation for a hapless running down victim of a fleeing anti-GM crop fanatic who has just committed an act of arson but not a bank robber making his get-away from a heist where he murdered a bank clerk.

There are also concerns about the new clause 17 which removes the right to appeal against the MIB's arbitrary rejection of a claim to the Secretary of State for Transport and substituting this with a paper appeal process to an arbitrator whose decision will be final. This appears to prevent the arbitrator considering the European law context. There is also no time limit for making an appeal and it seems that the appeal process itself can only be initiated by the MIB.

We have been here before

The much criticised and discredited 1999 Agreement was also introduced after a sham consultation. The MIB's botched draftsmanship introduced numerous clauses that clearly conflicted with the minimum standards of protection required under the European directives on motor insurance. Some of the obsessively impractical notice requirements were so extensive as to be unworkable, as well as defying common sense. These procedural absurdities necessitated immediate rectification. Later on, a number of its provisions were later successfully challenged and either amended by the courts applying a European law consistent interpretation or they were the subject of an award in damages against the Secretary of State for Transport under *Francovich* principles.

Now it seems that history is repeating itself. The minister has approved an agreement in which MIB has given itself powers to exclude claims and to restrict its liability in circumstances that clearly contravene European law. Just as in 1999, the minister appears to have simply rubber-stamped the MIB's latest draft and presented it, as in 1999, as a *fait accompli*.

Insurer partiality and abuse of executive power

The minister should has chosen to ignore the advice he received from myself and others in his own consultation process back in 2013 when he was told, in no uncertain terms, that his consultation was flawed because (i) its proposals did not go far enough and (ii) he needed to undertake a comprehensive comparative law review of the UK's entire transposition of European law. Those legitimate requests were ignored. His department rejected calls for a dialogue back in 2013, it later blocked the intervention of the Law Commission. His department has failed to answer or even to acknowledge correspondence seeking clarification on substantive law concerns. Instead we are blandly informed that the minister feels that he is constrained in what he can do without the co-operation of the MIB. This is as unconstitutional as it is unacceptable.

AMENDED UNTRACED DRIVERS AGREEMENT

In February 2013 the Minister for Transport made a number of proposals in his consultation exercise for remedying various unsatisfactory features of the Untraced Drivers Agreement 2013 (UtDA) but this left many European law infractions unaddressed.

As if to demonstrate that the 2013 consultation was a mere sham, the minister announced a third supplemental agreement to the UtDA dated 30 April 2013 which introduced revisions that had not raised in the consultation; this, within days of the consultation process closing. This introduced changes to clause 3 notice requirements and it imposed a new obligation on applicants to produce evidence of property damage.

The latest 3 July supplemental agreement (the fifth) is confined to implementing some (but by no means all) of the more obvious implications flowing from the Court of Appeal's decision in *Delaney*. It goes on to introduce

further procedural requirements, unlawfully imposed as a condition precedent of liability as well as replicating an unlawful claw-back provision that purports to entitle the MIB to deduct certain insurance payments from the victim's compensation. Needless to say, this did not feature in the consultation of 2013.

The minister has conspicuously failed to remove the numerous infractions of European law that prejudice the legal entitlement of accident victims despite being advised from several sources in the spring of 2013 that a comparative law review was urgently required. He has even failed to deliver on his original 2013 proposals. The DfT tells us that it is still in negotiations with the MIB.

The UtDA, as with both UDA, contain numerous infractions of EU law that unlawfully discriminate against victims of uninsured and untraced drivers.

PROSPECTS OF REFORM TO THIRD-PARTY MOTOR INSURANCE

The European Commission has been investigating the United Kingdom's systemic failure to match the minimum standards of protection for third party motor victims – since August 2013. It has failed to reach any determination, notwithstanding: (i) its own protocols requiring a decision within a year (ie by August 2014) and (ii) the *Damijan Vnuk* ruling in September 2014 elevating the importance of the protective purpose and confirming that motor insurance must provide cover to third parties that is good for any use consistent with the normal function of the vehicle, anywhere on land (including private property) and that the insurance obligation extends to any mechanically propelled vehicle intended for travel on land. This ruling and the Court of Appeal's ruling in *Delaney v Secretary of State for Transport* 2015 EWCA confirms and validates the need for wide ranging reform, raised in by several respondents in the MIB's aborted 2013 consultation on the MIB Agreements. It is difficult to envision clearer support for or vindication of the concerns raised in the infringement complaint, so it is disappointing to see the European Commission fail to discharge its constitutional role of enforcing European law, especially when the breaches are systemic, long standing, serious and have the effect of compromising the legal rights of millions of citizens.

It is clear that the minister has no intention of undertaking the wide scoped review of our national law provision. So it is vital that practitioners are alert to the fact that our national law in this area cannot be taken at face value. This applies just as much to Part VI of the Road Traffic Act 1988, the Rights Against Insurers Regulations 2002 as it does to the MIB Agreements.

Remedies arise out of legal rights. So competence in this field assumes a working knowledge of the following:

- the consolidated Sixth European Directive on Motor Insurance[5] and in particular arts 1[6], 3[7], 5[8], 9[9], 10[10], 12[11], 13[12] and 18[13];
- the relevant recitals in the preface to the Sixth Directive, which are intended to explain the rationale behind the individual provisions;

- the extensive body of Court of Justice decisions interpreting this law (and in some instances extending the meaning and scope of the terminology beyond the ordinary literal meaning of the words employed); and
- the relevant European law principles, such as: the principle that national laws must not indirectly deprive a directive of its effectiveness, the twin principles of equivalence and effectiveness, subsidiarity, direct and indirect effect, and latterly, what is meant by the protective principle in the context of third party insurance[14].

5. The sixth consolidating European Directive on Motor Insurance (2009/103/EC).
6. Definitions.
7. The third-party motor insurance requirement.
8. Derogations from the duty to insure.
9. Minimum levels of cover.
10. The role of the compensating body, ie the MIB, in compensating victims of uninsured and untraced vehicles.
11. A hotchpotch of special categories of victims that adds little to the core protective principle other than to provide illustrations.
12. Sets out the single permissible contractual exclusion of liability: the passenger with knowledge that the vehicle is stolen.
13. Confers the right to sue a motor insurer direct.
14. See under *Vnuk*, above.

Without this basic knowledge legal advisers are ill equipped to accurately identify the flaws in our national law provision and defects that allow insurers to exploit loopholes and which by the same token create such excellent opportunities for successful, well remunerated legal challenges.

Furthermore, if practitioners are not familiar with the techniques of a consistent European law interpretation, nor comfortable with the legal authorities that oblige our UK courts to apply this technique[15] and the multifaceted criteria for establishing a viable *Francovich* claim, then they will not be able to distinguish between a technical breach and one that has sound prospects of success.

15. See under Applying a European law consistent interpretation below.

There are also risk management issues presented by case management systems and lawyers applying the wrong legal criteria to individual case facts.

The good news is that the European law issues are relative easy to understand. So provided motor claims specialists acquaint themselves with the basic ABC of European law, there should be plenty of opportunities for successful (and dare I say it, profitable) legal challenges

Another remedy is to judicially review the minister's decision to approve the unlawful provisions within the Untraced Drivers Agreement and to fail to undertake the wide ranging review of the domestic transposition of Directive 2009/103/EC on motor insurance. I am able to report that a charity with a special interest in protecting crash victims has intimated its intention to bring a judicial review against the Secretary of State for Transport.

Correspondence about the contents of this Bulletin should be sent to Howard Cruthers, Editorial, LexisNexis, Lexis House, 30 Farringdon Street London, EC4A 4HH (tel 0203 364 4417).

Subscription and filing enquiries should be directed to LexisNexis Customer Services, PO Box 1073, Belfast BT10 9AS (tel: +44 (0)84 5370 1234).

Published by LexisNexis (www.lexisnexis.co.uk)

Printed in Great Britain by Hobbs the Printers Ltd, Totton, Hampshire

ISBN 978-1-4057-9432-9