Introduction

1. This paper responds to the Committee’s call for evidence of 15th September 2016 on autonomous vehicles.

2. Its remit is confined to offering an opinion on the adequacy of the Government’s proposals from July 2016 relating to compulsory third party motor insurance and product liability for autonomous vehicles. These issues are pertinent to the following questions listed in the Committee’s call for evidence:

   ‘Real world operation
   13. Are further revisions needed to insurance, regulation and legislation in the UK to create an enabling environment for autonomous vehicles?

   ...’

   ‘Wider governance
   15. What does the proposed Modern Transport Bill need to deliver?’

3. This paper will open by commenting on the Government’s specific proposals set out in Chapter 2 of its July 2016 paper: Pathway to Driverless Cars. It will then offer some observations on the need for wider reform, on the possible implications of a Brexit and on other related concerns about the Department for Transport’s approach to regulating compulsory motor insurance.

The Government’s proposals

4. In Chapter 2 (Insurance: enabling the evolution) the Government’s consultation paper sets out certain proposals for consideration. These are summarised as follows:

   a. That the scope of compulsory third party motor insurance should be extended to include product liability cover and this should be achieved by amending Part VI of the Road Traffic Act 1988;

   b. That this extended cover should only apply vehicles equipped with automated vehicle technology;

   c. That the scope of this new provision for product liability cover (as distinct from the existing cover restricted to driver or user liability) should also embrace ‘not at fault’ drivers whose vehicle is responsible for causing an accident;

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1 Set out in Chapter 2 of Pathway to Driverless Cars: proposals to support advanced driver assistance systems and automated vehicle technologies, Centre for Connected & Autonomous Vehicles, July 2016.
2 Pathway to Driverless Vehicles, para 1.3
3 Ibid, para 2.17
4 Ibid, para 1.3 and 2.9
5 Ibid, para 2.7 and 2.9
d. That vehicles should be classified to allow manufacturers, insurers and consumers to differentiate between vehicles that require this extended cover and those that don’t6;

e. That the minister’s current private law agreements with the Motor Insurers’ Bureau (MIB) be amended to extend the MIB’s liability to compensate victims of uninsured and untraced drivers7;

f. There are no plans to regulate the precise terms of cover provided by insurers8.

g. There are no plans to amend the existing legislation on product liability. The existing fault based approach is preferred over a strict liability regime9. However, the Government has specifically canvassed views from respondents both for and against such a proposition10;

h. However, consideration needs to be given to creating a new direct right of action against an insurer11, even where the accident may have been caused or contributed to by a manufacturing defect, where its software has been hacked by a third party or where the defect is due to the vehicle owner or user failing to properly maintain and update the system or attempts to circumvent the systems in breach of a policy term12;

i. Insurers are to be given a reciprocal right to recover their outlay from any other parties responsible for causing injury or loss (that is to say from third parties other than the driver of the insured vehicle13), including the vehicle owner14;

j. That where a driver has attempted to circumvent the system or has failed to maintain or update its systems then the insurer should be able to exclude liability to that driver but not third parties;15

k. Insurers are to be left to ‘make arrangements’ with manufacturers and to develop insurance products that share the economic risk to support the sales of their automated vehicles16;

l. The Government is not minded to opt for a ‘first party insurance model’ but has canvassed views on this17.

m. The Government favours a staged approach to regulatory reform

5. Whilst the broad thrust of the Government’s proposals is welcomed, to the extent that they are intended to protect consumers and innocent third parties from the financial hazard posed by the introduction of autonomous vehicles and systems, we have a number of comments on the substance of the proposals.

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6 Ibid, para 2.9
7 Ibid, para 2.12
8 Ibid, para 2.14
9 Ibid, para 2.20
10 Ibid, para 2.30, see Questions 2J and 2K.
11 Ibid, para 2.24
12 Ibid, para 2.25
13 Ibid, para 2.22
14 Ibid, para 2.27
15 Question 2H
16 Ibid, para 2.14
17 Ibid, paras 2.34 to 2.39
Comments on the proposals

6. Dealing with the aforementioned proposals in order of mention:

   a. That the scope of compulsory third party motor insurance should be extended to include product liability cover and this should be achieved by amending Part VI of the Road Traffic Act 1988.

7. The Government’s proposals fail to acknowledge that it is at least arguable that European law already requires that product liability is to be covered by mandatory third party motor insurance. There is nothing that limits insurance to the user. If that is right, then the requirement has not been met in this jurisdiction and the UK is at risk of an infringement action. That said, the point appears not to have occurred to other member states or to insurers, and as far as we are aware domestic motor insurance laws in the EU refer only to the user.

8. The minimum standard of civil liability motor insurance and the minimum standard or consumer protection for defective products are set by two European directives.

9. Articles 3 and 10 of European Directive 2009/103/EC on motor insurance (MI Directive) prescribe the minimum level of protection to be derived from civil liability insurance and in default of insurance, the compensatory guarantee required of the authorised Compensating Body to any third party injured by motor vehicle use.

10. The European Directive 85/374/EEC on product liability (PL Directive) sets the minimum standard of civil liability for defective products. This appears to have been fully implemented by the Consumer Protection Act 1987.

11. The first two paragraphs of Article 3 MI Directive are worth reciting in full:

   ‘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.’

12. It is arguable from the above extract that the MI Directive can be regarded as contemplating that any civil liability resulting from the use of the vehicle (regardless of whether it is attributable to the owner, driver or manufacturer) must be covered by this insurance.

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18 Article 3, MI Directive
19 Article 10, MI Directive
20 In the UK this role is discharged by the Motor Insurers’ Bureau
21 Article 5 MI Directive permits in certain circumstances member states to derogate certain vehicle owners and certain types of vehicle to be derogated from the Article 3 insurance requirement
13. Given the elevated importance given to the MI Directive’s protective purpose by the Court of Justice ruling in its judgment in Damijan Vnuk v Zavarovalnica Triglav d. d. [2014] (Case C-162/13) and the observation made in the European Commission’s Road Map communique of 8 June it is also strongly arguable that this is an absolute requirement and that member states do not have any legislative discretion to restrict the scope of the protection required by Article 3 to driver negligence.

14. The authors are not aware of any decision on this point. However, given the European law context, it is likely that Section 145 Road Traffic Act 1988 (if properly construed in the light of this European law) would be adjudged to already effectively require such cover. Indeed, in Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV the Court of Justice has this to say on this point:

‘When a national court has to apply the domestic provisions which have been specifically enacted for the purpose of transposing an EU Directive intended to confer rights on individuals, the national court must presume that the Member State, following its exercise of the discretion afforded it under that Article, intended entirely to fulfil the obligations arising from the Directive concerned’.

15. Accordingly, although the ostensible and literal meaning of the words in in Section 145(3)(a) of the Road Traffic Act 1988 appear to restrict the third party insurance requirement to ‘any liability which may be incurred by him or them’ as distinct from the potential liability of a manufacturer or supplier for a hidden defect, adherence to the strict or literal meaning of these words is likely to result in the UK transposition being held to be inconsistent with Article 3.

16. Whereas the well-established European law principle of consistent construction obligates national courts to apply a purposive construction of any national law intended to implement European law so that it gives full effect to that European law requirement, in so far as is possible.

17. If we are right, then urgent steps need to be taken to bring the UK transposition of the MI Directive into full compliance with this European law and to a standard that satisfies the European law principle of legal certainty. This will involve extensive

22 ‘It is not envisaged to change the definition of motor vehicle, because the existing definition is technology-neutral and will in the future capture all types of vehicle with a driver intended for travel on land and propelled by mechanical power (including e.g. automated vehicles).’ European Commission, Inception Impact Assessment, Adaptation the scope of Directive 2009/103/EC on motor insurance, 8 June 2016.

23 Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV: [2004] CJEU (Case C-397/01 to C-403/01)

24 See Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV: [2004] CJEU (Case C-397/01 to C-403/01), paras 113 to 119, see also Lord Aikens’ approach to consistent construction in a motor insurance context in Churchill v Wilkinson [2012] EWCA Civ 1166 where additional notional wording was added to Section 151(8) to bring the UK provision into conformity with the MI Directive.

25 See Commission v Greece [1996] ECR I-4459, Case C-236/95 at paragraph 13, where the CJEU ruled: ‘…the Court has consistently held that it is particularly important, in order to satisfy the requirement for legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts (see
reforms not just to the relevant primary\textsuperscript{26} and secondary legislation\textsuperscript{27} but also extensive revisions to the Government’s extra-statutory provision for victims of uninsured and untraced drivers\textsuperscript{28} as well as initiating measures to ensure that the policy terms provided by authorised motor insurers actually comply with the minimum standards of consumer and third party cover required by European law\textsuperscript{29}.

\textbf{b. That this extended cover should only apply vehicles equipped with automated vehicle technology}

18. As argued above, this is potentially inconsistent with Article 3 of the MI Directive. The UK has no legislative discretion here.

\textbf{c. That the scope of this new provision for product liability cover (as distinct from the existing cover restricted to driver or user liability) should also embrace ‘not at fault’ drivers whose vehicle is responsible for causing an accident}

19. It would appear that this is also required by Article 3 MI Directive.

\textbf{d. That vehicles should be classified to allow manufacturers, insurers and consumers to differentiate between vehicles that require this extended cover and those that don’t;}

20. The European law mandatory requirement for civil liability motor cover allows for no such distinction. The civil liability cover should include any mechanical or technical defect in the vehicle, regardless of whether it consists of a fault in an automated system or a simple mechanical defect in a brake or accelerator pedal.

\textbf{e. That the minister’s current private law agreements with the Motor Insurers’ Bureau (MIB) be amended to extend the MIB’s liability to compensate victims of uninsured and untraced drivers;}

21. It would appear that under European law the MIB is already obliged to compensate for mechanical and technical defects in vehicles that are caught by the Article 3 insurance requirement.

22. This is because Article 10 MI Directive requires the UK to ensure that its authorised compensating body is charged ‘with the task of providing compensation, at least up to this effect Case 29/84 Commission v Germany [1985] ECR 1661, paragraph 23, Case 363/85 Commission v Italy [1987] ECR 1733, paragraph 7, and C-59/89 Commission v Germany [1991] ECR I-2607, paragraph 18).’

\textsuperscript{26} Part VI of the Road Traffic Act 1988, as well as abrogating the codification of the third party rule to be found in the Contracts (Rights Against Third Parties) Act 1999 and the Third Parties (Rights Against Insurers) Act 2010 where they apply to third party victims who are supposed to be protected by compulsory motor insurance

\textsuperscript{27} Such as Regulation 3 EC Rights Against Insurers Regulations 2002

\textsuperscript{28} Namely the MIB agreements: the Uninsured Drivers Agreements 1999 and 2015 and the Untraced Drivers Agreement 2003

\textsuperscript{29} In UK Insurance Ltd v Holden and another [2016] EWHC 264 (QB) Judge Waksmann QC noted that the policy wording was not wide enough to satisfy even a literal interpretation of the scope of cover required by Section 145 Road Traffic Act 1988
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’.

23. Unfortunately, all the current MIB agreements inherit the same restrictions in scope that apply to Part VI Road Traffic Act 1988. However, it seems likely that a properly informed court, applying a European law consistent construction of any of the current MIB agreements (as required by Pfeiffer30) would interpret them as extending to cover liability for product liability as well as driver liability. Failing this, there is a strong case to argue that notwithstanding the defective implementation of Article 10 within the MIB agreements, the MI Directive has direct effect against the MIB31.

f. **There are no plans to regulate the precise terms of cover provided by insurers.**

24. The Article 3 insurance requirement is set in absolute terms. It obliges member states to ensure that liability arising out of the use of vehicles is covered by civil liability insurance. Accordingly, the Government’s current laissez faire approach to regulating motor insurers’ policy terms is incompatible with the mandatory requirement of the MI Directive.

25. Whilst it is entirely understandable that motor insurers should seek to restrict their third party cover to the minimum extent required by the literal meaning of the words employed by Section 145 Road Traffic Act 1988 (even when this falls below the proper level and scope of cover required by Article 3 MI Directive) the Government appears to have failed to enforce even this inadequate level of cover, see for example HHJ Waksman’s judgment in *UK Insurance Ltd v Holden & Pilling* [2016] EWHC 264 (QB)32.

26. Arguably what is called for is the codification of standard policy terms of cover for compulsory motor insurance.

g. **There are no plans to amend the existing legislation on product liability. The existing fault based approach is preferred over a strict liability regime. However, the Government has specifically canvassed views from respondents both for and against such a proposition.**

27. After ensuring in so far as is possible public safety, the compensatory entitlement of third party victims should be the paramount concern of the Government in this area.

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30 Supra
31 The only decision on this point is by Flaux J in *Byrne v MIB & Secretary of State for Transport* [2007] EWHC 1268 (QB) where he ruled that Article 10 does not have direct effect against the MIB. However, the case for direct effect of Article 10 is argued extensively by Nicholas Bevan in *Bridging the Gap*, British Insurance Law Association Journal, March 2016 and again less extensively in *Putting Wrongs To Rights, Parts 1 and 2, 27 May 2016 and 3 June 2016 respectively*
32 See paras 22 to 24
In our view, the current product liability regime does not provide the necessary level of compensatory guarantee necessary to ensure prompt settlement of third party claims arising out of autonomous vehicle systems. This is because these claims are likely to be exposed to potentially competing causational issues, that third parties have no first-hand knowledge of, as well as the prospect of a producer raising a state of the art defence under Section 4(e) of the Consumer Protection Act 1987.

28. There is also something anomalous in the notion of imposing a law that requires law abiding road-using members of the public to cover, through private insurance, the risk of defective products that they have purchased or hired as consumers in good faith that the products are fit for purpose and safe on or roads. This would effectively require consumers and motorists to subsidise part of the development and deployment costs of manufacturers and suppliers of autonomous vehicles by indemnifying them against the risk posed by launching their new technologies into the UK market. This could have the undesired effect of providing a disincentive to proper safety testing and regulatory compliance.

29. One possible solution might be to impose an absolute liability on producers, suppliers, distributors and retailers of these new technologies, extending possibly to maintenance and service operators of such systems, for loss or injury caused or contributed by them. However, the Government might face some practical difficulties in effecting such a measure as Article 15.2 of Council Directive 85/374/EEC on defective products seems to require the European Commission’s prior approval before the state of the art defence can be abrogated.

30. It is important that motor insurance premiums are not exposed to extensive product liability that is unlikely to recoverable from the responsible parties, whether by virtue of the effect of Section 4 of the Consumer Protection Act 1987 or otherwise.

31. However, to guard against the risk of a foreign manufacturer being under-insured and/or insolvent, and given the likelihood of lengthy and costly litigation delaying the third party’s compensatory redress, the government would be wise to consider introducing a statutory provision that imposes an absolute duty of indemnity on all motor insurers to satisfy any third party or driver claim (whether caused or contributed to by a product defect associated with the vehicle’s use) in terms analogous to but distinct from the strict liability that applies to an employer under the Employers’ Liability (Defective Equipment) Act 1969. The insurer will not be deemed to be negligent and the existing law on product liability might not require alteration. This should apply to conventionally controlled and ADAS and AVT controlled vehicles alike. Further statutory provision should be made to allow the insurer to recoup its outlay as a subrogated claim from a producer, supplier or other

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33 To apply to non-consumer scenarios and to be excluded from the section 4 state of the art defence
34 See Article 7 (e) of Directive 85/374/EEC for the state of the art defence and Article 15.2 ibid for the power to derogate
35 Advanced Driver Assist Systems
36 Automated vehicle technology
37 See above under Question 2J for an explanation of the European law requirement in this respect
third party, wholly or partly responsible for the defect that caused or contributed to the accident. This would ensure that innocent victims recover their compensation relatively promptly from the insurer involved, or in default, from the Motor Insurers Bureau (MIB).

32. Motor insurers are better placed than private individuals to take informed decisions on whether to pursue subrogated product liability claims, whether individually or as class actions.

33. Another option might be to introduce a no-fault state compensation scheme as in New Zealand under the Accident Compensation Act 2001 (ACC). However, this is unlikely to be welcomed by claimant representatives or insurers for various reasons, not the least being concerns over the lower levels of award under the ACC scheme. ACC does have a number of controversial features, including that it compensates victims who are in full or in part to blame for their own injuries. It also gives rise to a good deal of litigation on the extent of injuries and potential fraudulent claims: insurers themselves face such issues today, but ACC switches those costs to the State.

h. However, consideration needs to be given to creating a new direct right of action against an insurer, even where the accident may have been caused or contributed to by a manufacturing defect, where its software has been hacked by a third party or where the defect is due to the vehicle owner or user failing to properly maintain and update the system or attempts to circumvent the systems in breach of a policy term.

34. Article 18 MI Directive already requires member states to provide a direct right of action against the insurer of a party responsible for an Article 3 liability.

35. The UK transposition of this direct right is found in the EC (Rights Against Insurers) Regulations 2002. However, this is defective in several respects. First, by qualifying the third party’s entitlement to compensation, by subjecting the claimant to any defence that the insurer could raise against its policyholder. Whereas under European law the third party’s entitlement is free standing in nature, a victim should not be subject to any contractual restrictions or exclusions of liability, save to the extent expressly permitted by Article 13 MI Directive. Even where this applies, as a derogation from the MI Directive’s protective purpose, it is to be applied

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38 Where there are concurrent findings of causative user fault and a product defect, the third party should be paid in full by the motor insurer but the insurer’s right to recover its outlay from the producer / supplier should be proportionate to its causative potency and perhaps determined along the lines of the Law Reform (Miscellaneous Provisions) Act 1945

39 Ibid, para 2.24

40 See Regulation 3 (2) of the 2002 Regulations

41 Recital 15 states: ‘It is in the interest of victims that the effects of certain exclusion clauses be limited to the relationship between the insurer and the person responsible for the accident.’ See also Ruiz Berndlde [1996] CJEU Case C-129/94, paragraph 20; Candolin and Others [205] CJEU Case C-537/03, paragraphs 27 to 35. See also Churchill Insurance Company Limited v Benjamin Wilkinson and Tracy Evans v Equity Claims Limited 2011 ECJ Case C-442/10

42 Even where this applies, as a derogation from the MI Directive’s protective purpose, it is to be applied
reduced in exceptional circumstances and to a proportionate extent to reflect the
claimant’s own responsibility for his or her own loss or injury. Second, due to its
dephographic restriction in scope. It is also unclear whether the way Regulation 3(1)
confines the application of the direct right to persons entitled to a cause of action
against an insured person in tort, excludes product liability\textsuperscript{43}.

\textit{j. Insurers are to be given a reciprocal right to recover their outlay from any
other parties responsible for causing injury or loss (that is to say from third parties
other than the driver of the insured vehicle), including the vehicle owner.}

36. This is a sensible suggestion. Statutory provision should be made to allow a motor
insurer to recoup its outlay as a subrogated claim from a producer, supplier or other
third party, wholly or partly responsible for the defect that caused or contributed to
the accident\textsuperscript{44}. This would ensure that innocent victims recover their compensation
relatively promptly from the insurer involved, or in default, from the MIB.

37. Where the claimant is also the driver / owner of the vehicle wholly or partly
responsible for his or her loss or injury and it is established that that the same
individual is also partially responsible for a defect that caused or contributed to the
accident, then the insurers right of recovery against that person must not extinguish
the claim disproportionately. The provisions of the Law Reform (Contributory
Negligence) Act 1945 should cover this scenario in the vast majority of cases but
there may be difficulties where the same claimant is also the policyholder\textsuperscript{45}.

38. Motor insurers can ensure greater control of claims and costs if they are also
responsible for indemnifying both the liability of the user and the producer /
distributor of the product. They are better placed to take informed decisions on
whether to pursue subrogated product liability claims.

39. The MIB could assume a valuable role as a centre of expertise in investigating,
assessing and handling such claims on its members’ behalf. In which case it may be
necessary to confer the MIB with a statutory subrogated power to recover either its
own outlay or that of one of its members in this regard.

\textsuperscript{43} Arguably it doesn’t as third party product liability can exist under common law tort principles as well as
under the Consumer Protection Act 1987 but in the former case the evidential burden rests on the claimant
and it is one that will be difficult to overcome where there the mechanical or technical fault that causes the
accident features a defect that is a’ state of the art’ component of an autonomous vehicle

\textsuperscript{44} Where there are concurrent findings of causative user fault and a product defect, the third party should be
paid in full by the motor insurer but the insurer’s right to recover its outlay from the producer / supplier
should be proportionate to its causative potency and perhaps determined along the lines of the Law Reform
(Miscellaneous Provisions) Act 1945

\textsuperscript{45} Under European law, the amount of compensation a victim of a motor accident is entitled to may only be
limited in exceptional circumstances and on the basis of an assessment of that particular case Candolin and
Others [2005] CJEU Case C 537/03, paragraphs 29, 30 and 35
k. Insurers are to be left to ‘make arrangements’ with manufacturers and to develop insurance products that share the economic risk to support the sales of their automated vehicles.

40. This proposal assumes that motor insurers will be in a position to negotiate fair and reasonable terms with manufacturers and suppliers. Further measures may be needed, such as bolstering the strict liability of producers and suppliers for defective products, if motor insurers (and the affordability of premiums) are to be protected from extensive exposure to risk from the introduction of advanced autonomous vehicles on our roads.

41. If motor insurers are not able to recover a significant proportion of their outlay in settling claims caused by defective products, insurance premiums are likely to rise yet again.

l. The government is not minded to opt for a ‘first party insurance model’ but has canvassed views on this46.

42. It is agreed that a first party insurance model is inappropriate.

43. Whilst motor insurance often includes first party cover (as with the comprehensive motor cover or with legal expenses insurance) first party cover policies are primarily contractual arrangements that result in an agreed sum or an anticipated loss being paid direct to the policyholder. They are not subject to the third party protection that applies to third party policies: they usually confer no rights on third parties so they are neither caught by the Contracts (Rights of Third Parties) Act 1999, s151 Road Traffic Act 1988, nor the insolvency protection within the Third Parties (Rights Against Insurers) Act 2010.

m. The Government favours a staged approach to regulatory reform

44. We agree.

45. Our understanding of the advanced driver assistance systems likely to be introduced in the short and medium term is that they are designed to temporarily substitute direct human control of motor vehicles - subject to an overriding power of intervention by the human driver - in certain highly prescriptive scenarios: such as maintaining a course in motorway traffic, remote control parking and, for convoys of heavy goods vehicles run in close formation and controlled by a single lead driver. Presumably there will be further innovations along these lines. These systems will still require constant vigilance by vehicle users who must at all times be ready and able to resume control, either at the completion of the semi-automated process or in response to an exigency that requires human intervention. Because human control is retained, some responsibility for safe driving will continue to rest on the user. However, this will require new skills and training, allowing the user to recognise

46 Ibid, paras 2.34 to 2.39
exactly when intervention is necessary by reason of an apparent failure of technology or by the occurrence of an event which automation cannot predict or counter, eg, someone throwing a concrete block onto a road from a bridge. It will also be necessary to train users to override the technology when it detects a phantom problem, eg, a newspaper on the road. While it is possible to retain the basic common law rules relating to duty, breach and damage, some thought needs to be given to how those standards are to be applied to a failure to intervene. The existing common law rules do not necessarily impose a duty on a person to carry out a positive act to prevent a loss triggered from circumstances beyond that person’s control (so that there is no duty to pull a drowning child out of a river).

46. However, once fully automated vehicle technology is introduced then, provided the owner or user has not tampered with the technology, failed to maintain it or otherwise misused it or attempted to resume or assert control - then it is difficult to envision how the user could be held liable under existing tort rules for a resulting accident. Under common law principles such a user would be no more responsible for an accident than a bus passenger for the negligence of the bus operator or driver. Even on the most conservative estimate, 90% of road accidents currently are caused or contributed to by human fault, but if that is removed then there is no obvious basis for the imposition of liability.

47. Accordingly, if the compensatory entitlement of innocent third parties is to be adequately protected, provision needs to be made to ensure that there is either or both: (i) strict liability for any product defect (which the mandatory insurance cover must incorporate), although it remains to be determined whether liability should attach to the user or owner of the vehicle, the manufacturer of the product or the supplier of any part of the technology; and/or (ii) the insurer (and in its absence the a fall-back Compensation Body) should be subject to an absolute and free standing duty to indemnify liability for such use, subject of course to the conferral of a subrogated right to pursue any third parties for an indemnity or contribution, including producers, suppliers and garages etc. Either option would require legislation.

48. The key point here is that where there is full automation it may no longer be appropriate to fix liability and thus the incidence of insurance on the user or owner, and it might be better to require the suppliers of vehicles or technology to face strict product/service liability backed by insurance.

Additional observations

The pressing need for reform

49. The Government needs to give serious and urgent consideration to repealing of Part VI Road Traffic Act 1988 along and all associated regulatory provision [such as the European Community Rights Against Insurers Regulations 2003 and the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003] and the private law agreements between the Secretary of State
for Transport and the MIB relating to victims of uninsured and unidentified vehicles with a view to codifying it within a Modern Transport Act in terms that satisfy legal certainty and which also comply with the MI Directive.

50. The entire corpus of our national law provision for protecting the compensatory entitlement of third party victims of both culpable drivers and of defective products needs to be reviewed. This should include a re-evaluation of the suitability of the continued application of the common law third party rule in this context, whereby strangers to a contract are subject not just to the benefits of a contract but also its burdens. This rule applies save to the extent abrogated by Sections (1) and (2) 148 and 151(2)(b) and (3) Road Traffic Act 1988.

51. The inference that under UK law certain policy exclusions are valid against a third party can be drawn from the fact that Section 148 of the 1988 Act only prevents an insurer from relying on a limited number of exclusions that are listed in s 148(2) (such as the invalidation of any restrictions on the age or physical or mental condition of the driver)\(^{47}\). A similar conclusion is to be drawn from Section 151(2)(b) (the unauthorised use exception) and Section s151(3) which nullifies against a third party any restriction of cover to persons holding a driving licence. Whilst some limitations of liability are specifically expressed to be void; the correlative implication is that all other limitations are valid\(^{48}\).

52. According to Ward LJ’s meticulous analysis Part VI Road Traffic Act 1988\(^{49}\), the fact that a compulsory third party motor insurance policy has been issued and delivered under Sections 145 and 147 does not guarantee that a third party victim’s claim is covered.\(^{50}\)

53. According to this analysis Sections 143 and s145 of the 1988 Act impose a duty on the user of a motor vehicle, as opposed to the insurer, to ensure that he has in place adequate insurance to cover any use actually made of that vehicle. It is the responsibility of the user to ensure that his use conforms to whatever restrictions in cover apply to the policy; if he fails in this, he is driving uninsured. There is no concomitant requirement on an authorised motor insurer to provide cover in respect of any and every use to which the user puts the vehicle.\(^{51}\) The qualified nature of the statutory third party cover provided under Ward LJ’s interpretation may make sense from a commercial perspective but it seems to undermine the effectiveness of social policy imperative of protecting the legitimate compensatory entitlement of innocent third party victims that appears to be the legislative intention underpinning Part VI of the 1988 Act. It also conflicts with Article 3 of the MI Directive and a long and consistent line of Court of Justice judgments\(^{52}\).

\(^{47}\) Ward LJ in *EUI Limited v Bristol Alliance Limited Partnership* [2012] EWCA Civ 1267, para 42; this judgment was analysed and criticised by Nicholas Bevan in *Marking The Boundary* in the Journal of Personal Injury, issue 3 of 2013

\(^{48}\) Ibid, para 51

\(^{49}\) Ibid, paras 34 to 53

\(^{50}\) Furthermore, it should also be noted that some events cannot be insured against as a matter of public policy: such as an intentionally criminal act, *Hardy v Motor Insurers’ Bureau* [1964] 2 All ER 742

\(^{51}\) Ward LJ in *EUI Limited v Bristol Alliance Limited Partnership* [2012] EWCA Civ 1267, para 38
54. A complete overhaul of these provisions is necessary because the protection they afford is patchy, inconsistent, tediously long and unnecessarily complicated. This is in large measure the cumulative effect of decades of empirical development. All too often new provisions have been added without any obvious appreciation as the effect this has on the underlying Parliamentary objective.

55. The technical complexities caused by this approach are now so extensive that it can often take years to negotiate modest changes, as is evident with the six years of delay that has attended the government’s negotiations with the Motor Insurance Bureau concerning the long overdue replacement of the Untraced Drivers Agreement 2003. This gives the impression that the Government not only allowed its policy to be dictated by the motor insurance sector but that the industry is able to block reforms it does not like. Over the past eight decades no attempt has been made to rationalise this important area of our national law provision in a holistic fashion. There appears to be a strong case to put both of the schemes for uninsured and untraced drivers on a proper footing by codifying them within a statutory instrument.

56. The lack of legal certainty and systemic inconsistencies with European law is self-evident. It has also been exposed in by a number of recent cases, such as Churchill Insurance v Wilkinson; Evans v Equity & Secretary of State for Transport [2012] EWCA Civ 1166; Delaney v Pickett [2011] EWCA Civ 1532; Delaney v Secretary of State for Transport [2015] EWCA Civ 172; UK Insurance Ltd v Holden and another [2016] EWHC 264 (QB) in the raft of decisions culminating in the Supreme Court’s decision in Moreno v Motor Insurers’ Bureau [2016] UKSC 52 and in the ongoing judicial review RoadPeace v Secretary of State for Transport Case no. CO/4618/2015.

53 The UK’s extensive infringements are analysed in some detail in Nicholas Bevan’s article, Mind The Gap: Ongoing developments in the United Kingdom resulting from the Governments’ failure to fully implement the sixth European directive on motor insurance (2009/103/EC), published in the British Insurance Law Association Journal issue no 129 of October 2016; winner of the BILA Best Article Prize for 2016
54 A point well made by Lord Hailsham LC in Gardner v Moore and others [1984] 1 All ER 1100: ‘This leads me to point to the light shed on the policy of the 1972 Act by ss 148 and 149. It is true, of course, that these sections were grafted onto ss 143 and 145 (which, to the extent cited above, were copied from the 1930 Act) but without any apparent belief in the mind of the legislature that the scion was incompatible with the stock.’
55 In July 2013 the DfT published a communique, Statement of intent on the Consultation on the Review of the Uninsured and Untraced Drivers’ Agreements which indicated that the proposals set out in its February 2013 consultation paper were the product of three years’ negotiation with the MIB. These included improvements to the UtDA. It planned to publish a new UtDA that autumn. Whilst some minor changes were introduced in a sixth supplemental agreement, such as the misleading semantical changes to the guilt knowledge requirement that in our view fail to address the illegality exposed following the Court of Appeal’s decision in Delaney v SoSfT [2015] to uphold the Francovich award against the UK (see our comment below under ‘Legal challenges and delayed reform’), the DfT has failed to deliver even on its own plans (e.g. to provide safeguards for children and mentally incapacitated victims). We are now over three and a half years on from the February 2013 consultation. Accordingly, it would appear that the DfT and the MIB are in deadlock. In our view this indicates that the form in which the UK have chosen to implement Article 10 MI Directive is inappropriate, a more dirigiste approach (imposed by statutory instrument) may be required to driver through the necessary reforms.
57. This imprecision and inconsistency with the minimum standards of protection required under European law are counter-productive. It makes it difficult for insurers to set accurate reserves and to price their premiums competitively. It encourages fraud and expensive legal challenges. The lack of clarity is also unfair to consumers who purchase policies in good faith that they are fit for purpose, when all too often their cover is hedged by qualifications and restrictions. It can also prove to be inaccessible for those victims who discover their compensatory entitlement is negated or reduced for technical reasons they are unable to influence or control. Much of this complexity is unnecessary.

58. When the MI Directive is read in the light of the underlying principles that feature in the consistent line of Court of Justice judgments from Ruiz Bernaldez Case C-129/94 [1996] to in Damijan Vnuk v Zavarovalnica Triglav d.d. Case C-162/13 [2014], the insurance requirement prescribed by Article 3 is capable of being distilled into the following propositions:

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

59. According to the European Commission’s legal office the MI Directive is undergoing an extensive regulatory review following a wide-ranging infringement complaint against the UK. This exercise will include a review of the way in which different member states have implemented the MI Directive. It is likely that a seventh MI

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56 The Article 1 definition of "Vehicle" means any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled"
57 Vnuk, paras 56 and 59
58 Vnuk, para 59
59 This is the inescapable implication of Bernaldez (supra), Katja Candolin and Others. v Vahinkovakautusosakeyhtiö Pohjola and Others [2005] ECI (Case C-537/03), and Farrell v Whitty [2007] Case C-356/05 and it is subject only to the single exception permitted by Article 13.1 of the MI Directive
60 See Mr Justice Jay’s analysis in Delaney v Secretary of State for Transport 2014 EWHC 1785 para 108 in the context of the MIB Uninsured Drivers’ Agreement. The same principles apply to primary or secondary legislation implementing the MI Directive. This issue of legislative discretion is also important in the context of state liability under Francovich principles
61 See Bernaldez paras 18 to 21 (the opinion of Advocate General Lenz of 25 January 1996, paras 25 to 30, provides a helpful analysis of the rationale) and Candolin paras 17 to 23
62 The complaint was brought by Nicholas Bevan following the Department for Transport’s refusal to enter into a dialogue with representative bodies on the need for reform following its own February 2013 consultation on the MIB Agreements. It is registered under CHAP(2013)02537 and its reference under the EU Pilot scheme for handling complaints is 5805/13/MARK
Directive will be approved within approximately two or three years’ time. The Commission have indicated that it is contemplating confining the Article 3 insurance requirement to traffic use on publicly accessible land and to specifically exclude certain non-traffic uses of vehicles. Meanwhile it is clear that the current MI Directive is intended to confer a holistic and free standing entitlement to compensation up to the minimum levels set by Article 9 and subject only to the single permitted exclusion set out in Article 13.

60. Unfortunately, as is evident from Ward LJ’s analysis our domestic implementation fails to meet this standard. The learned judge’s reasoning, by which he attempted to reconcile the qualified and restricted nature of the third party cover provided for under Part VI of the Road Traffic Act 1988 with the holistic scope of the European law requirement is clearly inconsistent with the Court of Justice’s reasoning in Vnuk. Consequently, whole tracts of the wording in Part VI of the 1988 Act are either inconsistent with or directly contradict the European law it is supposed to implement.

61. If a similarly literal approach to interpretation, as employed by the Court of Appeal in EUI, were to be applied to our national law provision in the context of a road accident caused wholly or partly by a mechanical or technological defect, it is conceivable that a court would uphold any contractual restrictions in scope in cover against a third party victim. This would undermine the effectiveness of the protection required under the MI Directive.

62. Accordingly, rather than adding to the present confusion by introducing in a piece meal fashion new legislation restricted to regulating compulsory insurance for autonomous vehicles and driver systems, we urge a root and branch review of our entire national law provision for ensuring that victims of motor vehicle use are guaranteed their fully compensatory entitlement. In our view there is good reason to believe that this holistic approach should result in concise, clear and fair law that is capable of being understood by layman and professionals alike.

**Brexit**

63. Clearly once the UK leaves the European Union in approximately two years’ time the European Communities Act 1972 will be repealed, effectively revoking the supremacy of European law in this jurisdiction. Individuals affected by the any continuing discrepancies between the UK national law in this area and the MI Directive are likely lose their European law remedies and for incidents that postdate the cessation the UK law will be their only recourse.

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63 This would bring the Article 3 into closer alignment with Section 145 Road Traffic Act 1988.

64 Recital 15 states: It is in the interest of victims that the effects of certain exclusion clauses be limited to the relationship between the insurer and the person responsible for the accident.’

65 Katja Candolin and Others. v Vahinkovakuutusosakeyhtiö Pohjola and Others [2005] ECJ (Case C-537/03), paragraphs 17 to 21

66 In EUI v Bristol Alliance Partnership [2012] EWCA Civ 1267

67 Candolin (supra) see paragraph 28: ‘The national provisions which govern compensation for road accidents cannot, therefore, deprive those provisions of their effectiveness.’
64. However, a political decision will still need to be made as to whether the UK should fully implement the MI Directive regardless, including any successor into our national law. It should be remembered that there is a very considerable, if not complete, consensus of legislative intent between the UK and European legislatures. The differences lie in the execution of this policy; not the policy itself. The common intention of both the UK and EU law in this area is to guarantee the compensatory entitlement of motor accident victims. In which case, it is perhaps appropriate to ask what public benefit is served by permitting exceptions to the basic compensatory principle when in most cases, the victims are unable to influence or otherwise avoid their operation.

65. It also seems plausible to suppose that in future trade negotiations between the Government and the European Union the latter is likely to insist on a full implementation of the MI Directive if UK citizens are to continue to enjoy the valuable benefits of the various cross border remedies provided for in Chapter 7 of the MI Directive.

66. Furthermore, as we have already noted, the Commission’s ongoing regulatory review contemplates a seventh directive that will restrict the current scope of the Article 3 insurance requirement.

Legal challenges and delayed reform

67. One could be excused for believing that over the past few years the Department for Transport (DfT) has had a consistent policy of favouring the commercial interests of motor insurers at the expense of the accident victims whose interests the entire edifice of this European and national law provision is supposed to protect.

68. Few would challenge the DfT’s need for a close working relationship with motor insurers and their representative bodies (such as the Association of British Insurers and the MIB) and for some of its discussions to be confidential. The motor insurance sector is an important strategic partner and it plays a vital role in providing motor

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68 See above under para 58 regarding the European Commission’s Inception Impact Assessment, Adaptation the scope of Directive 2009/103/EC on motor insurance, 8 June 2016

69 One need only compare Lord Mance’s account of the legislative aim of the MI directives in Morena v MIB [2016] UKSC 52 [para 2] – ‘The expressed and obviously beneficial purpose of the arrangements introduced by the Directives ... is to ensure that compensation is available for victims of motor accidents occurring anywhere in the Community (now the Union) and to facilitate their recovery of such compensation.’ ...with Waller LJ’s account of the UK Parliament’s intention in Churchill v Wilkinson [2010] EWCA Civ 556 [para 3] – ‘Compulsory insurance has been a feature of legislation in the United Kingdom for many years. The aim is to provide a guarantee that an injured person will obtain the compensation that he or she is awarded against the negligent driver.’ Lord Hailsham makes a similar observation in Gardner v Moore & Ors [1984] 1 All ER 100: ‘Part VI of the Road Traffic Act 1972 is designed to protect the innocent third party from the inability to pay of a driver who incurs liability by causing him death or personal injuries.’

70 Such as the provision in Article 21 for claims representatives, the provision under Article 23 for international insurance information centres and provision under Articles 22 and 24 of the special claims procedure where a foreign insurer or claims representative fails to respond to a claim within a reasonable time

71 See para 59 under The pressing need for reform
accident victims with relatively prompt compensatory redress. However, there is also a corresponding need for open and accountable governance, which is not always evident in the DfT’s dealings in this area.

69. The DfT’s refusal to enter into an open dialogue with claimant representative bodies, the arguably tendentious nature of its earlier consultations, which was particularly noticeable in the way the DfT ignored the consistent calls for wide ranging reform made in response to its February 2013 consultation on the MIB Agreements, and the unacceptable delay in implementing properly the MI Directive (and its predecessors), in circumstances where the need for reform has been clear and obvious for many years- does nothing to disabuse the perception that it is acting partially.

70. The following track record appears to support this perception:

• 1996: *Bernaldez* CJEU
  
  – The DfT intervened, arguably unsuccessfully, in a case that had been referred to the Court of Justice from Spain. *Bernaldez* is an important case because it provides the first authoritative confirmation from the CJEU that the directives’ protective objective had been fully formed by this time. It ruled that member states had no discretion to introduce or permit their own idiosyncratic exclusions or restrictions in the compensatory guarantee required under Article 3 of the First Directive On Motor Insurance.
  
  – The DfT then failed to apply the clear and obvious implications to be derived from the CJEU’s decision based on Advocate General Lenz’s Opinion of 25 January 1996, whose principles applied equally to the duty and scope of the insurance obligation as to the compensating body’s obligation. See Jay J’s observations below.

• 1999: New Uninsured Drivers Agreement
  
  – The DfT approved a new scheme with draconian strike out penalties for the least procedural non-compliance with an excessive range of conditions precedent in circumstances that would not be permitted in an equivalent action under the Civil Procedural Rules, along with new exclusions of and restrictions in liability that are not permitted by the MI directives.
  
  – In 2014 Jay J’s offered the following analysis in *Delaney v SoSfT* [2014]: ‘In my judgment, the language of the Second Directive was, and is, clear and obvious.... Any fair reading of the Opinion of Advocate General Lenz and the Judgment of the ECJ in *Ruiz Bernaldez* would, or should, lead to the conclusion that as between insurer and victim the former cannot rely on an exclusion clause which is not within the express derogations set out in Article 2.1 [of the Second MI Directive] now Article 13 of the MI Directive]. True it is that it was not until the decision of the ECJ in *Farrell*, promulgated .... that

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72 Concerns that have been largely vindicated by the *Delaney* and *Vnuk* decisions

73 *See Rafael Ruiz Bernáldez* [1996] CJEU Case C-129/94 paragraphs 15 to 24


75 In 1996

76 84/5/EEC of 30 December 1983
there was unequivocal case-law to the effect that the same line of reasoning applied to the Article 1.4 [now Article 10 of the MI Directive] national body, but in my judgment - and as I have already explained - the point was close to being self-evident.’

‘the language of the Second Directive - even unadorned by authority - was and is clear enough, and that the case of Ruiz Bernaldez, coupled with a basic understanding of Community law principles, ought to have led any reasonable official acting with the resources of the department to conclude that the insertion of clause 6(1)(e)(iii) could not lawfully have been achieved.’

• 2001: White v White & MIB [2001] UKHL 9
  - The House of Lords ruled that the passenger exclusion in clause 6 of the Uninsured Drivers Agreement (UDA) of 1988 was inconsistent with the single permitted exclusion of liability in what is now Article 10 of the MI Directive which required actual knowledge in the passenger that the vehicle was uninsured.
  - The DfT failed to correct this in clause 6 of the UDA 1999 (which had by then replaced the 1988 version) and this scheme continues to apply to uninsured driver claims arising out of accidents that predate 1 August 2015.
  - In 2015 the DfT agreed what appear to be misleading and semantical revisions to the wording of the knowledge requirement in the new UDA, ostensibly in response to the Court of Appeal’s ruling upholding Jay J’s first instance finding in Delaney. The new agreement substitutes ‘knew or ought to have known’ from the 1999 Agreement with ‘knew or had reason to believe’ in the new agreement. It appears that these phrases carry precisely the same meaning and so conflict with the European law requirement as well as the ratio of the House of Lords decision in White.

• 2003: Evans v SoSf Transport CJC
  - In this case an earlier version of the UtDA was found to have failed to provide an equivalent level of compensatory protection on the basis that the version under consideration did not allow for the payment of interest on the claim. By then the 2003 edition was in force. Once again, the DfT appears to have failed to appreciate the wider implications or to revise the current version.
  - Flaux J made the following observation in 2007 in his judgment in Byrne v MIB: ‘... notwithstanding the Evans judgment of the European Court in 2003 which highlighted that the Untraced Drivers Agreement [of 1988] did not comply with the Second Directive in other respects, the Department does not seem to have checked through the entire Agreement at that time to ensure that it complied in every respect with the Directive’

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77 Farrell v Whitty [2007] CJEU Case C-356
78 Delaney v Secretary of State for Transport [2014] EWHC 1785 (QB) para 108. In march 2015 the Court of Appeal unanimously upheld Jay J’s finding that the UK was liable to compensate the claimant on the ground that the unlawful guilty knowledge provision was sufficiently serious to warrant damages under Francovich principles
79 Ibid, Delaney, para 112
• **2003: New Untraced Drivers Agreement (UtDA)**
  - The DfT introduced new exclusions of liability that are clearly not permitted by the MI directives, such as in clause 4 (c) which absolves the MIB from any liability whatsoever if the victim has failed to report the incident to the police within 14 days, no regard being had to the victims’ age or capacity. The MIB can and does rely on these provisions.

• **2007: Byrne v MIB & SoSf Transport [2007] EWHC 1268 (QB),**
  - When the MIB’s failed to succeed in a defence that relied on the strict application of an absolute three-year time limit for presenting a claim under the Untraced Drivers Agreement 1996, regardless of the victims minority, the DfT introduced minimal changes to made to the UtDA 2003 to bring the strict year limitation period into line with the Limitation Act 1980. Unfortunately, once again it failed to undertake a proper compliance review (or if it did, it failed to implement its findings) which would have revealed various other provisions that were non-compliant: such as the unlawful property damage limitation period\(^81\), the unlawful property damage exclusion\(^82\) the unlawful offset of insurance payments from damages\(^83\).

• **2011: Churchill v Wilkinson CJEU\(^84\) & EWCA\(^85\)**
  - When the DfT was confronted with a CJEU decision that section 151(8) Road Traffic Act 1988 was inconsistent with the MI Directive, it conceded to notional wording added by the Court of Appeal to bring the provision into line with the MI Directive. It failed to publish an official amendment of the legislation or to address a near identical provision in Section 148 (4) of the 1988 Act. When confronted with this instance of non-conformity, it failed undertake a compliance review of Part VI of the 1988 Act, which if undertaken, would have revealed numerous infringements of the MI Directive.

• **2011: New property restriction introduced to UtDA**
  - In April 2013 the DfT sanctioned a supplemental agreement which amended the UtDA 2003 by introducing a new property damage restriction that excluded all such claims unless a ‘significant’ injury had been sustained in the accident (not necessarily by the claimant). Such a measure was permitted by the Fifth MI Directive 2005/14/EC of 11 May 2005. However, the new UK law provision defines ‘significant injury’ as: ‘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...’.

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\(^{80}\) Byrne v MIB [2007] EWHC 1268 (QB), Byrne, para 72

\(^{81}\) Clause 4 (3) (a)(ii), only removed ten years later by way of a supplementary agreement in 2013

\(^{82}\) Clause 4 (3)(f) UtDA 2003

\(^{83}\) Clause 6 UtDA 2003 which conflicts with the disregard under the rule in Parry v Cleaver [1970] AC 1

\(^{84}\) Churchill Insurance v Wilkinson; Evans v Equity Claims [2011] CJEU (Case C-442/10)

\(^{85}\) Churchill Insurance v Wilkinson; Evans v Equity & Secretary of State for Transport [2012] EWCA Civ 1166
— By importing into the term ‘significant’ a meaning that is in effect a serious injury requirement the DfT has permitted a flagrant breach of the Directive in circumstances where the European Commission’s clearly stated objective was simply to restrict the recovery of property damage to cases where there was some independent evidence that an accident had taken place; in the interests of preventing fraud.

• 2013: DfT consultation on the MIB Agreements

— In February 2013 the DfT announced its consultation on its proposals for review of MIB Agreements. The announcement followed within a matter of days a four-part series of articles by Nicholas Bevan in the New Law Journal that exposed the failings in the UK transposition of the MI Directive and warned the minister that his department might incur liability for failing to properly implement this law. Various informed respondents warned the DfT of the widespread European law non-conformity of the UK statutory and extra-statutory implementation of the MI Directive, urging the DfT to undertake a wide ranging review of the entire UK transposition of this law. It was specifically warned that the proposed exclusion of terrorism exclusion clause was unlawful. It was also advised that the geographic and technical scope of the duty to insure and the third party cover required by sections 143 and 145 Road Traffic Act 1988 were too narrow.

— The DfT was warned that the UDA and UtDA contained numerous unlawful restrictions and exclusions of liability.

— The DfT later abandoned the consultation and refused even to enter into a dialogue with various claimant representative bodies.

• Later in 2013, further evidential requirements were introduced to the UtDA 2003

— These were set as a condition precedent to any entitlement to compensation for property damage and they were incorporated into the UtDA 2003 by way of a supplemental agreement.

— They were introduced within 4 days of the date set by the DfT for closure of responses to its consultation and without being mentioned in the consultation and without any prior notification.

• October 2013, Infringement complaint to the European Commission

— When the DfT refused to enter into a dialogue or to publish its final proposals as promised in the Summer of 2013, Nicholas Bevan filed a private infringement complaint at the European Commission. The complaint was accepted. According to the Commission the complaint has set in train a much wider investigation into the way every member state complies with the MI Directive and it is part of the regulatory review described above with reference to the Road Plan of 8 June 2016.

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86 Review of the Uninsured and Untraced Drivers’ Agreements, DfT, 28 February 2013
87 On the right road? Parts 1 – 4, Nicholas Bevan, New Law Journal, February 2013
88 Nicholas Bevan’s response was 64 pages long and included a comparative law spreadsheet that referred to over forty potential infringements of European law.
– The DfT has been provided with extensive details of over 50 separate infringements and there have been a number of lengthy meetings between DfT officials and the Commission on this subject.
– The DfT have been supplied with updated comparative law schedules from time to time.

• Early 2014, The DfT block the involvement of the Law Commission
  – When the Law Commission approached Nicholas Bevan in July 2013, seeking his proposals for reform in this area, with a view to incorporating this in its next triennial reform agenda, he submitted a detailed report setting out the relevant EU and UK law along with a detailed comparative law analysis that was submitted in October that year.
  – The Law Commission later wrote to indicate that there were unable to proceed with the project as the DfT were not prepared to support a review.

• September 2014: Damijan Vnuk v Zavarovalnica Triglav d. d. [2014] (Case C-162/13)
  – The CJEU judgment provided unequivocal confirmation that the UK had no legislative discretion to restrict the geographic scope of the third party insurance requirement to roads or other public places or the restrict the insurance requirement to motor vehicles intended or adapted for use on roads, as stipulate in the 1988 Act.
  – The CJEU judgment also confirmed that the Article 3 insurance requirement extends to any use made of a motor vehicle intended for travel on land that is consistent with its normal function and it elevates the importance of the legislative objective of protecting victims to equal importance with the aim of liberalising the free movement of people, vehicles and goods within the EEA.
  – The DfT is fully aware of the implications of Vnuk and the extent to which that judgment vindicates numerous concerns raised by several respondents to its February 2013 consultation and in the infringement complaint. Over two years have elapsed and yet the DfT has failed or refused to take any steps to rectify the numerous defects in its transposition that this decision exposes.

• 2013/14 DfT ignore further warnings of newly identified defects
  – The DfT was informed by Nicholas Bevan that the UtDA failed to provide any equivalent and effective protection for minors and mentally incapacitated victims. The DfT has failed or refused to bring its provision in this respect into line with the minimum requirements of CPR Part 21 in line with Dunhill v Bergin [2014] UKSC 18.

• February 2015: Delaney v SoSf Transport [2015] EWCA Civ 172
  – The Court of Appeal upheld Jay J’s first instance finding that the UK was in serious breach of European law in its transposition of Article 10 MI Directive in the UtDA 2003.

• August 2015
In August last year the DfT announced a new UDA as well as changes to the UtDA. Whilst removing two clearly unlawful passenger knowledge exclusions of liability contained in the 1999 version, the new UDA still contains a number of provisions that undermine the effectiveness of the MI Directive, such as the new terrorism exclusion. The ineffectual changes to the guilty passenger knowledge requirement\(^89\) (ostensibly introduced to remove the constructive knowledge element held to be unlawful in *White v White* in 2011 and in *Delaney* in 2014) and the widened scope of the deductions it purports to be entitled to make from damages, appear to be also inconsistent with the European law requirement.

Despite having amended the UDA 1999 in the past, the DfT appears to have decided to allow the old scheme to continue to apply, unamended, for accidents predating 1 August 2015. This decision is likely to have been taken in the full knowledge that the UDA 1999 contains a number of unlawful exclusions and restrictions of liability that conflict with the MI Directive.\(^90\)

The DfT was informed of these defects within a week of the new UDA being published but has failed or refused to act.

**October 2015: RoadPeace v SoSf Transport CO Ref: CO/4681/2015**

- A national road safety charity invited the DfT to bring the UK national law provision into line with the minimum standards of compensatory protection required under the MI Directive but it refused. Accordingly, the charity has applied for judicial review of the UK’s national law transposition of the MI Directive.
- The judicial review concerns a number of discrete/illustrative legal challenges that the UK’s statutory and extra-statutory implementation of MI Directive.
- The Government Legal Department has already made a number of open concessions within the proceedings, including the following:
- **In an open response from October 2015**
  - Ground 2 re: failure to extend the geographic limit to include all use within territory. DfT claims that it will consult on how best to amend domestic law, including both the UDA and UtDA in this regard, so as to reflect the position under EU law.
  - Ground 7 – re: the Terrorism exclusion in the UDA 2015 and UtDA. The DfT admits that these exclusions are unlawful.
  - Ground 8 re: the lack of suitable safeguards for children – the DfT concedes suable safeguards need to be put in place and says that further consideration on this will need to be given.
  - **Other points conceded**
  - Ground 9.1 – re: Statutory definition of motor vehicle, the DfT accepts that domestic legislation, the UDA and UtDA would need to be amended to give effect to the *Vnuk* decision.

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89 See above in this section under 2001: *White v White & MIB* [2001] UKHL 9
90 Between 2013 and 2015 Nicholas Bevan has provided the DfT, directly and through the legal office of the European Commission, with detailed schedules that list and explain which statutory and extra-statutory provisions appear to conflict with the MI Directive.
• Ground 9.7 – re: the Rights Against Insurers Regulations 2002, the DfT admits that the definition of ‘accident’ in regulation 2(1) (which is confined to accidents occurring in the UK) fails to comply with the Directive.


• Ground 9.16 re: Clause 2 UtDA, the DfT accepts that suitable safeguards to protect minors are necessary and the UtDA may need amending, and says this will be considered as part of the ongoing negotiations with the MIB to review the UtDA.

• Ground 9.18 re: the unlawful exclusion of property damage caused by unidentified vehicle – ‘significant’, the DfT accepts that this is likely to be amended.

  – Additional and clearly referenced inconsistent provisions have been cited and explained within the proceedings and these points have yet to be conceded or determined.

  – The DfT is contesting the application and a three-day rolled up permission and substantive hearing of the issues has been fixed for mid-February 2017.

71. The DfT’s failure to promptly address the longstanding and extensive illegality that permeates its entire national law implementation of the MI Directive is in our view egregious and its conduct, in refusing to enter into a dialogue with representative organisations and ignoring their calls for an urgent and wide ranging review, threatens to undermine public confidence in the DfT’s good offices.

72. In the meantime, the DfT continues to provide individual victims of uninsured or untraced drivers with a direct online link to the MIB91, presumably in the full knowledge that the MIB agreements fail to give full effect to the minimum standard of compensatory protection required under European law.

26 October 2016

Authors:

Nicholas Bevan, (Solicitor, consultant and visiting lecturer on EU motor insurance law)
Professor Robert Merkin QC, (Lloyds professor of commercial law)
Dr Kyriaki Noussia, (Senior Lecturer / Assistant Professor in Law)

91 https://www.gov.uk/compensation-victim-uninsured-driver