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Vnuk: the position now under UK motor law

In this article, we look a little deeper into the announcement in February 2021 by the Transport Secretary of the government's "*plan to scrap EU law, ensuring British drivers avoid £50 a year insurance hike"* and discuss what this might mean in practice. The announcement relates to the effects of the decision of the European Court in the well-known case of ***Vnuk*** as long ago as September 2014.

Superficially, one might wonder why it is necessary for something to be 'scrapped' when it has not been implemented in the first place. However, the matter deserves closer examination than merely poking fun at the somewhat misleading headline. Further, watching the published YouTube video does not reveal any more of the detail or the government's exact intentions.

The claimed estimated saving to the UK motoring public of £50 per year on premiums is a significant sum. The detailed actuarial analysis has been published and reveals a maximum anticipated annual cost saving of £2.3bn. However, it is important to note that this figure was based on a Personal Injury Discount Rate ('PIDR') of 1% - it being uncertain at the time the work was carried out as to where the PIDR would land. History tells us, of course, that it landed at -0.25% meaning the estimated impact

IN BRIEF

In this article Paul Ryman-Tubb and David Holt of Weightmans look at how UK motor law is responding to the CJEU judgment in *Vnuk.*

What is the impact of the government's announcement that it 'plans to scrap EU (motor) law'?

would rise further. Inevitably, any impact cost assessment has to be somewhat broad-brush as it is impossible to be accurate in terms of the actual cost.

Recap

Few in the motor insurance industry will not be familiar with the ***Vnuk*** case and the angst it has caused. The issue goes back as far as 2007 when Mr Vnuk, a Slovenian farm worker, was knocked from a ladder whilst working in a hayloft by a reversing tractor with a trailer attached in a private farm yard. The motor insurer refused to pay and an argument ensued about the interpretation the Motor Insurance Directive (2009/103/EC) ('the Directive') in relation to the extent of its requirements for compulsory motor insurance.

The European Court held that the Directive required insurance to be in place in respect of any use of a motor vehicle ('motor vehicle' being very widely defined, as per Art 1 of the Directive, as being any mechanically propelled vehicle save for one running on rails) which was 'consistent with the normal function of the vehicle'. A later European Court clarification would add the words 'as a means of transport' to this phrase. Insurance was required for such use anywhere, including on private land.

These requirements can be contrasted with UK national law which, though in place for many years prior to the Vnuk decision, seeks to give effect to the Directive, namely Sections 143 and 145 of the Road Traffic Act 1988 ('the RTA'). The RTA only requires the use of motor vehicles on a 'road or other public place' to be covered by insurance (Section 143) and a motor vehicle is more restrictively defined as being one which is 'intended or adapted for use on a road' (Section 185) – here there is no reference to the words 'or other public place'. Unhelpfully, no definition of 'other public place' is provided in the RTA, but it clearly cannot encompass all possible private land vehicle 'use' scenarios.

The thought of compulsory insurance for all manner of 'vehicles' (including golf carts, ride on lawn mowers, mobility scooters etc.) as well as the necessity for all vehicles used on private land to be insured sent shock waves through the motor insurance and motor sport industries. The framework for the liability of the Motor Insurers' Bureau ('MIB') has always been based upon the compulsory insurance requirements in the RTA. If such requirements were broadened, so would the exposure for MIB and, through its annual levy, this burden would be passed to motor insurers and the insuring public.

Real concerns were raised about the practicalities of enforcement, the opportunities for fraud and the sheer volume of claims that would result from the UK widening the compulsory insurance requirements in the RTA. The EU are going through a review of the Directive (REFIT) and the issues posed by ***Vnuk*** are part of that review. However, it is not yet known when or exactly how, if at all, that process will change the Directive.

Is Brexit the answer?

One might be forgiven for thinking that, from the end of the Brexit transition period on 31 December 2020, the problems arising from ***Vnuk*** might come to an end and that there is no need for the government to 'scrap' anything given that the RTA has not been amended to give effect to the implications of ***Vnuk***. However, this view would be mistaken.

The government announcement does at least suggest that no amendment will be made to the RTA to make it ***Vnuk*** compliant, which is encouraging, but the government will need to do more than this to ensure that the ramifications of ***Vnuk*** do not continue to be felt.

One must consider here the European Union (Withdrawal) Act 2018 (the 2018 Act).

The 2018 Act effectively takes a 'snapshot' of EU law at the point of Brexit and 'retains' that in UK law until such time as new law is passed after 31 December 2020. As a result, much existing EU law as at 31 December 2020 operates as retained law in the UK unless or until it is overturned by legislation passed by the UK government. Moreover, the UK courts **must** have regard to existing decisions of, and general principles enunciated by, the European Court prior to 31 December 2020.

Anything the European Court (or indeed any legislative body of the EU) does after 31 December 2020 **may** be taken into account by an UK court *"so far as it is relevant to any matter before the court"* (Section 6(2)). Accordingly, for example, any decision made by the European Court after 31 December 2020 will be persuasive, albeit not binding on the UK courts.

This all means that already established general principles of EU law, including equivalence and directly effective rights for individuals will continue to apply, as will the requirement for UK courts to interpret national law so far as possible so as to give effect to retained EU law (the ***Marleasing*** principle). The only way to bring an end to the application of such retained EU laws and principles is for the UK government precisely to legislate their cessation either completely or, more likely, in particular contexts where their application produces ongoing, unwanted results.

Alternatively, as regards pre-31 December 2020 decisions of the European Court, the Supreme Court (not any lower court) can overrule any particular decision. However, to do so, it *"must apply the same test as it would apply in deciding whether to depart from its own case law"* (Section 6(5)). So, not only does it take a considerable period of time for a case to reach the Supreme Court (although leapfrog applications may now become more prevalent from lower courts, bypassing the Court of Appeal), but also there must be special justification or strong grounds for the Supreme Court to depart from the existing EU case law.

Marleasing has already impacted the RTA definition of a motor vehicle. In ***Lewington v MIB [2017] EWHC 2848,*** Mr Justice Bryan decided that a large earth moving machine, described as a 'large yellow Tonka toy', met the definition of a 'motor vehicle intended or adapted for use on roads' in Section 185 of the RTA. He used Marleasing to interpret Section 185 so to give effect to the wider definition

of 'motor vehicle' in Art 1 of the Directive. Accordingly, MIB was liable to compensate the Claimant despite the fact that the machine in question was not strictly 'intended or adapted for use on roads'.

The EU law principle of direct effect allows individual Claimants to enforce rights conferred on them by the Directive directly against an emanation of the state. MIB is an emanation in the context of any directly effective, compulsory insurance rights.

In ***Lewis v Tindale and others [2019] EWCA Civ 909***, the Claimant was injured by the Defendant's uninsured motor vehicle whilst on private land. Even though the applicable Uninsured Drivers Agreement did not apply to incidents occurring on private land (since it followed the compulsory insurance requirements of the RTA), the Court of Appeal held that, as an emanation of the state for these purposes, MIB was liable to meet the claim since the Directive required insurance for the use of vehicles on private land and this requirement gave rise to a directly effective right enabling the victim to seek compensation.

Further, there is the EU law principle of equivalence which essentially requires the equal treatment of victims in any circumstances falling within the ambit of the compulsory insurance requirements. This potentially has wide application.

The above commentary demonstrates how the motor insurance industry and, thereby the motoring public remain exposed to the financial burden of claims arising in circumstances beyond those envisaged by the RTA alone notwithstanding that the Brexit transition period has ended.

What might be done?

It would seem that the government is working towards removing the effects of ***Vnuk*** by legislative means. It appears that the government wishes to remove the compulsory requirement for insurance for vehicle use on private land. It also seems that certain vehicle types will be removed from the ambit of the compulsory insurance requirements, but it is not clear if the Section 185 definition will be amended to any extent. The government may choose to leave the definition as it is currently, but specifically legislate which vehicle types are excluded from the need for insurance going forward as has already been done for Electrically Assisted Pedal Cycles for example.

Section 6(7) of the 2018 Act provides that retained EU law, retained EU case law and retained general principles of EU law may be modified by the UK government through domestic legislation such that the courts must have regard to such laws and principles **as modified by the legislative change**. Insurers must hope that the legislative change is wide enough such that there will be no need for the Supreme Court to have to mop up any lingering effects of ***Vnuk*** by overturning EU laws and principles not legislated away by the UK government.

In short, the government needs to do more than simply leave the RTA as it is. It must at least positively legislate to explain what it intends even if the wording of the principal sections of the RTA in this context largely remain unaltered.

A considerable amount of work was done, particularly by the UK government in terms of consultation and impact assessment in the years following the ***Vnuk*** decision. The government was aware that the Directive might be altered so as to ameliorate the effects of ***Vnuk*** at least to some extent as a result of REFIT. Doubtless this work is now being revisited to see if it could be used to shape UK law in a post Brexit world.

So, if the government does take action to ensure that the implications of *Vnuk* are removed from UK law, how does that affect the Green Card scheme? What happens with UK motorists driving in Europe and particularly moving between Northern Ireland and Ireland?

The answer to that question lies in the fact that the RTA deals separately with the requirements for insurance of vehicles registered in Great Britain that are (1) used in Great Britain and (2) used in other member states.

Changes needed to remove the unwanted bits of Vnuk affect (1) but need not affect (2). In other words, the law in the UK can be clear that cover is only required on roads or public places, but in so far as vehicles used in other member states go, then the RTA can remain as it is requiring cover to meet the minimum legal requirements of the country visited, so complying with Vnuk. It was the promise by the UK government that it would continue to require cover in other member states which complies with their law that enabled the UK to remain a signatory to the Multilateral Agreement as part of the Green Card system. This paves the way for the removal of the need for motorists to carry green cards once the Commission take the necessary action to allow that to happen.

That deals with the main issue for cross border of the extent of the insurance required.

As for what needs to be insured, this is much less likely to be an issue for cross border travel. Not many will take their ride-on mower on holiday to France! However, in practice, if a 'machine' not required to be insured in the UK (post the government's changes to disapply Vnuk) is taken abroad then it will need the necessary cover to be legal.

This article was kindly provided by the Weightmans partners **Paul Ryman-Tubb,** External Technical Lead on motor indemnity matters, and **David Holt**, Head of Large Loss and Technical Claims. Weightmans is a FOIL member firm.