

## High Court Damages Ruling in Hit-and-Run Case

*Byrne v Motor Insurers Bureau / Secretary of State for Transport* [2007] EWHC 1268 (QB)

**By Jorren Knibbe  
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In *Byrne v Motor Insurers Bureau / Secretary of State for Transport*, Flaux J has made the rare finding that the United Kingdom has committed a sufficiently serious breach of Community law to give rise to *Francoovich* damages liability. Flaux J held that the UK has failed adequately to transpose Article 1(4) of the Second Motor Insurance Directive (84/5/EEC), which requires Member States to establish a system for compensating victims of road accidents caused by 'hit-and-run' drivers who cannot be traced. Although the point arose on a preliminary issue and questions such as causation remain to be litigated, the judgment paves the way for a compensation claim by the Claimant against the Secretary of State.

### Background

Ben Byrne's claim, which was presumed true for the purposes of Flaux J's determination of the preliminary issues, was that he was injured in 1993, at the age of 3, when he was hit by a car while crossing the road with his father. The driver did not stop, and was never traced.

The Secretary of State had arranged a compensation scheme for the victims of hit-and-run drivers in the Untraced Drivers Agreement ("UDA") concluded in November 1972 with the Motor Insurers' Bureau ("MIB"), a company composed of insurers authorised by statute to provide motor insurance. Under the UDA, a victim injured by an untraced driver could apply to the MIB for compensation. The MIB would carry out an investigation, and if satisfied that the requirements of the UDA were fulfilled, would award compensation calculated in the same way a court would have calculated damages in a tort action against the driver. However, under clause 1(1)(f) of the UDA, compensation would only be paid if the victim applied to the MIB in writing within three years of the date of the accident.

Some ten years after the 1972 UDA was concluded by the Secretary of State and the MIB, the Community legislature laid down a requirement in Article 1(4) of the Second Motor Insurance Directive that Member States provide a compensation scheme for victims of untraced drivers, in accordance with the requirements of

Monckton Chambers  
1 & 2 Raymond Buildings  
Gray's Inn  
London WC1R 5NR

Tel 020 7405 7211  
Fax 020 7405 2084  
DX LDE 257

chambers@monckton.com  
www.monckton.com

that provision. No amendments were made to the UDA to take account of any differences.

Ben Byrne's parents were unaware of the UDA scheme until October 2001. Their subsequent application to the MIB was dismissed as outside the time limit laid down by clause 1(1)(f). Ben Byrne sought damages from the MIB for breach of the UDA as it should be interpreted in the light of EC law, or alternatively for breach of obligations directly applicable to the MIB under EC law. In the further alternative, Ben Byrne claimed damages from the Secretary of State for failure properly to implement the Second Motor Insurance Directive.

### **Interpretation of the Second Directive**

As the first preliminary issue, Flaux J was asked to determine whether Article 1(4) of the Second Motor Insurance Directive precluded Member States from applying a time limit under their compensation schemes for victims of untraced drivers which was less favourable than the limitation rules applying to claims for damages brought in the courts against identified drivers. Counsel for the Claimant pointed out that, under section 28 of the Limitation Act 1980, Ben Byrne could have commenced a claim in tort at any time until his 21st birthday in 2010.

Determining this issue in favour of the Claimant, Flaux J observed that the purpose of the Motor Insurance Directives was to ensure the free movement of vehicles throughout the Community, in particular by abolishing the checks for valid insurance previously carried out on drivers crossing some national frontiers. This purpose had meant that national rules on compulsory insurance had to be harmonised, and that there had to be a system for compensating the victims of uninsured and untraced drivers, who would no longer be detected at Member State frontiers.

Flaux J held that this purpose would not be adequately achieved unless the victim of an untraced driver could obtain under Article 1(4) of the Second Motor Insurance Directive protection equivalent to that which would be available against an identified driver in the national courts. The UDA in its current form failed to achieve such equivalent protection because of the three-year time limit on applications, which was much shorter than the relevant provisions of the Limitation Act 1980.

Furthermore, Flaux J reasoned that the need for equivalent protection flowed not only from the purposes of the Directives, but also from their express terms as interpreted by the ECJ in Case C-63/01 *Evans* [2003] ECR I-14447, and also from the general principle of equivalence in Community law, both of which had also been infringed.

### **Compatible construction of the UDA**

In the light of his finding on the interpretation of the Second Directive, Flaux J was next asked to determine whether the UDA fell to be construed compatibly with the EC legislation, pursuant to the principles laid down by the ECJ in Case C-106/89 *Marleasing* [1991] ECR I-4135. Disposing of this point relatively quickly, Flaux J held that he was bound by the decision of the Court of Appeal in *Mighell v Reading* [1999] 1 CMLR 1251 to the effect that contractual agreements between the State and private parties do not fall within the *Marleasing* doctrine.

### **Direct effect of the Second Directive as against the MIB**

Third, Flaux J was asked to determine whether Article 1(4) of the Second Directive conferred directly effective rights on the Claimant on which he could rely against the MIB. In order to succeed on this point, the Claimant had to show first that the provisions of Article 1(4) were "*unconditional and sufficiently precise*" within the meaning of the ECJ's case law on direct effect, and secondly that the MIB was "*an emanation of the State*".

The Defendants relied on the *Mighell* case, where the Court of Appeal followed existing principles laid down by the ECJ in order to hold that the provisions of the Second Motor Insurance Directive were not "*unconditional and sufficiently precise*" because Member States had been given a discretion in how to establish a compensation scheme.

The Claimant, however, referred to the more recent judgment of the ECJ in Case C-441/99 *Gharehveran* [2001] ECR I-7687, at paragraph 44, to the effect that a Member State would not be permitted to refer to a discretion in order to resist a finding of direct effect in circumstances where that State had already exercised that discretion.

Flaux J accepted that the *Gharehveran* principle applied in the circumstances, since the UK's discretion as to how to set up the relevant compensation scheme had been 'fully used'. Thus Article 1(4) did have direct effect, and moreover in the light of the more recent ECJ decision in *Gharehveran*, Flaux J was not obliged to follow the contrary ruling of the Court of Appeal in *Mighell*.

However the Claimant would only be allowed to rely on the direct effect of Article 1(4) against the MIB if it constituted an emanation of the State within the meaning of the ECJ's jurisprudence in Case C-188/89 *Foster v British Gas* [1990] ECR I-3313. Flaux J held that the MIB did perform a 'public service' within the meaning of that jurisprudence, but that the MIB was not under the 'control of the state' and did not have any 'special powers' characteristic of a State body. It followed that the Claimant could not rely on Article 1(4) against the MIB.

### **Sufficiently serious breach by the United Kingdom**

Flaux J's findings on the first three preliminary issues effectively disposed of the Claimant's case against the MIB. It remained to be determined whether the Claimant could, in the alternative, claim damages against the Secretary of State for the UK's failure properly to implement Article 1(4) of the Second Directive, under the doctrine of Member State liability laid down by the ECJ in Case C-6/90 *Francovich* [1991] ECR I-5357.

To this end, Flaux J was asked to determine as a fourth preliminary issue whether the UK had committed a "sufficiently serious breach" for the purposes of the ECJ's jurisprudence. For this purpose, it was necessary that the UK have "*manifestly and gravely disregarded the limits on its discretion*", as required by the ECJ in Case C-46/93 *Brasserie du Pêcheur* [1996] ECR I-1029 at paragraph 55.

There was evidence that the Department of Transport had realised in 1987, when concluding a new agreement with the MIB applying to uninsured (rather than untraced) drivers, that a time limit for applications to the MIB shorter than that applicable to actions in tort was not compatible with the Second Directive. As a result, the agreement governing claims against uninsured drivers included a time limit corresponding with the provisions of the Limitation Act. The Department had however failed to amend the time limit in the UDA.

In the circumstances, Flaux J accepted the Claimant's argument that in failing to amend the UDA in 1987, and in failing to check through the entirety of the UDA when considering the effect of the ECJ's judgment in the *Evans* case (above) in 2003, the Department had been guilty of an "*inexcusable lack of thoroughness*". This was an "*extremely serious breach*", which the Secretary of State was not able to excuse by reference to the fact that other Member States had also implemented time limits which were shorter than the equivalent limitation periods, since the UK could not show that it had relied in any way on the conduct of those other Member States.

It followed that the principal *Francovich* criterion of a *sufficiently serious breach* was satisfied, and the Claimant could invoke the Member State liability doctrine in order to claim damages against the Secretary of State. However it remained for the Claimant to substantiate his claim in the main proceedings. Before he does so, an appeal would seem likely.

*Nicholas Paines QC and Josh Holmes represented Ben Byrne.*

**For more information on Nicholas Paines QC, Josh Holmes and Jorren Knibbe, please contact the Clerks on 020 7405 7211 or consult the 'Find a Barrister' Section on [www.monckton.com](http://www.monckton.com).**

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