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Case No: HQ12X04828

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/06/2014

Before:

MR JUSTICE JAY

- -

Between:

Sean Robert Delaney — **Claimant**

- and -

The Secretary of State for Transport — **Defendant**

- -
- -

Philip Moser QC and Eric Metcalfe (instructed by **Pinto Potts Solicitors**) for the **Claimant**
Brain Kennelly and Tom Cleaver (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing dates: 12th to 14th May 2014

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE JAY

MR JUSTICE JAY:

Introduction

1. On 25th November 2006, the Claimant was a front seat passenger in a Mercedes 500SL driven by his acquaintance or friend, Shane Pickett. Owing to the driver's negligence, a serious road traffic accident took place on the B4113 near Nuneaton. The Claimant had to be cut out of the wreckage of the vehicle and he was found to have sustained severe personal injuries. Members of the emergency services discovered a bag containing 240 grams of cannabis under the front of the Claimant's jacket. A smaller quantity was found in Mr Pickett's sock. Criminal proceedings were successfully brought against him in relation to his dangerous driving and the possession of cannabis. The police never interviewed the Claimant in respect of what happened that day, and he was not charged with any offence. The police response, or the absence of it, was probably brought about by the severity of the Claimant's injuries and the degree of his pre- and post-traumatic amnesia: he simply has no recollection of any of the relevant events.

2. The driver held a policy of insurance with Tradewise Insurance Services Ltd ("Tradewise") in respect of his liability under section 143 of the Road Traffic Act 1988 ("the RTA 1988"). On 4th March 2009 Tradewise obtained an Order to the effect that it was at all material times entitled to avoid this policy of insurance pursuant to section 152(2) of the RTA 1988 on the grounds that the policy was obtained by the non-disclosure of material facts and by the representation of facts which were materially false. The matters which were misrepresented and/or not disclosed by the driver comprised that: (i) he suffered from diabetes; (ii) he suffered from depression; and (iii) he was a habitual cannabis user.

3. This state of affairs brought within potential scope the Motor Insurers' Bureau ("MIB") as insurer of last resort under the Uninsured Drivers' Agreement made between it and the Secretary of State in 1999 ("the Uninsured Drivers' Agreement 1999"). The precise nature of these arrangements will need to be examined subsequently, but at this stage it is sufficient to mention that Tradewise – standing in the shoes of the MIB - became the "Article 75 insurer" liable to meet the road traffic act liability brought about by Mr Pickett's driving on this occasion, subject to it being proven that one of the exceptions set out in the Uninsured Drivers' Agreement 1999 was applicable.

4. On 23rd April 2009 the Claimant commenced proceedings in the Coventry County Court against Mr Pickett and Tradewise. On 25th January 2011 HHJ Gregory dismissed both claims. He held that (i) the Claimant's claim was barred on grounds of public policy (i.e. the defence of *ex turpi causa* succeeded), and (ii) the Claimant knew or ought to have known that the vehicle was being used in the course or furtherance of crime, namely the transportation of cannabis for the purpose of subsequent supply, and clause 6(1)(e)(iii) of the Uninsured Drivers' Agreement 1999 was accordingly applicable.

5. On 21st December 2011 the Court of Appeal (Ward, Richards and Tomlinson LJJ) allowed the Claimant's appeal on the *ex turpi causa* issue – on the basis that the joint

criminality was only the occasion, and not the cause, of the accident - but, by a majority (Ward LJ dissenting), dismissed it on the clause 6(1)(e)(iii) issue. Mr Philip Moser QC asked me to note that no argument was addressed to the Court of Appeal on the issue which is before me in these proceedings, namely the incompatibility of clause 6(1)(e)(iii) with relevant EU Directives, and no findings were made in that regard. It is true that a belated attempt was made to advance that issue in the Application for permission to appeal to the Supreme Court, but it led nowhere, because the application was refused.

6. On 16th November 2012 the Claim Form was issued in the current proceedings. HM Attorney General was originally a defendant but proceedings against him have been discontinued. The claim was for damages "arising as a result of the Defendant being in breach of Article 1(4) of Directive 84/5". The Particulars of Claim alleged that clause 6(1)(e)(iii) was incompatible with Article 1(4) and that, "in so far as the Claimant has been unable to obtain compensation from Tradewise by reason of the exclusion under clause 6(1)(e)(iii) of the 1999 Agreement, the United Kingdom is in breach of its Community law obligations under Article 1(4) of the Directive" (paragraph 8e). Paragraph 8f of the Particulars of Claim averred that the breach was sufficiently serious to accord to the Claimant an entitlement to *Francovich* damages under Community law principles.

7. The medical evidence submitted with the Particulars of Claim confirmed that the Claimant "undoubtedly suffered life-threatening injuries at the time of the accident in question", that he has suffered some intellectual blunting, and that his pre-morbid IQ was in the normal range.

8. The Defence was filed on 15th April 2013. It averred on a number of bases that clause 6(1)(e)(iii) was not incompatible with Article 1(4) of Directive 84/5, but it did not contend that Article 1(4) did not apply to a situation where the insurer had validly avoided the contract of insurance on the grounds of misrepresentation or non-disclosure: that anterior point simply was not taken. Having regard to the state of the pleadings, those advising the Claimant proposed preliminary issues in the following form:

> "(a) whether the United Kingdom government breached its Community law obligations under Article 1(4) of Directive 84/5/EEC when it agreed the exclusion under clause 6(1)(e)(iii) of the Uninsured Drivers' Agreement; and
>
> (b) whether the Defendant is liable to the Claimant for any loss suffered as a consequence of this breach, by reason of the matters alleged in the Particulars of Claim"

and on 24th July 2013 Master Eyre ordered a trial on that basis.

9. Paragraph 27(1) of the Defendant's Skeleton Argument dated 6th May 2014 contended for the first time that "[a]rticle 1.4 imposes no obligations in respect of damage caused by vehicles in relation to which a valid policy of insurance was taken out, but where that policy was subsequently voided by the insurer" (paragraph 27(2) and (3) maintained the pleaded case in the alternative). In his oral submissions – the point was not covered in his Skeleton Argument, because it was unheralded - Mr Moser

mounted a forceful attack on the substance of Mr Kennelly's expanded defence but, entirely commendably, did not take a pleading point. I made clear during the course of argument that the *quid quo pro* must be that the preliminary issues be amended to cater for the possibility that paragraph 27(1) of the Defendant's Skeleton Argument might be correct, and to be fair to him, Mr Kennelly did not protest. Revised wording was placed before me on the third day of the trial, and pursuant to my ruling made on that occasion (to be reflected in the Order drawn up at the handing down of this judgment), preliminary issue (a) now reads:

> "whether, in view of the undisputed operation of s.152(2) of the RTA 1988, the exclusion under clause 6(1)(e)(iii) of the Uninsured Drivers' Agreement 1999 is in breach of the UK's EU law obligations under Article 3.1 of Directive 72/166/EEC, Articles 1.4 and 2.1 of Directive 84/5/EEC, and Article 1 of Directive 90/232/EEC."

10. Before I explain how these preliminary issues fall to be analysed, it is necessary to set out the relevant legal framework.

Governing Legal Framework

11. The EU legislation concerning motor insurance has now been consolidated into Directive 2009/103/EC. However, given the date of the Claimant's accident, it is necessary to examine the predecessor directives.

12. Directive 72/166/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability ("the First Directive"), was passed with a view to minimising disparities between national requirements in the field of compulsory motor insurance. Article 3.1 provided:

> "Each Member State shall, subject to Article 4, 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 these measures."

Article 4 makes clear that a Member State may provide for derogations in relation to certain legal persons, public or private, and certain types of vehicle. Crown vehicles are an obvious example. The parties are agreed that Article 4 does not bear on the instant case.

13. The First Directive, and its successors, must be read in the light of the Community law principles of equivalence (i.e. parity with comparable domestic law obligations) and effectiveness (i.e. Member States giving proper effect to Community law obligations, and abstaining from taking steps which render them virtually impossible or excessively difficult to exercise).

14. Directive 84/5/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles ("the Second Directive") was enacted for a number of reasons, most important amongst which was the existence of continuing major disparities between the laws of different Member States concerning the extent of the obligation to ensure insurance cover, and the desirability of extending that obligation to property damage.

15. The fifth, sixth and seventh recitals are relevant to the present discussion inasmuch as it is a well-established principle of the ECJ that the text of a directive, which is the governing set of provisions, must be read consistently with the recitals (see the opinion of Advocate-General Trstenjak in RWE Vertrieb AG v Verbraucherzentrale Nordhein-Westfalen e.V, C-92/11, paragraph 37). These recitals provided:

> "Whereas the amounts in respect of which insurance is compulsory must in any event guarantee victims adequate compensation irrespective of the Member State in which the accident occurred;
>
> Whereas it is necessary to make provision for a body to guarantee that the victim will not remain without compensation where the vehicle which caused the accident is uninsured or unidentified; whereas it is important … to provide that the victim of such an accident should be able to apply directly to that body as a first point of contact; *whereas, however, Member States should be given the possibility of applying certain limited exclusions as regards the payment of compensation by that body and of providing that compensation for damage to property caused by an unidentified vehicle may be limited or excluded in the view of the danger of fraud*;
>
> Whereas it is in the interests of victims that the effects of certain exclusion clauses shall be limited to the relationship between the insurer and the person responsible for the accident; whereas, however, in the case of vehicles stolen or obtained by violence, Member States may specify that compensation will be payable by the aforementioned body; [emphasis supplied]"

The eighth recital dealt separately with the application of excesses in relation to property damage caused by uninsured vehicles or, where appropriate, vehicles stolen or obtained by violence. The fourth sub-article to Article 1.4 provided that the maximum amount of the excess which the relevant national body might apply was the sum of 500 ECU.

16. Article 1 of the Second Directive provided, insofar as is material, as follows:

> "1. The insurance referred to in Article 3.1 of Directive 72/166/EEC shall cover compulsorily both damage to property and personal injuries.
>
> 2. Without prejudice to any higher guarantees which Member States may lay down, each Member State shall require that the

> amounts for which such insurance is compulsory are [above a specified minimum];
>
> …
>
> 4. Each Member State shall set up or authorize a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied …
>
> The victim may in any case apply directly to the body which, on the basis of information provided at its request by the victim, shall be obliged to give him a reasoned reply regarding the payment of any compensation [the first subparagraph].
>
> However, Member States may exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured [the second subparagraph].
>
> Member States may limit or exclude the payment of compensation by that body in the event of damage to property by an unidentified vehicle [the third subparagraph].
>
> …
>
> Furthermore, each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by this body, without prejudice to any other practice which is more favourable to the victim [the fifth subparagraph]."

17. Pursuant to Article 2, which is not directly applicable to the instant case, Member States were required to take steps to ensure that any statutory provision or contractual clause contained in an insurance policy issued in accordance with Article 3 of the First Council Directive, excluding from insurance the use or driving of vehicles by persons who were not authorised to do so, did not hold a licence to do so, or were on breach of requirements concerning the condition and safety of the vehicle concerned, would be void in respect of claims by third party victims. However, in respect of claims brought by passengers who knew that the relevant vehicle was stolen, Member States were given the power to dis-apply this requirement.

18. Article 1 of Directive 90/232/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles ("the Third Directive") provided, for the avoidance of doubt, that the insurance obligation referred to in the First Directive covered liability for personal injuries for all passengers.

19. Before turning to the relevant provisions of domestic law, it is appropriate to identify two points arising out of these provisions. The first is that Article 1.4 of the Second Directive did not state that the obligation to set up a domestic body with the task of providing compensation to the victims of road traffic accidents encompasses vehicles in relation to which a valid policy of insurance was taken out, but where that policy was subsequently avoided by the insurer. The second is that the highlighted words in the subordinate clause to the sixth recital to the Second Directive presage the authorisation of more than one exclusion, because the plural of that noun is used.

20. The relevant provisions of UK domestic law are contained in Part VI of the RTA 1988, which was a consolidating statute. Section 143 obliges users of motor vehicles to be insured against third-party risks (unless a relevant exception, e.g. for Crown vehicles, applies). Subject to section 147, the effect of section 151(2) and (5) is that the insurer must satisfy any judgment obtained against the insured regarding liability in respect of personal injury or death, together with interest and costs, "notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy or security". However, this obligation is expressly subject to section 152(2), which provides:

> "Subject to subsection (3) below, no sum is payable by an insurer under section 151 of this Act if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration –
>
> (a) that, apart from any provision contained in the policy or security, he is entitled to avoid it on the ground that it was obtained –
>
> (i) by the non-disclosure of a material fact, or
>
> (ii) by a representation of fact which was false in some material particular …"

As I have pointed out, Tradewise obtained a declaration to that effect in the instant case. It is common ground that the effect of section 152(2) is that the contract of insurance was avoided as between the insurer and the driver as well as between the insurer and the Claimant.

21. Were it not for the manner in which the MIB operates in this jurisdiction, this state of affairs would have the tendency to place the UK in breach of its obligations under the Directives – if that were not already clear enough from the wording of the Directives themselves, a swathe of ECJ decisions state that (subject to specified exceptions) any attempt by an insurer to avoid third-party liability is of no effect. The MIB was first set up in 1946, long before the EEC existed and 27 years before the UK's accession, and the Defendant has sought, with the aid of the MIB, to accommodate its Community law obligations within the existing contractual framework. Although that policy decision has had the potential to create tension, it was not Mr Moser's submission in these proceedings that section 152(2) is incompatible with Community law.

22. The effect of Article 75 of the Memorandum and Articles of Association of the MIB is that Tradewise became the "Article 75 insurer" notwithstanding that the relevant policy (i) had been avoided for misrepresentation and/or non-disclosure, or (ii) the use of the vehicle was other than that permitted by the policy. Tradewise had availed itself of point (i) in the County Court proceedings, but on account of the arrangements concerning the MIB this was only legally effective as between insurer and insured; it was of no effect as between insurer and victim. Moreover, Article 75 imposed a general obligation on Tradewise, standing in the shoes of the MIB, to satisfy the RTA judgment secured by the Claimant against Mr Pickett following his success on the *ex turpi causa* issue in the Court of Appeal. In this way, although it was self-evidently not the policy intention in 1946, the UK found itself in a broad measure of compliance with the Directives, notwithstanding the existence of what is now section 152(2).

23. I express myself in these terms because the Uninsured Drivers' Agreement 1999 contains provisions which the Claimant contends are inimical to the UK's obligations under the relevant Directives. These are the provisions which contain the applicable exceptions to the MIB's liability. Clause 5 of the agreement reinforces the general rule that the Article 75 insurer must satisfy the RTA judgment of its erstwhile insured.

24. The exceptions to the MIB's liability in respect of claims for personal injuries brought by passengers against the driver are contained in clause 6(1)(e) of the Uninsured Drivers' Agreement 1999, but clause 6(3) is also of interest. I therefore set out all the salient provisions:

> "(e) a claim which is made in respect of a relevant liability described in paragraph (2) by a claimant who, at the time of the use giving rise to the relevant liability, was voluntarily allowing himself to be carried in the vehicle and, either before the commencement of his journey in the vehicle or after such commencement if he could reasonably be expected to have alighted from it, knew or ought to have known that –
>
> (i) the vehicle had been stolen or unlawfully taken,
>
> (ii) the vehicle was being used without there being in force in relation to its use such a contract of insurance as would comply with Part VI of the 1988 Act,
>
> (iii) the vehicle was being used in the course or furtherance of a crime, or
>
> (iv) the vehicle was being used as a means of escape from, or avoidance of, lawful apprehension.
>
> …
>
> (3) the burden of proving that the Claimant knew or ought to have known of any matter set out in paragraph (1)(e) shall be on MIB but, in the absence of evidence to the contrary, proof by MIB of any of the following matters shall be taken as proof

> of the claimant's knowledge of the matter set out in paragraph (1)(e)(ii) –
>
> (a) that the claimant was the owner or registered keeper of the vehicle or had caused or permitted its use;
>
> (b) that the claimant knew the vehicle was being used by a person who was below the minimum age at which he could be granted a licence authorising the driving of a vehicle of that class;
>
> (c) that the claimant knew that the person driving the vehicle was disqualified from holding or obtaining a driving licence;
>
> (d) that the claimant knew that the user of the vehicle was neither its owner nor registered keeper nor an employee of the owner or registered keeper nor the owner or registered keeper of any other vehicle."

Clause 6(1)(e)(iii) and (iv), and clause 6(3) appeared for the first time in an uninsured drivers' agreement in 1999. It may readily be appreciated that clause 6(1)(e)(iii), which is commonly known as the "crime exception", is not one of the exceptions expressly authorised by the Second Council Directive.

25. In White v White [2001] 1 WLR 481, the House of Lords held that clause 6(1)(e) must be interpreted as requiring actual knowledge or wilful blindness ("a passenger had information from which he drew the conclusion that the driver might well not be insured but deliberately refrained from asking questions lest his suspicions should be confirmed"), but that it did not include "what can be described broadly as carelessness or 'negligence'", such as where he "gave no thought to the question of insurance, even though an ordinary prudent passenger, in his position and with his knowledge, would have made inquiries". It further held that the relevant phrase in the Uninsured Drivers' Agreement 1999 was "intended to be coextensive" with the exception in the Directive and "should be construed accordingly". It follows that the clause "or ought to have known" in the crime exception is to be given a very specific interpretation, and that its presence does not place the UK in breach of its Community law obligations.

Synopsis of the Issues Arising

26. On one interpretation of his Skeleton Argument, Mr Moser was seeking to re-open the majority decision of the Court of Appeal upholding the findings of HHJ Gregory that clause 6(1)(e)(iii) applied to the Claimant's journey on this unfortunate occasion. Mr Kennelly for the Defendant took issue with this, and at the outset of the hearing I was bracing myself for having to deal with what might be described as a preliminary issue to the preliminary issues, namely whether it would be "not unfair" to require the Secretary of State to prove the facts afresh. However, very wisely in my view, Mr Moser did not press this point in oral argument, at least for the purposes of his case on the crime exception.

27. Nonetheless, the point arises in an indirect way: it is part of the Defendant's pleaded case that the Claimant knew that Mr Pickett's vehicle was uninsured at the material time on account of the fact that it was being used for the purposes of a joint criminal enterprise. In this regard Mr Kennelly's Skeleton Argument advanced this pleaded case in two slightly different ways. First, it was said (see paragraph 47 of the Defendant's Skeleton Argument), that clause 6(1)(e)(iii) is permitted by Article 1.4 of the Second Directive because everyone knows that a vehicle being driven in the course or furtherance of crime is uninsured: in other words, subparagraph (iii) is really a sub-set of (ii). Secondly, it was said that even if the claim was wrongly defeated by clause 6(1)(e)(iii), it would have been precluded by subparagraph (ii) because the Court may safely infer from all the available evidence that the Claimant did in fact know that the vehicle was uninsured (see paragraph 91 of the Defendant's Skeleton Argument). In oral submission Mr Kennelly placed greater weight on this second point. Although the first trial judge made no findings on this aspect of the Claimant's knowledge, Mr Kennelly submitted that I should draw the relevant inferences from all the material I have at my disposal.

28. In the light of these submissions, I consider that the first preliminary issue subdivides into three sub-issues, albeit each is closely related to the others. These are:

(1) whether Article 1.4 of the Second Council Directive, either read in isolation or in conjunction with Article 3.1 of the First Directive, Article 2.1 of the Second Directive and Article 1 of the Third Directive, imposes obligations on Member States in respect of damage caused by vehicles in relation to which a valid policy of insurance was taken out, but where that policy was subsequently avoided by the insurer;

(2) whether, if the answer to (1) is in the affirmative, Articles 1.4 and 2.1 of the Second Directive require Member States to ensure that compensation is paid in all circumstances save those expressly set out as exclusions within the text of these provisions;

(3) whether, if the answer to (2) is in the affirmative, the exception in clause 6(1)(e)(iii) is consistent with, and does not undermine, the specific exceptions permitted by Articles 1.4 and 2.1 of the Second Council Directive.

29. If the answer to (3) above is in the negative, the second preliminary issue arises. In essence, that issue involves an examination of the preconditions for State liability under *Francovich* principles, as explained and developed in subsequent ECJ and domestic jurisprudence. Here, the battle-lines between the parties are clearly and firmly drawn and do not merit any further preliminary discussion.

30. In the event that I should conclude that the Defendant is liable in damages to the Claimant for causing or permitting the enactment of the crime exception in breach of its Community law obligations, I will need to address its fall-back argument on causation, namely that the MIB would have been entitled to invoke clause 6(1)(e)(ii) – which is Community law compliant, provided that it is construed in line with White v White – to defeat this claim. It should be explained that as regards this issue I am required to draw appropriate inferences without the benefit of hearing from the Claimant, although I have of course read his witness statement. The parties are agreed that his current disabilities do not enable him to give oral evidence in a way that could

do him justice. The parties are also agreed that the issue prefigured under paragraph 92 of the Defendant's Skeleton Argument does not arise at this stage.

31. My final preliminary observation is that I have been able to decide this case without making a reference to the ECJ. Given that in my view there is no doubt as to what the relevant Directives mean (see the approach laid down by the Court of Appeal in Regina v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd [1993] QB 534), recourse to the ECJ would be unnecessary.

The First Issue: whether Article 1.4 of the Second Council Directive, either read in isolation or in conjunction with Article 3.1 of the First Directive, Article 2.1 of the Second Directive and Article 1 of the Third Directive, imposes obligations on Member States in respect of damage caused by vehicles in relation to which a valid policy of insurance was taken out, but where that policy was subsequently avoided by the insurer

32. When opening his client's case to me Mr Moser submitted with beguiling compulsion that the position is very straightforward. A Member State is obliged to provide for a system of compulsory car insurance for damage to property or personal injury; that system must compensate any third party victims, in particular passengers; and further, the system must include a compensatory body as insurer of last resort, in the event that there be a failure or breakdown at an anterior stage. Moreover, whereas the Directives do permit of "certain limited exceptions", these are the exceptions specified in the text of the Second Directive itself, and no more. Given that clause 6(1)(e)(iii) is not one of the certain limited exceptions, the UK (in the guise of this Defendant) is in breach.

33. I will be examining the language of the Second Directive in due course, but at this juncture I propose to review the key ECJ jurisprudence in chronological order. The parties reminded me that my obligation under section 3(1) of the European Communities Act 1972 is to apply the law in accordance with the principles laid down by and any relevant decision of the European Court.

34. In Ruiz Bernaldez [Case C-129/94], a Spanish Royal Decree purported to exclude from insurance cover property damage caused by an intoxicated driver. The victim's claim against the insurer was therefore precluded by domestic law, but the Provincial Court posed five questions of the ECJ pertaining to the position under Community law. At paragraph 24 of his Opinion, Advocate General Lenz encapsulated the intendment and scope of the Directives in these terms:

> "Consequently, the Directives create the legal framework for ensuring that persons injured by a motor vehicle, wherever registered in the Community, can be certain of compensation. The guarantee of compensation for damage caused by vehicles normally based in another Member State, which the national insurers' bureau of the host country must assume, and the creation of a body which must provide compensation for damage to property or personal injuries caused by an unidentified or uninsured vehicle, are both part of that context."

Mr Kennelly submitted that this "guarantee" is not as copper-bottomed as the Advocate General might be appearing to suggest. Whereas that submission would appear to be well-founded in relation to matters such as the insolvency of the insurer, the circumstances in which the insurer and/or the national insurer's bureau may avoid liability to the victim are strictly confined.

35. In Ruiz Bernaldez the third question asked by the Provincial Court was whether the statutory provisions and contractual clauses referred to in Article 2.1 of the Second Directive, which exclude insurance cover but are void as against a third party victim, are to be regarded as an exhaustive list. The relevant exclusion in the Spanish Royal Decree was not on that list. Advocate General Lenz's answer to that question was that, given that the overall objective of the Directives was the protection of victims, an insurer could not seek to rely upon an exclusion which went beyond the terms of Article 2.1. It is correct that Mr Lenz was not addressing the scope of possible exclusions within Article 1.4. Given that the liability of the national body is only capable of arising if the primary insurance obligation has not been satisfied by the insurer, paragraphs 40 and 42 of Mr Lenz's Opinion (setting out his conclusions on the third and fourth questions) rendered that issue entirely moot. The matter could never trouble the national body on these or similar facts because the insurer's ability to avoid third party liability to the victim was limited to the derogations or exclusions expressly set out in Article 2.1. If none of these applied, the insurer remained liable.

36. However, the Spanish Provincial Court had posed a fifth question on the hypothesis that the relevant exclusion clause might be held to be valid as against the victim. In such circumstances the potential liability of the national body would arise. Advocate General Lenz decided to answer that question in the event that the Court took a different view on the previous questions. Here, paragraph 46 of his Opinion is particularly relevant:

> "Apart from those highly exceptional cases of the victim's own blameworthy conduct, it must be assumed that there is a need to ensure that there are no gaps in the duty to compensate the victim. That principle can be seen to be the guiding principle of the directives. To that effect, the national guarantee body must be regarded as covering accident victims who would otherwise be unprotected. The reason for requiring such a body to be established is the concern to protect victims."

37. Mr Lenz concluded his Opinion by observing that the Directives laid down a general rule to the effect that the insurer should be compensating the victim, not the Article 1.4 body. In addition (see paragraph 51):

> "*Only* if, for whatever reason, he has no claim for compensation against the insurer, would the 'body' have to pay compensation in the interest of the extensive protection of victims. Furthermore, the Member States are free to extend the competence of the body by statute, provided complete protection is ensured for victims."

38. I derive a number of points from Mr Lenz's answer to the fifth question. First, the victim cannot be permitted to fall between two metaphorical stools: the principal

obligation under Article 2.1 of the Second Directive rests on the insurer, but if that is not satisfied then the national body must step up to the plate. Secondly, this general rule is subject to "those highly exceptional cases of the victim's own blameworthy conduct". Mr Moser submitted that these cases are limited to those expressly stipulated in the Second Directive. Powerful support for that contention is provided by paragraph 45 of Mr Lenz's Opinion where he referred in terms to the second subparagraph of Article 2.1 and the example of the victim knowing that the vehicle was stolen. However, Mr Lenz did not expressly refer to the second subparagraph of Article 1.4, nor did he specifically rule out of account rules of domestic law, such as *ex turpi causa* or contributory negligence, based on public policy considerations. These matters were simply not in issue on the facts of Ruiz Bernaldez. Nevertheless, on any fair reading of paragraph 46 of his Opinion the Advocate General was not suggesting that there might be an ability in Member States to create specific exceptions which were not expressly mentioned in the Second Directive or were not otherwise justifiable on public policy grounds according to established principles of domestic law.

39. The third point I derive from these paragraphs of Advocate General Lenz's Opinion is that, although the scheme of the Second Directive is such that the insurer (if it exists) and not the national body should pay compensation, provided that the system as a whole ensures complete protection for victims there may be no objection in principle to the national body having an enhanced role. This is exactly the position which obtains in this jurisdiction on account of section 152(2) of the RTA 1988. However, the logical corollary must evidently be this: that the national body, here the MIB, must pay compensation in circumstances where the insurer - "for whatever reasons", which must include the avoiding of the insurance policy for misrepresentation or non-disclosure by the insured – owes no liability in respect of the victim's claim. Were the position otherwise, the victim would be left without a remedy even in circumstances where there was no blameworthy conduct on his part.

40. I have paid particular attention to the Opinion of Advocate General Lenz because it appears to me to contain a flawlessly coherent, logical and principled guide to the scheme of the Second Directive. I do not accept that it can be discounted on the basis suggested by Mr Kennelly, namely that an Advocate General does not expound the law; only the ECJ does this. First, Advocate General Lenz's answers to the third and fourth questions supply the reasoning lacking in paragraphs 20 and 21 of the ECJ's Judgment: in a system where the Court prefers to speak in an oracular fashion, the exegesis may be found elsewhere. Secondly, although Advocate General Lenz's answer to the fifth question was moot on the facts on that case, Mr Kennelly made no attempt to punch holes in it. The only matter where there might be a scintilla of uncertainty (viz. the first sentence of paragraph 46 of his Opinion) is answered by an accurate reading of the Directive itself and subsequent ECJ jurisprudence. As for the language of the Directive, I am referring to the fact that it sets out a number of exclusions and derogations, and it is an established principle of Community law that these must be read restrictively.

41. The Judgment of the ECJ in Ruiz Bernaldez was couched in characteristically elliptical terms, and in line with its traditionally parsimonious approach no answer was supplied to the fifth question; it simply did not arise. However, at paragraph 20 of its Judgment the ECJ supported the Advocate General's reasoning in relation to his

answer to the third question and, because the point was effectively the same, the fourth:

> "That being so [the need to avoid disparities in the treatment of victims], Article 3.1 of the First Directive precludes an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle."

At paragraph 21 of its Judgment the ECJ observed that Article 2.1 of the Second Directive was a mere exemplification of that general rule. That sub-article was subject to the derogations contained in its second and third subparagraphs – in particular (for present purposes), the insurer could exclude its liability on the basis of an Article 2.1 exclusion clause if the victim knew the vehicle to be stolen. As I have said, it is a basic principle of Community law that derogations are to be construed restrictively: in others words, that these specific derogations represent the limits of an insurer's ability to avoid liability to the victim. I regard paragraphs 20 and 21 of the Judgment of the ECJ as implicitly supporting paragraphs 40 and 42 of the Advocate General's Opinion; there is no room for an alternative view.

42. In Evans v Secretary of State for Transport and the MIB, Case C-63/01, the issue which arose concerned the absence of a provision in the Untraced Drivers' Agreement enabling arbitrators to award interest and costs to victims of road traffic accidents. The argument for the claimant, in a nutshell, was that the UK had failed to transpose the full panoply of rights and guarantees couched by the Directives, and the ECJ agreed.

43. The lengthy Opinion of Advocate General Alber is particularly illuminating on the issue of *Francovich* damages, and I will therefore be returning to it. The core of Mr Alber's reasoning on the transposition issue was that the Community law principles of equivalence and effectiveness meant that the domestic system had to replicate the range of rights and remedies vouched by the common law, and in this regard the MIB fell short. Mr Alber saw no mismatch between the Untraced Drivers' Agreement and the role of the MIB in the context of Article 1.4 of the Second Council Directive. This was hardly surprising, since in an untraced drivers' case there is by definition no known insurer and under domestic law rules the victim must make direct application to the MIB.

44. The ECJ in Evans took a more cautious line, holding that it was for the national court to decide whether, under the procedural arrangements adopted (i.e. the terms of the Untraced Drivers' Agreement), the principles of equivalence and effectiveness had been infringed. No issue turns on this for present purposes.

45. In Candolin v Vahinkovakuutusosakeyhtio Pohjola, Case C-537/03, the issue arose as to whether the insurer could avoid liability to compensate the victims of a road traffic accident caused by the negligence of a drunk driver because they too were under the influence of alcohol and must have known of the driver's condition.

46. For present purposes two issues arose for determination. The first was whether the Directives provided an exhaustive list of the applicable exclusions from the subrogated obligations of insurers in respect of liabilities of this nature. Advocate

General Geelhoed considered that Article 2.1 of the Second Directive created a comprehensive code, and the ECJ agreed. At paragraph 23 of its Judgment, it said this:

> "It follows that the second subparagraph of Article 2.1 of the Second Directive must be interpreted as meaning that a statutory provision or a contractual clause in an insurance policy which excludes the use or driving of vehicles from the insurance may be relied on against third parties who are the victims of a road traffic accident only where the insurer can prove that the persons who voluntarily entered the vehicle which caused the injury knew that it was stolen."

Here, the ECJ was effectively repeating what it had said at paragraphs 20 and 21 of its Judgment in Ruiz Bernaldez.

47. The second issue which arose for determination was whether separate national rules, such as *ex turpi causa* or contributory negligence in this domestic context, are contrary to the principles underpinning the Directives. The ECJ's answer was that rules of this nature could only be invoked to the extent that they were proportionate. Given that the application of such rules no longer arises in the instant case, I need concern myself no further with this aspect of the matter, save to make two observations. First, I suspect that the famous decision of Tasker Watkins J in Owens v Brimmell [1977] QB 859 would withstand scrutiny on this basis. Secondly, the crime exception cannot be justified as analogous to some sort of general common law principle of public policy. To the extent that it goes further than *ex turpi causa*, the Community law doctrine of equivalence precludes this.

48. Candolin is instructive in at least two ways. In my view, this was the first occasion on which the ECJ made crystal clear that exclusion clauses relating to the conduct of the victim, as opposed to that of the insured, could not be relied on beyond the extent expressly mandated by the Directive. To my mind, the Advocate General had said almost as much in Ruiz Bernaldez, although there the conduct of the victim was simply not in issue. I have also examined what the ECJ said at paragraphs 20 and 21 of its Judgment in that case. Putting public policy considerations to one side, I would add that it is not possible to discern any reason based on logic or principle for treating exclusion clauses relating to the conduct of the victim differently from those relating to the conduct of the insured: if the Directives are to be interpreted as imposing strict constraints in relation to the latter, that must apply equally to the former. Secondly, although the Defendant may be entitled to point out that Candolin does not bear on Article 1.4 of the Second Council Directive, the reason for that must be plain and obvious: no issue under that provision arises if the insurer is unable to avoid liability. However, if, by dint of some vagary of domestic law, an insurer *is* entitled to avoid liability and Article 1.4 comes into play, the logic of Candolin must surely be that the ability of the national body to avoid paying the victim is constrained to exactly the same extent.

49. In Farrell v Whitty, Case C-356 the issue was whether the MIBI (the Irish analogue of the MIB) was able to refuse to compensate the victim of a road traffic accident in circumstances where she was travelling in part of a van which had not been designed or constructed with seating accommodation for passengers. The ECJ rejected the Irish

Government's case on two grounds. First, the concept of "passenger" within the Directives covered all passengers, wherever they were physically located within the vehicle. Secondly, it was not open to Member States to carve out exceptions or derogations in addition to those specified in the Second Council Directive. Specifically (see paragraphs 27 and 28 of the Judgment of the ECJ):

> "In addition, Community legislation expressly lays down exceptions to the obligation to protect victims of accidents. Those exceptions are referred to in the third subparagraph of Article 1.4 and in Article 2.1 of the Second Directive.
>
> However, the Community legislature did not provide any derogation with respect to a separate category of persons who may be victims of a road traffic accident, namely those who were on board a part of the vehicle which is not designed for their carriage and equipped for that purpose. That being so, those persons cannot be excluded from the concept of 'passenger' and, accordingly, from the insurance cover which the Community legislation guarantees."

50. To my mind, save in the separate context of insolvency, this is a complete answer to the contention advanced under paragraph 27(2) of the Defendant's Skeleton Argument, and to be fair to him, Mr Kennelly came close to recognising this in oral argument. What we also see in Farrell is the taking of the final short step – the express application of the comprehensive code principle to Article 1.4 cases – left untaken in Candolin. Additionally, the reasoning, if not the decision, in Farrell seriously undermines paragraph 27(1) of the Defendant's Skeleton Argument.

51. My attention was also drawn to Churchill Insurance Company Ltd v Wilkinson, Case C-442/10. To the extent that this authority avails either party, it aids Mr Moser's argument, but in my judgment it does not add to what may already be clearly gathered from previous authority.

52. Mr Kennelly placed particular reliance on Csonka v Allam, Case C-409/11 as being the most recent utterance of the ECJ on these matters. He submitted that it was directly germane to the content of the obligations arising under Article 1.4 of the Second Directive, which is central to the issue I have to decide. Accordingly, I propose to take some time to examine that authority.

53. In Csonka, the drivers of motor vehicles caused property damage to third parties and were constrained to pay the victims in circumstances where the insurer was unable to do so, being insolvent. The drivers then brought a *Francovich* claim against the Hungarian government on the basis that it had failed adequately to transpose into domestic law the obligation under Article 1.4 of the Second Directive, namely to set up a national body to satisfy the underlying civil liability. The essential issue in that case was the true meaning and effect of the clause in Article 1.4 - "for which the insurance obligation provided for in paragraph 1 has not been satisfied". It is to be recalled that the insurance obligation in Article 1.1 was the obligation in Article 3 of the First Directive "to take all appropriate measures to ensure that civil liability in respect of the use of motor vehicles normally based in its territory is covered by insurance".

54. Advocate General Mengozzi considered that Article 1.4 should not be understood as requiring the giving of a guarantee of compensation in all circumstances. The language of the Directives indicated that the obligation under Article 1.4 was limited to circumstances where the insurance obligation *provided for* in Article 3 of the First Directive was not satisfied, and that was the obligation to ensure that civil liability was covered by insurance. That obligation was satisfied in the instant cases because appropriate insurance contracts had been taken out; they existed. The fact that the insurer subsequently became insolvent did not mean that the relevant obligation on the Member State was not satisfied. Advocate General Mengozzi drew a distinction between two situations: the first, covered by the Directives, was the bilateral one where no insurance was taken out and two "weak" parties existed, namely the victim and the tortfeasor; the second, not covered by the Directives, was the triangular one where the more complex position of the insurer needed to be considered. In such a situation, there may be other legal remedies available, including proving in the liquidation.

55. At paragraph 30 of his Opinion, Mr Mengozzi drew attention to the fact that an earlier draft of the Second Directive made clear that the original intention was to treat an uninsured vehicle as one where the insurer was entitled to refuse to pay compensation to the victim, for example by avoiding the policy. Mr Kennelly placed heavy reliance on this reasoning. In my judgment, he was wrong to do so. All that it indicates is that it was originally the policy of the EU legislature that the national body required for the purposes of what is now Article 1.4 of the Second Directive would operate in the same sort of way as the MIB does in this jurisdiction. However, this was not the regime which was in fact implemented by the Second Directive. In the context of that regime, the circumstances in which an insurer is entitled to avoid the policy or refuse to pay victims are strictly circumscribed by the Directives themselves, and for that reason the Article 1.4 national body is truly one of last resort.

56. It is in this context that paragraph 31 of the Judgment of the ECJ needs to be understood:

> "As regards the determination of the actual circumstances in which the insurance obligation laid down in Article 3.1 of the First Directive may be regarded as not having been satisfied, it is significant – as the Advocate General stated in point 32 of his opinion – that the European legislature did not confine itself to providing that the body must pay compensation in the event of damage caused by a vehicle for which the insurance obligation has not been satisfied in general, but made it clear that that was to be the case only in relation to damage caused by a vehicle for which the insurance obligation provided for in Article 3.1 of the First Directive has not been satisfied, that is to say, a vehicle in respect of which no insurance policy exists."

57. Thus, the principle of Community law vouched by Csonka is clear. An Article 1.4 compliant regime does not have to guarantee the satisfaction of the insurance obligation in some general way: the national body is not a long-stop to meet the obligations of insolvent insurers. The guarantee which Article 1.4 mandates is limited to cases where there is no insurance policy in existence at all.

58. In my judgment, Csonka has no relevance to the situation where an insurer seeks to avoid liability to the victim, either on the basis of misrepresentation or non-disclosure by the insured, or on the basis of some misconduct by the victim which is not expressly catered for in the exceptions to the Directive. As it happens, Advocate General Mengozzi mentioned only the first type of case, not the second, and as we have seen he did so in a different context. It is entirely plain from earlier ECJ jurisprudence, which I have discussed, that the insurer cannot seek to avoid liability to the victim on the basis of the insured's failures or the victim's misconduct, subject to one of the limited exceptions being in application.

59. Mr Kennelly submitted on a number of occasions that the present case is concerned with the Member State's obligations under Article 1.4 of the Directive, and paragraph 31 of the ECJ's Judgment in Csonka makes clear that there the sole obligation under that provision is to provide for a national body to meet the liability where no contract of insurance exists at all. Mr Kennelly says that the fact that Tradewise avoided the contract does not mean that this is a situation where the contract never existed, and that I should not be ensnared by the attractions of a domestic law analysis based on the concept of voidable *ab initio*.

60. In my judgment, the ingenuity of Mr Kennelly's submission was matched only by its fallaciousness, but in order to cater for all possibilities I caused the first preliminary issue to be reworded. Aside from its extremely late arrival on the forensic scene, the point relies on the fact that the UK has decided to implement its obligations under these Directives in a heterodox manner, entitling the insurer to avoid liability under section 152(2) and giving the MIB a greater role than Article 1.4 contemplates. I do not accept for one moment that the Defendant is able to rely on this domestic idiosyncrasy as the basis for rebutting the Claimant's argument. For the purposes of its analysis of Article 1.4, Csonka proceeded on the basis of a strict dichotomy: either there is no insurance, or the insurer is unable to satisfy the subrogated liability for a reason unconnected with the requirements of the Directives as revealed by an examination of their language and intendment. There is no room for an additional category of case, that is to say the situation where the insurer seeks to avoid liability under the policy on a basis which is unsupported by the language and intendment of the Directives. In any event, as soon as one brings into play other provisions of the Directives, as the reformulated first preliminary issue now does, it is clear from the raft of ECJ decisions to which I have referred that a situation cannot arise whereby the insurer's avoidance of liability leaves the victim without a remedy. These decisions apply to the obligations of the relevant national body if, as here, the victim has no remedy against the insurer under domestic law.

61. I conclude that paragraph 27(1) of the Defendant's Skeleton Argument is wholly without merit, and must be rejected.

62. The Defendant's Skeleton Argument raised other matters which Mr Kennelly did not pursue by way of oral submission. For example, it was said that the obligation on the Member State is confined to setting up a body with the "task" of providing compensation, and – if the claim is to be rejected – of giving a reasoned reply. Thus, so the argument runs, the task does not have to be fulfilled in all cases. The answer to that argument is that compensation must be provided to victims on a basis equivalent to similar claims against negligent drivers governed by national law unless one of the

stated exceptions applies. Mr Kennelly was right not to run this argument orally but in my view it should never have seen the light of day.

63. The first issue I have identified must therefore be answered in the affirmative.

The Second Issue: whether Articles 1.4 and 2.1 of the Second Council Directive require Member States to ensure that compensation is paid in all circumstances save those expressly set out as exclusions within the text of these provisions

64. My review of the ECJ jurisprudence has already provided a clear and conclusive answer to this: see Ruiz Bernaldez, Candolin and Farrell.

65. Undaunted, Mr Kennelly urged me to adopt a different approach, having regard to the terminology of the subordinate clause to the sixth recital to the Second Directive. Mr Kennelly invited me to note the plural ("certain limited exclusions") and to carry out some basic arithmetic. The sole exclusion expressly mentioned in Article 1.4 which is not referred to in some other recital is the knowledge of no insurance exception in the second subparagraph. Specifically, property damage is dealt with in the second part of the subordinate clause to the sixth recital, stolen vehicles in the seventh recital, and excesses in the eighth recital. It follows that the subordinate clause to the sixth recital must be contemplating further limited exclusions. These are permissible provided that they are strictly defined.

66. I simply cannot accept that submission. The recitals do not bear this overly punctilious textual approach, nor can they be permitted to override the express provisions of the Directive, which must be pre-eminent. Furthermore, I accept the force of Mr Moser's submission that, if the Defendant were right, we could in fact have an unlimited number of exceptions each of which was tightly worded. But Mr Kennelly's greatest problem is that ECJ case law is against him.

67. The second issue I have identified must therefore be answered in the affirmative.

The Third Issue: whether the exception in clause 6(1)(e)(iii) is consistent with, and does not undermine, the specific exceptions permitted by Articles 1.4 and 2.1 of the Second Council Directive

68. According to paragraph 47 of the Defendant's Skeleton Argument:

> "The effect of clause 6(1)(e)(iii) is to recognise that a person who entered a vehicle in the knowledge that it is being used in the course of or furtherance of a crime can, at least in the context of the United Kingdom, be taken as a matter of common sense as knowing that the vehicle is uninsured. In other words, clause 6(1)(e)(iii) is a specific example of the exemption permitted by Article 1.4."

69. Mr Kennelly did not quite go that far in oral argument. He accepted that clause 6(1)(e)(iii) went further, albeit not very much further, than clause 6(1)(e)(ii), and he

also accepted that the average person, without special knowledge would not necessarily be aware that a vehicle being driven in the course of a criminal joint enterprise is not insured. These matters are sufficient to dispose of this point.

70. In any event, and regardless of the way in which Mr Kennelly advanced his client's case in oral argument, I consider that clause 6(1)(e)(iii) cannot be envisaged as some sort of sub-set of clause 6(1)(e)(ii). That is not how the draftsperson of the Uninsured Drivers' Agreement has approached the matter – for example, the crime exemption could have been added as an avoidance of doubt provision at the end of existing clause 6(1)(e)(ii), or it could have been added to the list of rebuttable presumptions in new clause 6(3) – and it is not how I would approach the matter on grounds of common sense. Clause 6(1)(e)(iii) is a material addition to the list of excepted categories; it is not some limited species of explication of an existing category.

71. The third issue I have identified must therefore be answered in the negative.

72. It follows that the United Kingdom, in the legal personification of this Defendant, is in plain breach of EU law, and the question of liability to pay compensation on *Francovich* principles therefore arises.

The Fourth Issue: whether the Defendant is liable to the Claimant for any loss suffered as a consequence of this breach, by reason of the matters alleged in the Particulars of Claim

73. As with the previous issues, I consider that the best way to examine this issue is to consider the ECJ jurisprudence in chronological order. I will then examine the domestic jurisprudence and the available evidence.

74. The *fons et origo* of the doctrine of State liability for non-compliance with or breach of Community law is Francovich v Italian Republic, Cases C-6/90 and C-9/90. In that case there was a complete failure by the Italian Government to implement the provisions of a relevant EU Directive in time. At paragraphs 38-40 of its Judgment the ECJ held, in fairly general terms:

> "Although State liability is thus required by Community law, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of community law giving rise to the loss and damage.
>
> Where, as in this case, a Member State fails to fulfil its obligation under the third paragraph of Article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.
>
> The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the

> content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties."

Mr Kennelly submitted, and I agree, that this somewhat broad phraseology has been refined in subsequent cases.

75. In Brasserie du Pêcheur SA v Federal Republic of Germany, R v Secretary of State for Transport, ex parte Factortame, Cases C-46/93 and C-48/93 ([1996] QB 404), the issues were whether provisions of domestic law which created insuperable obstacles for nationals of other Member States were in breach of Community law and, if so, as to the considerations which should govern the determination of claims for damages and interest. The ECJ held that the relevant Governments had acted in defiance of Community law, and so issues as to determination of damages arose. At paragraphs 46 and 47 of its Judgment, the ECJ drew a distinction between cases where the Member State enjoyed a wide discretion in implementing Community policies – in which circumstances a claim for damages could be brought only "[if] the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers" (see paragraph 45) – and those where its margin of discretion is constrained. In this latter context (paragraph 46):

> "That said, the national legislature – like the Community institutions – does not systematically have a wide discretion when it acts in a field governed by Community law. Community law may impose upon it obligations to achieve a particular result or obligations to act or refrain from acting which reduce its margin of discretion, sometimes to a considerable degree. That is so, for instance, where, as in the circumstances to which the Judgment in *Francovich* relates, Article 189 of the Treaty places the Member State under an obligation to take, within a given period, all the measures needed to achieve the result required by the Directive. In such a case, the fact that it is for the national legislature to take the necessary measures has no bearing on the Member State's liability for failing to transpose the directive."

76. The ECJ held, on the relevant facts, that the German and UK legislatures did have a wide discretion (see paragraphs 49 and 50). In such circumstances, the test was as follows (see paragraph 51):

> "… Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties."

On my reading of its Judgment, the ECJ did not expressly articulate the relevant test in a paragraph 46 type of case, where the margin of discretion was constrained. As a further gloss on paragraph 51, the ECJ explained that factors which the Court must

take into consideration include the clarity and precision of the rule breached (see paragraph 56).

77. Mr Kennelly placed particular reliance on R v HM Treasury, ex parte BT, Case C-392/93 ([1996] QB 615), where the ECJ applied the wide discretion principle to situations where the Member State incorrectly transposes EU law. The reason for this is that Member States must not be hindered in the exercise of their legislative functions. Thus, the test was as laid down by the ECJ at paragraph 51 of its Judgment in Brasserie du Pêcheur. In addition (see paragraph 43 and 44):

> "In the present case, Article 8.1 is imprecisely worded and was reasonably capable of bearing, as well as the construction applied to it by the Court in this judgment, the interpretation given to it by the United Kingdom in good faith and on the basis of arguments which are not entirely devoid of substance. That interpretation, which was also shared by other Member States, was not manifestly contrary to the wording of the directive or the objective pursued by it.
>
> Moreover, no guidance was available to the United Kingdom from case-law of the Court as to the interpretation of the provision at issue, nor did the Commission raise the matter when the 1992 Regulations were adopted."

78. In R v MAFF, ex parte Hedley Lomas (Ireland) Ltd, Case C-5/94 ([1997] QB 139), the Ministry refused to grant an export licence to the applicant in breach of Article 34 of the Treaty. Mr Kennelly noted that the ECJ did not expressly refer to ex parte BT. The ECJ underscored the distinction between the wide discretion type of case, where the three conditions previously discussed fell to be applied (see paragraph 25 of its Judgment), and the narrow/constrained discretion type of case (of which the case before it was an example) where the position was capable of being analysed differently. At paragraph 28 of its Judgment the ECJ said this:

> "As regards the second condition, where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach."

In such circumstances, the test remains – is the breach sufficiently serious? But, it will be much easier to establish this if the margin of discretion open to a Member State is considerably reduced. It will be even easier to establish this if there is no discretion at all.

79. In Evans v Secretary of State for Transport and MIB (*loc. cit*), Advocate General Alber, but not the ECJ, discussed the preconditions for State liability in a circumstance where, in his view, there was little or no discretion conferred on Member States. Paragraphs 149-153 of his Opinion are instructive. On my reading of them, (i) irrespective of the breadth of the discretion, the sufficiently serious breach test is always applicable, and (ii) in a little or no discretion type of case, the Member

State's failure to take any of the measures necessary to achieve the result prescribed by a directive within the relevant time-frame will, almost by definition, constitute a manifest and grave disregard by that Member State of the limits, such as they are, on its discretion. It may be seen that in this way the *test* that Community law imposes is a unitary one, but the factors which fall to be taken into account in ascertaining breach will vary according to the context.

80. The parties referred me to other ECJ cases on this issue, but it seems to me that these took the matter no further.

81. In the domestic context the leading authority is, and remains, the decision of the House of Lords in R v Secretary for Transport, ex parte Factortame [2000] 1 AC 524. At 541D-F Lord Slynn reviewed the authorities I have covered, as well as Dillenkofer v Federal Republic of Germany [1997] QB 259 (which was another case where failure to implement a directive could, without more, constitute a sufficiently serious breach). Aside from the enumeration of the relevant factors in Lord Clyde's opinion, I have found Lord Hoffmann's opinion to be particularly illuminating. I therefore propose to take some time to summarise it.

82. In Lord Hoffmann's view, ex parte Factortame was an example of a legislation/wide discretion type of case where breach of community law will be sufficiently serious only if the legislature manifestly and gravely disregarded the limits of its discretion. The breach in issue was a contravention of fundamental principles of Community law, namely the rights of establishment of citizens of other Member States and their right to invest in UK companies. Although the department was acting in good faith and with the benefit of legal advice, it took a substantial risk that it was wrong, and deliberately decided to run that risk. I would add that "deliberately" in this context does not have to mean – "deliberately intended to breach EU law, or act with that motive" – but rather it was capable of meaning – "embark on a deliberate as opposed to inadvertent course of conduct which carries with it the substantial risk that the law may be broken". I note that at 555B Lord Clyde viewed the matter slightly differently: for him, the difference was between a deliberate intention to infringe and inadvertence.

83. Two sentences from Lord Hoffmann's opinion were relied on by Mr Moser as being of particular relevance:

> "But the question of whether the error of law was excusable or inexcusable is an objective one and the excuses must be considered on their own merits [548D/E]
>
> When one comes to consider the strength of the United Kingdom's arguments to justify discrimination against nationals of other member states, it seems to me that there was fatal divergence between the rhetoric which the Government used to describe the problem and the solution which was adopted. [548E/F]"

I agree that the first citation is important but I am not convinced that the second applies here. Mr Moser relies on what departmental officials said in some of the documents in 1996-1999 regarding the UK's obligations under the Directives. But, as

we shall see, there was no rhetoric surrounding the policy decision to implement the crime exception, merely a deafening silence.

84. As is well-known, Lord Clyde set out in his opinion a non-exhaustive series of factors which fall to be weighed in the balance. I will be considering these subsequently. What it is important to recognise at this stage is that (i) the test is objective (544D) (if a government acts in bad faith that is an additional factor which falls objectively to be considered), (ii) the weight to be given to these various factors will vary from case to case, and no single factor is necessarily decisive, and (iii) the seriousness of the breach will always be an important factor. Although not expressly mentioned by Lord Clyde, I would add that in a minimal/no discretion type of case it will be easier for the claimant to prove the requisite degree of seriousness.

85. In Byrne v MIB and Secretary of State for Transport [2008] EWCA Civ 574, the Court of Appeal was considering the application of a limitation period in the Untraced Drivers' Agreement which was less favourable than that contained in the Limitation Act 1980. The issue of *Francovich* damages arose, and on my reading of his Judgment Carnwath LJ, in rejecting the submission advanced by Mr Paines QC for the claimant/respondent to the appeal, adopted the sort of approach indicated by Advocate General Alber in Evans. He envisaged the cases (in terms of the width of the applicable discretion) as falling at different places along a continuum rather than being dichotomous in character. Thus (at paragraph 37):

> "I agree, however, that the application of those principles varies with the context, as Lord Slynn's summary illustrates. An important consideration is the degree of discretion left to the Member State. In that respect Brasserie du Pêcheur and Dillenkofer can be seen as opposite ends of a spectrum. In Dillenkofer there was little doubt what the Directive required. The German Government had simply delayed implementation, with the result that direct loss was suffered by those who would have enjoyed its protection in the interim. In those circumstances, it was held that mere infringement was "sufficiently serious" to found liability. Although in theory this was an application of Brasserie du Pêcheur principles, use of such apparently opprobrious terms as "manifest disregard" may distort the inquiry. Culpability may be relevant; but state liability does not necessarily depend on a successful witch-hunt."

Mr Kennelly contended that Carnwath LJ's is an "outlying", if not unorthodox approach. I simply cannot agree. On analysis, what Mr Kennelly was really submitting was that all cases of this nature involve legislative choices and a substantial margin of discretion. That is the unorthodox approach which I reject. I also cannot accept Mr Kennelly's related submission that "manifest and grave disregard" is the touchstone – in the sense that some sort of moral culpability or egregious conduct must be established as a precondition for liability. Carnwath LJ and Advocate General Alber have correctly stated the law. Context is all: in a situation where the Member State's discretion is minimal or non-existent, a material breach of clearly worded provisions of Community law with significant consequences for individuals

will often constitute a sufficiently serious breach for these purposes, and (as a corollary, but no more) a manifest and grave disregard of the relevant obligation.

86. On the facts of Byrne Carnwath LJ upheld the damages claim, but not on the basis of what was done in 1987, characterising this as an attempt to hang state liability "from such a slender evidentiary thread". What was critical, in his view, was the department's failure to respond to the unambiguous statement of principle – that of the need to ensure equivalence with the system for insured drivers – emanating from the ECJ in Evans in 2003.

87. In R(oao Negassi) v Secretary of State for the Home Department [2013] EWCA Civ 15, the Court of Appeal was considering the compliance by the UK with its obligations under the Reception Directive. Lord Kerr in the Supreme Court found that the provisions of the Directive were clear, precise and unambiguous. However, state liability was not established in that case on the basis of Lord Clyde's multifactorial test. This was a bona fide attempt to transpose the Directive, and at paragraph 20 of his Judgment, Maurice Kay LJ said this:

> "The evaluation of the seriousness of the breach in the present case seems to me to be quite finely balanced. I have come to the conclusion that, notwithstanding the points in Mr Negassi's favour (the most striking of which was the total exclusion of the subset of applicants for asylum of which he was one), the breach was not sufficiently serious to satisfy the test. It was not deliberate. It was the result of a misunderstanding of new provisions in an area of recent EU concern. It was not a cynical or egregious misunderstanding. It was not confined to the Secretary of State. It was shared, as a matter of first impression, by a number of judges …"

88. Finally, Mr Kennelly also drew my attention to the first instance decision in Banco de Vapor BV v Thanet DC [2014] EWHC 490 (Ch). However, in my view that case does not illuminate the relevant principles; it simply applies them to somewhat egregious facts.

89. Having set out the relevant legal principles, I turn to examine the evidence. There is a conspicuous paucity of it. There are no documents bearing on the decision to introduce the crime exception into the Uninsured Drivers' Agreement.

90. In November 1996 the Defendant wrote to the MIB stating that its legal branch had now produced a final draft of the revised agreement. Mr Kennelly relied on the following:

> "One of the principal aims of the revision is to ensure that the provisions of the Agreement meet our obligations under the Motor Insurance Directives. In particular it must provide a high level of consumer protection as required by the Third Directive and, of course, its terms must reflect the principal aim of the main Agreement; to provide compensation for road traffic accident victims who are uninsured when the RTA would require them to be insured."

91. I agree that this shows that the department, as one might expect, was intending to be loyal to the fundamental principles of these Directives. However, this paragraph throws no light on the department's reasons, intentions and motives bearing on the enactment of an additional exclusion which would be its very nature remove from scope a group of road traffic accident victims, as opposed to enhancing their protection.

92. The November 1996 letter also addressed section 144 of the RTA 1988. In that context the author, who is not known, said this:

> "The exclusions contemplated in the Directives are those in which a putative claimant is involved in an illegal act; depositors are complying with the law as it stands."

It is true that the exclusions set out in the Second Directive include examples of illegal conduct, although permitting oneself to be driven in a motor vehicle in circumstances where the driver is known to be uninsured is not (without more) such an example. In any event, this elliptical sentence says nothing about clause 6(1)(e)(iii) and falls far short of suggesting that the exclusions may extend beyond those expressly specified in the Directive.

93. The memorandum from R Ford dated 21st January 1998 shows that the department was concerned about the possibility of infraction proceedings brought at the instance of the Commission, but this was in a specific context far removed from our facts. At some point it is clear that the Commission was sent a draft of the proposed revised agreement, and I am prepared to draw the inference that the relevant draft it saw included the new clause 6(1)(e)(iii). This clause had found its way into the draft agreement by, at the latest, the spring of 1998.

94. In 1998 and early 1999 there was correspondence between the department and the MIB concerning the draft agreement, and some discussion of the constructive knowledge wording of clause 6(1)(e) (this was in the existing agreement), as well as of the substance of what become the new clause 6(3). However, as I have said, no available document throws any light on the provision currently under scrutiny, and the only Ministerial submission which had been found says nothing about it.

95. In these circumstances, I asked Mr Kennelly a series of close questions directed to the availability of witnesses, compliance by the Defendant with its disclosure obligations under CPR Part 31, and the Crown's duty of candour relating to litigation of this nature. Mr Mike Power, the senior civil servant involved in 1998 and 1999, is now in New Zealand. No other official has knowledge of these matters. The Treasury Solicitor has done his best to comply with the Crown's disclosure obligations in difficult circumstances.

96. At one stage I was considering whether I should draw an inference adverse to the defendant in line with the principles outlined by Brooke LJ in Wiszniewski v Central Manchester HA [1998] PIQR P324. Such an inference might be drawn in circumstances where a claimant had established a *prima facie* case that the defendant had acted in breach of the obligations I have listed in my previous paragraph. Not without an element of hesitation, I cannot conclude that the Claimant has made out a *prima facie* case of what, on any view, must be understood to be impropriety. In short,

I conclude that the Treasury Solicitor has done his best to comply with CPR Part 31 and to locate possible witnesses who could throw light on what happened 15 or 16 years ago. Furthermore, and perhaps for the avoidance of doubt, I conclude that there is no evidence of bad faith on the part of the department in relation to the implementation of clause 6(1)(e)(iii). By this I mean that I cannot conclude that the Defendant went ahead in the knowledge that it was violating Community law.

97. My degree of hesitation stems from the fact that it is remarkable that no relevant documents exist. A provision of this sort must have been the subject-matter of detailed written discussion and deliberation within the department, and (one would have thought) a Ministerial submission. And yet we have nothing.

98. The inferences which do fall to be drawn from this material, or the absence of it, require careful examination. I draw the inference that the issue must have been discussed at departmental and Ministerial level (although I draw no inferences as to the content of those discussions). I have carefully considered whether I should also draw an inference that the department took legal advice on the introduction of the crime exception. Mr Kennelly submitted, or accepted, that I should not. On the one hand, it could be said that the department must have done (the new clause cried out for advice). On the other hand, one is left wondering what the advice could have said, assuming that it was remotely competent. I prefer to approach this issue on the footing that I am not prepared to draw an inference either way, and I will therefore approach the matter on both alternative hypotheses. As I will come to demonstrate, it makes no difference to the outcome whether legal advice was obtained or not. But what I should make absolutely clear is that I am not prepared to draw any inference regarding the content of any legal advice the department obtained, save to reiterate that I cannot conclude that the department acted in defiance of any such advice.

99. In response to another of Mr Kennelly's submissions, I am not prepared to draw an inference in the Defendant's favour that because the documents show in general terms that it was intent on complying with the Directives, it may properly be inferred that it was reasonably believed that the introduction of the clause in issue would also be in compliance with the Directives. That would be a step too far, and in any event ignores the obvious distinction between bringing the agreement in line with the Directive on account of the need to safeguard the interests of victims, and taking positive steps to remove victims from its ambit.

100. Mr Kennelly did accept that the absence of evidence rendered it impossible for him to advance a positive case that the breach was excusable. That was a realistic concession, particularly in circumstances where I am enjoined to apply an objective criterion to the issue.

101. I fully accept that the exercise of drawing inferences has an element of unreality about it, but this has been compelled by the extreme sketchiness of the available evidence. However, the Defendant can have no possible complaint about this. The real point is that I have not drawn the adverse inferences which I might have done.

102. The MIB agreements were reviewed by the department and the MIB in 2009/10, and relevant documents have been disclosed. In these documents the crime exception is expressly considered. Departmental thinking was consistently along the following lines:

> "if the "knowledge that the vehicle was uninsured" derogation can be used to cover the crime scenario then there would be no equivalence problem."

That is of course true, but it is a big "if" which seems to have merited no further examination. Indeed, at what may have been a slightly earlier stage the department was recognising that "it is not clear what basis in the Directives there is for this exclusion". There is no evidence that legal advice was obtained in these circumstances, and in the subsequent consultation a number of stakeholders expressed concerns (see page 697 of the bundle). On the other hand, the European Commission has not taken an interest.

103. Apart from all the points made in his written argument, which it is unnecessary for me to summarise, Mr Kennelly mounted a spirited defence of his client's position. His point of departure was that his submissions on the issue of breach were not entirely without merit. There is no difference between breach by commission and breach by omission. In the first set of proceedings in the County Court, no point was taken as to Community law compliance, the current Defendant was not joined as a party, and I should draw no inferences in the Claimant's favour in this respect; indeed, I should draw the contrary inference that the point was not plain and obvious. Mr Kennelly made a number of submissions regarding the veniality of the breach, but these were superseded by his subsequent acceptance that he could not mount a positive case in this respect. Finally, Mr Kennelly said on a number of occasions that in 1999 there was no ECJ authority directly on point, and that the breach was not grave and manifest, or (put another way) sufficiently serious.

104. In my judgment the correct approach is to apply the multifactorial test outlined by Lord Clyde in ex parte Factortame against this important contextual backdrop: that this is not the sort of situation where the Defendant had a wide margin of discretion. Rather, by introducing the crime exception the Defendant was removing from scope a category of victim which was previously within the ambit of the agreement, and in that sense could not be taken to have made any relevant legislative choice in relation to the implementation of a Directive. The consequences are binary: either the Defendant acted in accordance with the permissions in the Directives, or it did not. There is no suggestion that the Uninsured Drivers' Agreement had not worked perfectly adequately for a number of years, and there is no evidence of any compelling need to restrict its boundaries. The Defendant naturally had a "choice" of sorts (it could decide to implement the new clause, or it could decide to maintain the status quo), but in my judgment this was far from being the sort of broad discretion recognised in the jurisprudence.

105. Mr Moser tentatively submitted that the limited or no discretion type of cases might fall into a different category altogether, although he recognised that he did not need to go that far. Neither do I: as I have already observed, all these cases fall at different points along a continuum. Even in a case where there is no discretion – and in my judgment the instant case comes close to being an example of one – the multifactorial test still applies. The real point is that in such a case the nature of the breach may be sufficiently serious to justify the imposition of state liability because all other factors are outweighed. My approach in the instant case is to place all the Lord Clyde factors into the balance without going so far as to say that any one factor is paramount. I reiterate what I said under paragraph 85 above.

106. The first of Lord Clyde's factors is the importance of the principle of Community law which has been breached. I would not classify the protection of victims of road traffic accidents as "a general and superior principle of Community law" (see ex parte Factortame, at 554F). The present case is not directly concerned with the free movement of nationals within Member States. The protection of victims is a principle of second-order importance which is worthy of recognition. This Claimant has a substantial claim for damages which clause 6(1)(e)(iii) has precluded. The social security system will not meet his needs fully.

107. The second of Lord Clyde's factors involves a consideration of the seriousness of the breach in the context of a range of sub-factors including the margin of discretion open to the Member State and the clarity of the Community law provisions at issue. This is not quite how Lord Clyde articulates the matter, but in my judgment this is the stage at which these issues fall appropriately to be considered. Lord Clyde did not expressly mention the margin of discretion factor because on the facts of Ex parte Factortame the department had a considerable degree of latitude in the legislative arena.

108. I have already concluded that the present case is a paradigm of a little or no margin of discretion type of case. The issue which I need to resolve is how clear and obvious it was in 1999 that the permissible exclusions were confined to those expressly set out in the Second Directive. No evidence exists, and no inferences may be drawn, as to the Defendant's reasoning process, but could any reasonable person have concluded that the term "certain limited exceptions" in the sixth recital somehow permitted the enactment of exclusions which went beyond the permissions stated in the Second Directive itself? In my judgment, the language of the Second Directive was, and is, clear and obvious, and Mr Kennelly's submission on the recital was both tortuous and unarguable. 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. True it is that it was not until the decision of the ECJ in Farrell, promulgated after the Claimant's accident on 19th April 2007, that there was unequivocal case-law to the effect that the same line of reasoning applied to the Article 1.4 national body, but in my judgment – and as I have already explained - the point was close to being self-evident.

109. Mr Kennelly urged me to conclude that his arguments were not entirely without merit. In my view this is not the right question. I prefer to conclude that his arguments were plainly wrong. At no stage was he able to point to a paragraph in an Opinion of an Advocate General or a Judgment of the ECJ which positively supported his case. I have addressed the significance and materiality of Csonka: the correct analysis is that this case is irrelevant. As soon as the first preliminary issue was revised to reflect the change in the Defendant's case, Csonka fell away.

110. Finally as regards Lord Clyde's second factor, I do not consider that this factual situation is complex (see Lord Clyde at 554G).

111. As for Lord Clyde's third factor, the Defendant has not advanced a positive case as to the degree of excusability of the breach beyond the submissions ably advanced by Mr Kennelly on the issue of breach, which I have of course already addressed.

112. As for Lord Clyde's fourth factor, my approach has been that 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.

113. Given my approach to the matter of inferences, the state of mind of the infringer is difficult to evaluate. I have not concluded that the Defendant possessed a deliberate intention to infringe in the sense that it knew that it was acting in breach of Community law. On the other hand, I am a long way from accepting Mr Kennelly's submission that this is an example of an inadvertent breach. That submission, to be made good, would require my drawing a series of favourable inferences (from the department's perspective) which I am not prepared to do. My favoured approach, in line with the inferences which it is fair and proper to draw and with Lord Hoffmann's guidance, is to hold that the Defendant must be taken to have decided deliberately to run the risk. There are only two logical possibilities, and I address both of them. If the Defendant took legal advice, then – without speculating further as to the content of that advice – the most favourable gloss (from the department's perspective) that could be placed on these facts is that a deliberate decision was taken to run the risk. Given that no inferences may be drawn as to the content of any advice obtained, it cannot be inferred that such advice might have given the green light. If, on the other hand, the Defendant did not take legal advice, that is not something which avails it one iota. I entirely reject Mr Kennelly's argument that there was no prompt or spur to the taking of such advice. Any department of State acting responsibly should have taken legal advice on an issue of this obvious sensitivity and potential controversy. I also see no merit in Mr Kennelly's separate submission that it may properly be inferred from the Claimant's failure to join the department as a defendant in the original proceedings that the point cannot be fairly characterised as plain and obvious. Ockham's razor applies: the more parsimonious explanation is that those advising the Claimant believed that they had a more than reasonable case against Mr Pickett and Tradewise which should be pursued to a conclusion without creating an unnecessary risk as regards the department's costs.

114. In short, to conclude that the Defendant acted inadvertently, or excusably, would entail my drawing the sort of favourable inferences which I cannot accept should fairly be drawn in these circumstances.

115. The remainder of Lord Clyde's factors do not weigh heavily in the scales in the present case. The Defendant's conduct in 2009/10 betrays a certain ostrich-in-the-sand philosophy, but the Claimant's accident had happened some years before that, and it would have been very difficult to have removed the offending clause with retroactive effect. The seventh factor does not really add to the second in the circumstances of this case. As for the position of the Commission, its inaction weighs slightly in the balance in the Defendant's favour, but I take Mr Moser's point that a close reading of the Uninsured Drivers' Agreement would be required in order to pinpoint the potential problem.

116. Mr Kennelly's strongest point was that his client's breach simply was not serious enough. He submitted that the issue cannot be altogether plain and obvious because the forensic process has required detailed written and oral argument, and the review of

a number of authorities: this was not the sort of case where the Court could already have formed a clear view at the outset of the hearing. Furthermore, although he did not put it quite in these terms, arriving at "the answer" has required the analysis and then the synthesis of a number of matters, all of which have merited some thought: the effect of the UK's idiosyncratic application of the Directives through the MIB; the impact of the sixth recital on the terms of the Second Directive; and, the developing jurisprudential picture as it has slowly evolved through the ECJ cases. However, in my judgement enumerating the points in this way serves to create an appearance of complexity which I have to say is illusory. Each of the points, individually analysed, is straightforward, and the need to combine the points and to understand their interrelation is also a straightforward exercise.

117. I therefore conclude that the Defendant is guilty of a serious breach of Community law in circumstances where its room for manoeuvre under the Directives was closely circumscribed. It did not have a wide discretion. Its obligations under the Directives, and their relevant confines, were quite clear, and – in the absence of knowing the actual reason for this policy decision – the best that may be said is that the Defendant decided to run the risk, which was significant, knowing of its existence. I have examined all of Lord Clyde's factors: the majority bear on the seriousness of the breach, and some are of little weight in these circumstances. I conclude with little hesitation that the Defendant's breach is so serious that, subject to the final issue of causation, it must pay compensation to the Claimant under the *Francovich* principle.

The Fifth Issue: Causation and Clause 6(1)(e)(ii)

118. The Defendant's fall-back position is that there is a break in the chain of causation at the final stage. This is because clause 6(1)(e)(ii) applies to these facts: the Claimant knew, or was wilfully blind to the fact, at the time of entering the vehicle, that the vehicle was uninsured for the purposes of the journey he was taking. Mr Moser does not dispute that, if clause 6(1)(e)(ii) were held to apply, it would operate to defeat his client's claim for the reason proposed; his short submission is that I should not draw the requisite inference.

119. My approach must be that which I have already mentioned: on the purposive construction of the clause mandated by White v White, the issue is whether the Claimant had information from which he drew the conclusion that the driver might well be uninsured but deliberately refrained from asking questions for fear that his suspicions would be confirmed; or whether he was simply careless, giving no thought to the question of insurance, even though an ordinary prudent passenger in his position and with his knowledge, would have made inquiries.

120. I must have regard to what I know about this Claimant in what may be described as his pre-morbid state. The expert evidence shows that he was a man of average intelligence. There is no evidence that he dealt in drugs on any previous occasion, and I do not draw an inference from his life-style or anything else to that effect. The Court of Appeal referred in terms to his "passion for motor cars" and his work as a vocational tutor in the car industry. Mr Kennelly fairly conceded that without this additional evidence the average person specified by Lord Nicholls could not be deemed to have the requisite knowledge, but he firmly submitted that with or from

this additional evidence it was safe and appropriate for me to draw the inference which locates this case in the actual knowledge or wilful blindness category. In other words, I should be confident that the Claimant knew enough about car insurance matters that the inference must be that he drew the conclusion that the driver was uninsured (the deliberate refraining from asking questions really takes the matter no further on these facts). Put another way, this simply was not a case where the Claimant gave no thought to the question of insurance: it may not have been at the forefront of his mind, but it was sufficiently within the compass of his thinking at the relevant time.

121. At one stage in the oral argument I considered that the fact that a criminal joint enterprise was not amongst the rebuttable presumptions in the new clause 6(3) of the Uninsured Drivers' Agreement 1999 lent some strength to the Claimant's argument that there is no necessary or even contingent link between crime and the absence of insurance. On reflection, however, this is not a sound approach. The reason why criminal joint enterprise does not feature in clause 6(3) is because it separately features in clause 6(1)(e)(iii). Any possible bridge between this last provision and clause 6(1)(e)(ii) therefore raises a separate issue.

122. In my judgment, the Claimant certainly loved cars but that hardly means that he must be deemed to have understood all relevant legal aspects of driving or insurance. If an issue had arisen in this case concerning the Claimant's actual knowledge of the Highway Code, I would have treated him in the same way as any other reasonably prudent driver (I appreciate that in negligence actions drivers are deemed to know what the Highway Code says). To draw the inference that the Claimant's knowledge of insurance matters was somehow enhanced by his knowledge of cars and their functioning would be to embark on an exercise in speculation. I have been careful to avoid such a course in relation to previous issues, and I follow the same approach here. The inferences drawn by HHJ Gregory in the first trial were solid and not speculative. I cannot reach the inferential conclusion from the available evidence that the Claimant had information from which he drew the conclusion that the driver might well not be insured. The better view, by a considerable margin, is that the Claimant gave no thought to the question. It follows that the Defendant's case on causation fails.

Concluding Observations

123. Many readers may be wondering how it comes about that a drug-dealer is entitled to compensation against Her Majesty's Government in circumstances where he was injured during the course of a criminal joint enterprise. The understandable reaction might be: there must be some rule of public policy, reflecting public revulsion, which bars such a claim. The short answer is that there is not. The Court of Appeal held in terms that the insurer's public policy defence failed on these facts, and that must be the end of that matter in terms of domestic law. The relevant European Directives clearly state that there are only certain limited exceptions to liability in these circumstances, and that too must be the end of the matter as a matter of Community law.

124. The law is clear, the Defendant is in serious breach of it, and there must be judgment for the Claimant on the issue of liability, with damages to be assessed.