Extra-contractual Rules and Third-party Rights of Direct Action: The Court of Justice Defines Claimants' Rights and Insurers' Obligations in Motor Vehicle Agreements

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Abstract

AR v Others is a Polish reference to the Court of Justice centering on the application of Directive 2009/103/EC, the sixth and consolidated Motor Vehicle Insurance Directive (MVID), and the obligations therein regarding insurers' liability to third-party victims. To ensure that persons suffering injury (third-parties) in motor vehicle accidents are provided with minimum standards of protection, the MVID regulates the compulsory motor vehicle insurance regime throughout the EU. This judgment is significant for two reasons. First, it identifies the scope of extra-contractual clauses permitted in the laws of Member States which affect the remedies of third-party victims of motor vehicle accidents. Secondly it, for the first time, defines the scope of the direct right of action of a third-party against the insurer of a driver who caused the damage (a right introduced by the Fourth MVID (2000/26)).[1] As a final, albeit perhaps more discursive contribution but one which we find profoundly important, it confirms the Court's decision in *Linea Directa* regarding when a vehicle is in

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[1] Directive 2000/26/EC [2000] OJ L181/65.

"use" for the application of the MVID. However, in so doing it raises again the issue of the Court of Justice embarking on a course of factual jurisprudence.

KEYWORDS: Direct right of action; extra-contractual clauses; factual jurisprudence; Motor Vehicle Insurance Directive; use of a motor vehicle.

Introduction

Article 363(1) of the kodeks cywilny (Civil Code) provides that compensation for damage suffered as a result of an accident involving a motor vehicle "should be effected, as the injured party chooses, either by restoration to the previous state or by payment of a corresponding sum of money." In the event that restoration to the previous state is impossible or there is excessive difficulty or costs for the party liable, the injured party's right of action shall be limited to a monetary payment.

Article 822(1) and (4) of the Civil Code further provides that via a civil liability insurance contract, the insurer undertakes to pay compensation, as specified in the policy, for damage caused to third parties in respect of whom the policyholder or insured person bears liability. The Code continues that a person who is entitled, under the insurance policy, to compensation for an act of the assured may bring an action directly against the insurer. Thus the law of Poland was relatively clear.

The questions raised in *AR v Others*[2] stemmed specifically from the distinction between the national law of Poland and the application of Article 18 of the MVID. Six claims were pending before the Sąd Rejonowy dla m.st. Warszawy w Warszawie (District Court for

[2] Case C-618/21, *AR and Others*, Judgment of the Court (Fifth Chamber) 30 March 2023, ECLI:EU:C:2023:278.

the city of Warsaw, Poland). Five of the cases related to the refusal by the insurer (of the person responsible for the road traffic accident that led to the damage) to compensate the injured parties in the manner they chose. The sixth case related to damage sustained to a vehicle through a falling garage door. Here the injured parties were seeking monetary compensation for the damage to their vehicles. In each of the claims the quantum of the compensation differed depending on the route of the claim sought.

The aim of the insurance compensation regime in Poland is to restore the injured person's property to the value it would have been had the damage not been incurred, operating as it does based on the premise that the injured party is not unjustly enriched.

The injured parties were the applicants in the main proceedings and had instigated a direct right of action against the insurers for the costs of repairing their vehicle. Importantly, the applicants had not incurred the costs of the damage to their vehicles, rather, they used a system in Polish law described by the referring court as "hypothetical repair costs." Polish case law provides for compensation to be paid to the owner of a damaged vehicle on the calculation of the hypothetical costs (rather than those actually incurred) of repairing the vehicle to its pre-accident state. This quantum of compensation applies regardless of the owner having had the vehicle repaired, and further, regardless of whether they actually ever intend to have it repaired. This level of compensation typically far exceeds the compensation likely to be awarded under the alternative, "differential", model. The differential model, based on Polish legislation, determines the value of the damaged vehicle had the accident not occurred, compared with the current value of the vehicle in its damaged or repaired state. This value is used to establish the level of compensation available.

The benefit to the injured party of the hypothetical repair costs model is evident, but it also has the practical benefit of being applicable to those parties who have already sold their damaged vehicle and thus cannot use any award to repair the vehicle. For the insurers, awards

of compensation must not exceed the actual amount of the damage, calculated through a differential model. Therefore they, in the claim, wanted the application of this model of compensation.

The present method of determining compensation levels in Poland operates on the hypothetical repair costs previously mentioned, even though the referring court acknowledged the possibility of the injured party being enriched through this system. It considered this justifiable by the EU principle of the special protection through the MVID afforded to the third-party victims of accidents involving motor vehicles.[3] This was a further matter to which it sought clarification.

The national court was uncertain and wanted clarity as to the purpose of the direct right of action. Was its intended use to oblige the insurer of the person responsible for the damage (rather than the tortfeasor) to compensate the applicant, or to oblige the insurer to pay the compensation provided for in the policy of insurance directly to the injured party?

The MVID

The reference centered on the application of Directive 2009/103/EC,[4] (the MVID). The MVID provides a regime for the harmonized insurance against civil liability in respect of the use of motor vehicles, ensuring minimum standards of protection are available to third-party victims of accidents involving vehicles. The significance of this judgment is that this is the first occasion the Court has had to clarify the scope of the direct right of action of a third

[3] Recital 1 of the Fifth MVID, Directive 2005/14/EC [2005] OJ L149/14.

[4] Directive 2009/103/EC [2009] OJ L263/11 of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability.

party-victim against the insurer of the driver at fault for all the damage caused by a motor vehicle. It also enabled consideration of the use of extra-contractual provisions which might impact, and negatively, on the access to the compensation required at Article 3 MVID.

Article 3 MVID requires each Member State 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. Article 18 further establishes the obligation on each Member State to ensure that injured parties in accidents involving motor vehicles enjoy a direct right of action against the insurance undertaking covering the responsible person against civil liability.[5] This obligation is reiterated at Recital 30 of the MVID where "the right to invoke the insurance contract and to claim against the insurer directly is of *great importance* for the protection of victims of motor vehicle accidents" (authors' emphasis).

The existence of the direct right of action against the insurer of the person at fault is an important protection for third-party victims in particular. The right improves the legal position of injured parties of motor vehicle accidents, especially those which occur in States outside of the victim's Member State of residence. The victim is not obliged to seek recovery of damages against the responsible party[6] given the inherent problems with serving notice on such a defendant, the victim also cannot be obligated in seeking recovery from other tortfeasors, and for the defendant insurer, it is allowed to conduct litigation in the name of its assured and may seek contributions from other insured tortfeasors (where appropriate).

Questions Referred to the Court

[5] See Case C-340/16, *Landeskrankenanstalten-Betriebsgesellschaft - KABEG v Mutuelles du Mans assurances - MMA IARD SA,* ECLI:EU:C:2017:576.

[6] Case C-558/15, *Alberto José Vieira de Azevedo and Others v CED Portugal Unipessoal, Lda and Instituto de Seguros de Portugal - Fundo de Garantia Automóvel,* ECLI:EU:C:2016:957.

Given the hypothetical and differential models of compensation permitted in Poland, and the potential restriction of national legislation and case law negatively impacting on the effectiveness of Article 18 MVID, a preliminary reference was made.

The first question related to the interpretation of Article 18 MVID, and by implication Article 3's general obligations to ensure civil liability through insurance is satisfied. The court sought guidance as to whether Article 18 MVID precluded national legislation from, in the first instance, allowing an injured party's direct right of action against the relevant insurer, but excluding or limiting that insurer's obligations in respect of the calculation of the compensation to real and actual losses to property (the differential repair costs model). This would be a contrast to the situation where the injured party seeks a remedy directly from the person responsible/tortfeasor, where they can opt to require the latter to restore the vehicle to its state before the damage occurred (repair of the damage paid by the person responsible or paid by that person directly to a garage), instead of claiming compensation.

The second question continued that if this first question was answered in the affirmative, must also the MVID be interpreted as precluding national legislation which adopts the hypothetical repairs costs model.

The third question was based on the premise that the first question was answered in the affirmative and the second in the negative. In such a situation, does the MVID preclude national legislation which further restricts and prescribes the award and use of compensation granted? An example of such a restriction could be by the insurer paying a garage/mechanic directly for repairs or for the victim to have to produce receipts of repair works having been completed prior to the reimbursement of the costs associated with the damage from the accident (thus ensuring the avoidance of the victim being unjustly enriched as a result of the damage). This was continued in the fourth question in respect of the compatibility of national

provisions which restricted the award of compensation in situations where the victim no longer had possession of the vehicle damaged in the accident and so could not seek its repair to its pre-accident condition.

The Decision and Reasoning of the Court

Succinctly, the Court of Justice was faced with questions from the referring court as to the compatibility with the MVID of national legislation which sought to, or may in practice, restrict as the only way of redress through a direct action, to the payment of monetary compensation (and therein be subject to rules of quantum and conditions upon its payment).

The Court of Justice reiterated how the fundamental nature of Article 3's aims was achieved through Article 18's right of direct action against the insurer of the party responsible for the damage to the vehicle. However, whilst it has previously explained that both Article 3 and 13 MVID preclude an insurer from relying on statutory provisions or contractual clauses in order to refuse to compensate victims for an accident caused by the insured vehicle,[7] the Court of Justice in the present case continued that the right of direct action was only based on the benefits that the insurer would have had to provide to its assured (and thus within the limits of the insurance contract). Consequently, in respect to the scope of Article 18 MVID when read together with Article 3, Member States are not prohibited from providing in their national legislation that the only means of obtaining redress from that insurer is to provide monetary compensation to injured parties who bring a direct action against the insurer of the person at fault.[8]

[7] Case C-287/16, *Fidelidade-Companhia de Seguros SA v Caisse Suisse de Compensation and Others,* ECLI:EU:C:2017:575.

[8] *AR and Others,* Case C-618/21, at para. 35.

Nevertheless, to ensure that the effectiveness of the direct right of action regime is not undermined, the Court ruled that Member States *are* precluded from establishing rules of compensation (such as through the rules relating to the calculation of the compensation or imposing conditions on its payment) in their national legislation which would have the effect of excluding or limiting the insurer's obligations.

Commentary

The Court's decision is timely and provides an opportunity to determine an injured party's right to bring a direct action against the insurer of the person responsible for the damage caused as a result of the accident. The Polish insurance system allows injured parties to claim monetary compensation against insurers for the cost of repair work to restore their vehicle (and its financial worth) back to the position it was in before the accident. Such a system is common in torts and can be seen in the system of reliance losses in contract law. It is founded on the principle of avoiding transgression of the doctrine of unjust enrichment.[9] According to that doctrine, compensation must be limited to returning the injured party to their pre-injury position. It is not intended to be punitive, to discourage transgression, nor was it intended to benefit the claimant since the defendant has no control over what the claimant will do with the compensation awarded (here, either paying for vehicle repairs or choosing not to repair).

Returning to the issue of the extent of the right of direct action against an insurer, the Court of Justice begins its analysis of the law from para. 32. To reiterate, Article 18 and the injured parties' direct right of action against the insurer is a fundamental provision of EU law,

[9] See Case C-501/18, *BT v Balgarska Narodna Banka,* ECLI:EU:C:2021:249, para. 125; and Case C-100/21, *Mercedes-Benz Group (Responsabilité des constructeurs de véhicules munis de dispositifs d'invalidation),* ECLI:EU:C:2023:229, para. 94.

but one that does not preclude national law from providing that such a method of obtaining redress may consist only of benefits of a monetary nature.[10] Further, this right allows the injured party to invoke the insurance contract and claim against the insurer directly. Hence this action may relate only to the provision of the benefit which the insurer would have been required to provide to its assured, within the limits of the contract of insurance. If such a contract only provides for a monetary form of compensation, Article 18 does not prevent the remedy of redress in the form, exclusively, of monetary compensation. This too safeguards the third-party's right in securing compensation as whilst the Member State will have its own procedural rules and financial limits for the award of compensation in civil liability claims, these are subject to Article 9 MVID which provides for minimum levels of cover to be applied (and these amounts are reviewed every five years in line with the European Index of Consumer Prices). This practice maintains the EU principle of effectiveness and equivalence[11] since it awards the injured party the compensation that the insured party would have been entitled to claim from the insurer had the insurer compensated the victim personally. Thus, there is no conflation between the obligation to provide insurance cover (which is governed by EU law) and the extent of compensation that can be provided based on the assured's civil liability (governed by national law). EU law is not intended to harmonize the civil liability rules of the member states, but to allow the states freedom to determine their

[10] *AR and Others,* Case C-618/21, at para. 35.

[11] National compensation laws should not undermine the effectiveness of EU law, for example by automatically excluding or disproportionately restricting the victim's right to compensation by compulsory insurance. See Case C-707/19, *K.S. v A.B.*, ECLI:EU:C:2021:405, para. 26; and Case C-923/19, *Van Ameyde España SA v GES, Seguros y Reaseguros SA,* ECLI:EU:C:2021:475.

rules in this regard. They are "free to determine the rules of civil liability applicable to road accidents."[12]

Consequently, the Court of Justice ruled that the MVID forbids extra-contractual rules for calculating compensation and payment conditions insofar as such rules would have the effect of excluding or limiting the insurer's responsibility to cover the entire amount of compensation that the assured must provide to the injured party in the event of a direct action brought by an injured party against an insurer. The Court stressed in such circumstances that the insured's benefit could only be payable under the conditions expressed in the insurance policy. Conditions other than those set out in the contract (such as making sure compensation is actually used to repair the vehicle) would not be allowed.

What is use of a vehicle?

The Court of Justice has in this ruling clarified what Member States' obligations are in respect of ensuring civil liability for accidents involving motor vehicles is covered by insurance. It is a clear instruction to the Member States, and the insurers which operate in the EU will be wise to take this into account when dealing with claims directly from third-party victims of the actions of their assured. They would also be wise in reviewing the terms of their policies of insurance to ensure compliance, especially with regards any clauses that purport to restrict the payment or use of payments of compensation.

This ruling is important and the clear and unequivocal nature of the Court of Justice's instruction would make a note and commentary on this matter relevant to the broad readership of EU law generally. Yet we also consider that the claim from the referring court,

[12] *AR and Others,* Case C-618/21, at para. 43 and see *K.S.,* Case C-707/19*,* para. 24.

the sixth claim for compensation due to the damage caused to the vehicle by the falling garage door, highlights significant issues which are perhaps more comment-worthy and raise matters of interest which are of much more general interest and importance to EU lawyers and scholars (beyond those in the insurance sector).

The Court's observations on the matter begin at para. 29 and here the Court distinguishes between damage caused by a vehicle (in which the MVID applies) and damage caused to a vehicle (in which circumstances the MVID would not apply). As such, the Court concluded at para. 31 that this is a matter which does not concern the "use of a vehicle" and as it consequently does not invoke application of the MVID, the case is not admissible for a ruling. This is clearly obiter and does not impact on the value of the judgment. Indeed, in many ways the point may be lost in other commentaries and even the referring court seemed to want to distance itself from actually referring the case to the Court of Justice (clearly expecting the Court to determine the issue as it did). That point being acknowledged, the very reason for its relevance to the developing law of the MVID is because of the activism that has, historically, been demonstrated by the Court of Justice.

Why is the 'use of a vehicle' so important?

Article 3 MVID establishes the requirement for the compulsory insurance of vehicles, a task mandated to Member States for vehicles normally based in their territory.[13] It continues that the contracts of insurance are to cover loss or injury caused in those States and for nationals of Member States during direct journeys between those States where the EU Treaty is in force. Beyond reference throughout the MVID to the application of the Directive in situations

[13] Subject to the permitted derogations in Article 5 MVID.

involving the use of a vehicle, no further definition is provided. This has led to the use of the terms "circulation", "use" and "utilisation" in the transposition of Article 3 by Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Latvia, Lithuania, Malta, Romania, Slovakia, Slovenia, Sweden and the UK. It should also be recognized from the outset that the MVID was established, among others, primarily to remove the border checks on the insurance of vehicles passing between Member States in fulfilling the free movement principles upon which the Union is founded. This is important for the following discussion as it would not be unreasonable for the Court of Justice, as we consider later, to simply leave to Member States the factual determination of the use of a vehicle for the purposes of obligations then stemming from the MVID. The Court of Justice chose not to take this path, rather it has sought to provide greater guidance to Member States as to which situations the MVID will apply. The sixth case referred to in *AR v Others*[14] again draws attention to the problems faced by the Court in this regard.

It would not be controversial to comment that the Court of Justice has previously applied a very broad and expansive interpretation of the "use of vehicles" in respect of the MVID. The case law list is growing and includes a tractor delivering bales of hay into a barn;[15] a previously immobilized car being made to work and leading to an accident during its unauthorized use;[16] a tractor used as a herbicide sprayer at the time of causing an

[14] *AR and Others,* Case C-618/21.

[15] Case Case C-162/13, *Damijan Vnuk v Zavarovalnica Triglav d.d.,* ECLI:EU:C:2014:2146.

[16] Case C-80/17, *Fundo de Garantia Automóvel v Alina Antónia Destapado Pão Mole Juliana and Cristiana Micaela Caetano Juliana,* ECLI:EU:C:2018:661.

accident;[17] an all-terrain vehicle causing injury during use on private land;[18] the passenger of a parked car causing damage when opening the door onto another vehicle; a vehicle parked and through its leaking of oil caused a third-party to slip and sustain injury; [19] and a vehicle being stored in a garage where a spontaneous electrical fire led to property damage.[20] Therefore, given the Court has seemingly extended its jurisdiction in such matters to the application of the law rather than simply to its consistent interpretation throughout the Member States,[21] it is somewhat out of character for it to refuse to include this case in its broad and developing jurisprudence of "use of a vehicle." It may be a situation where the Court is impliedly influenced by Directive 2021/2118's[22] impending amendment to the MVID[23] and the restrictions therein.[24]

[17] Case C-514/16, *Isabel Maria Pinheiro Vieira Rodrigues de Andrade and Fausto da Silva Rodrigues de Andrade v José Manuel Proença Salvador and Others*, ECLI:EU:C:2017:908.

[18] Case C-334/16, *José Luís Núñez Torreiro v AIG Europe Limited, Sucursal en España and Unión Española de Entidades Aseguradoras y Reaseguradoras (Unespa)*, ECLI:EU:C:2017:1007.

[19] Case C-431/18, *María Pilar Bueno Ruiz and Zurich Insurance PL, Sucursal de España v Irene Conte Sánchez*, ECLI:EU:C:2019:1082.

[20] Case C-100/18, *Línea Directa Aseguradora SA v Segurcaixa Sociedad Anónima de Seguros y Reaseguros*, ECLI:EU:C:2019:517.

[21] A matter reserved for Member States per Article 267 of the Treaty on the Functioning of the European Union.

[22] Directive 2021/2118 - Amendment of Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability.

[23] James Marson and Katy Ferris, *Changing Lanes and Removing Rights: Quashing the Judicial Activism of the Court of Justice through Directive 2021/2118* 47 EUR. L. REV. 773-790 (2022).

[24] James Marson and Katy Ferris, *The Problem of Vnuk and the EU Response. A Critique of the Law on Compulsory Motor Vehicle Insurance* J. BUS. L., in press (2023).

As can be seen by the most brief reference to the developing case law of the Court of Justice above, the term "use of a vehicle" has been on a journey[25] with the Court concluding that this concept covers any use of the vehicle that is consistent with the normal function of the vehicle, insofar as that normal function is as a means of transport.[26]

At this point it is worth remembering that in *Juliana*,[27] the Court of Justice confirmed that the obligation for a vehicle to be subject to an insurance policy was distinct from the operation of the compulsory insurance regime. Key to the operation of the MVID was the type of use of the vehicle at the time of the accident.

The Court of Justice is likely adopting a sensible and limited interpretation of the MVID in *AR v Others,*[28] correctly distinguishing between vehicles being used as such at the time of the accident, and in the present case where a vehicle was damaged by the physical property in a location which just happened to be a place in which vehicles could be temporarily housed (a garage). Yet such a sensible, common sense and measured approach is not necessarily adopted in each case considered. For example, in *Andrade*[29] the Court of Justice distinguished between the application of a policy of insurance in respect of the use of a tractor at the moment of causing injury. Given that in the moments before it slipped down a terrace it was being used as a herbicide sprayer, this could not be as a means of transport. This demarcation between the other, broader, authorities follows a similar reasoning as

[25] James Marson and Katy Ferris, *For the Want of Certainty: Vnuk, Juliana and Andrade and the Obligation to Insure* 82(6) MOD. L. REV. 1132-1145 (2019)

[26] This definition being explicitly used in Directive 2021/2118.

[27] *Juliana,* Case C-80/17.

[28] *AR and Others,* Case C-618/21.

[29] *Andrade,* Case C-514/16.

existed in English law. In *Brown v Roberts*[30] it was held that a person is not considered to be "using" a vehicle (and thereby invoking the requirement of insurance) unless the user of the vehicle has performed some element of "*controlling, managing or operating*" of the vehicle at the relevant time. It is unlikely that the Court of Justice sought direction from English jurisprudence when coming to its conclusion, but the Court of Justice's usual purposive approach to statutory interpretation has often been contrary (and, dare we suggest, a more helpful and to be welcomed approach) than the narrow and literal approach often seen in English jurisprudence.[31]

AR v Others[32] does add further weight to the authority from *Linea Directa*[33] regarding the use of a vehicle and in which circumstances the MVID and its obligations on Member States, and thereby private parties, will (and will not – *AR v Others*)[34] be invoked. A vehicle must be being used as a means of transport, broadly interpreted, for the MVID to be applicable. It had been questioned whether the authority from *Linea Directa,*[35] that a spontaneous fire caused as a result of an electrical fault amounted to a vehicle being used as a means of transport, was a correct understanding of the law, similarly to the parked vehicle whose door was opened by a passenger and caused damage (per *BTA Baltic*)[36] could be

[30] *Brown v Roberts* [1965] 1 QB 1.

[31] Although, see Ian McLeod, *Literal and Purposive Techniques of Legislative Interpretation: Some European Community and English Common Law Perspectives* 29 Brook. J. Int'l L. 1109-1134 (2003).

[32] *AR and Others,* Case C-618/21.

[33] *Línea Directa,* Case C-100/18.

[34] *AR and Others,* Case C-618/21.

[35] *Id*.

[36] Case C-648/17, *AAS "BTA Baltic Insurance Company", anciennement "Balcia Insurance" SE v "Baltijas Apdrošināšanas Nams" AS*, ECLI:EU:C:2018:917.

considered as being in "use".[37] The Court of Justice was asked to consider whether the compulsory insurance through the MVID applied to a vehicle which had no connection to use and posed no risk to road users. The Court of Justice had ruled in the affirmative given, as noted in *BTA Baltic*,[38] that being in a parked state / being immobilized were natural steps in forming part of its use as a means of transport (as confirmed in *Juliana*).[39] The UK's Supreme Court had ruled,[40] just before *Linea Directa*[41] and in opposing to adopt a purposive interpretation[42] of national law,[43] that a vehicle which caught fire due to work being performed in the owner's own private garage, could not be a consequence "caused by or arising out of" its use as a vehicle (per national law). Through a literal interpretation of the wording of the UK's national law, and even the MVID, such a conclusion would not be difficult to draw. Property damage caused to a vehicle (rather than from it) through a negligent repair (*Phoenix*)[44] or from some electrical defect in the vehicle (*Linea Directa*)[45] is not, strictly, a consequence of its use (regardless of how far that definition is stretched). Thus, the UK's refusal to invoke the MVID in Phoenix[46] and the Court of Justice's conclusion as to

[37] Here it was as the Court of Justice considered the act of opening a vehicle's door was consistent with it being used as a means of transport – allowing people to enter and exit the vehicle, unload goods and so on (para. 36 of the judgment).

[38] *BTA Baltic,* Case C-648/17.

[39] *Juliana,* Case C-80/17

[40] *R&S Pilling (T/A Phoenix Engineering) v UK Insurance Limited* [2019] UKSC 16.

[41] *Línea Directa,* Case C-100/18.

[42] Which the UK's Court of Appeal had adopted and concluded differently.

[43] Section 145 Road Traffic Act 1988.

[44] *R&S Pilling (T/A Phoenix),* UKSC 16.

[45] *Línea Directa,* Case C-100/18.

[46] *R&S Pilling (T/A Phoenix),* UKSC 16.

the application of the MVID in Linea Directa[47] are not easily reconciled as points of law (beyond, perhaps, considerations of the UK appeal courts' consistent (or otherwise) application of the MVID).[48]

Is the Court of Justice straying into factual jurisprudence?

This leads to a final point raised in *AR v Others*[49] and is worthy of reflection as it is one that is increasingly lost in the discussion and practical application of the MVID, but one which was ably raised by Advocate-General Bobek in *Van Ameyde v GES*.[50] Here A-G Bobek considers the recent case authority of the Court of Justice, which he considers has begun to operate as a form of "factual jurisprudence"[51] and urges for the Court to return to its role as establishing the uniform interpretation of the law rather than its uniform application.[52] It is the obligation to ensure insurance cover, not in establishing the specifics of where liability is to be placed, which is the Court's role. The sixth claim, where a garage door causes damage to a vehicle should surely be a matter for national law – as indeed the Court of Justice explained, but in rather oblique terms. It would surely, given this emphasis on the existence of compulsory insurance from the MVID, have been more appropriate for the Court at paras. 29 – 31 to have identified that a policy of insurance exists, and as such there is no need for its

[47] *Línea Directa,* Case C-100/18.

[48] James Marson, Hasan Alissa and Katy Ferris, *Resolving the Inconsistency between National and EU Motor Insurance Law. Was Factortame the Solution nobody Sought?* 22(1) GERMAN L. J. 122-146 (2021).

[49] *AR and Others,* Case C-618/21.

[50] Case C-923/19, *Van Ameyde España SA v GES, Seguros y Reaseguros SA,* ECLI:EU:C:2021:125.

[51] *Id*, at para. 3.

[52] *Id*, at para. 38.

involvement in proceedings. The application of the law is for national courts based on its assessment of the facts, it is not a matter of concern within the MVID or requiring its interpretation in the specific circumstances. Artificial examinations of the concept of the term "use of a vehicle" has, as a discrete subject, taken on a life of its own, and seems that it will only get worse with the introduction of Directive 2021/2118 later in 2023. And this returns the discussion to the jurisprudence outlined in this piece and the application of the MVID to the sixth claim from the referring court, damage to a vehicle from a garage door. It is understandable why the Court arrived at its conclusion, – this is after all damage *to* a vehicle rather than damage *from* a vehicle. Yet such a distinction seems very artificial given the broad concept of use from the jurisprudence of the Court, and it does read as being unduly specific as to the application of the law, rather than as an interpretation of the general principles upon which the law is based.

It almost seems that the Court of Justice, in trying to determine what might constitute the parameters of "the use of a vehicle" and what might form "consistent use as a means of transport",[53] has created for itself a self-defeating paradigm from which it may now struggle to remove itself. Take for instance *Vnuk*.[54] The tractor here was delivering hay into a barn. Thus it is was being used as a means of transport at the time of the accident given that it was not stipulated what was to be transported, just that this was its role. The tractor in *Andrade*,[55] where the MVID was not invoked, was being used as a sprayer at the time of the accident – hence it was not being used as a means of transport. This distinction can be maintained through logical thought, yet the level of detailed application of when the MVID will be invoked and when it will not is summed up in these two very cases. Had the tractor in

[53] *Vnuk,* Case C-162/13, para. 59.

[54] *Vnuk,* Case C-162/13.

[55] *Andrade,* Case C-514/16.

Andrade[56] been moving between locations when it then slipped down the terrace and killed the victim at the bottom of the slope, the MVID would have come into effect. As it was stationary and spraying herbicide, and as a result of the previous rainfall and the vibrations from the tractor it slipped and caused the injury resulted in the MVID, and thus the application of compulsory motor vehicle insurance, to fail to apply. Tractors are, by their nature, typically employed as agricultural vehicles and will transport items and people between locations, but also perform some work role depending on its particular use. Trying to identify when the vehicle becomes a means of transport and when it has some other non-transport role is surely a matter purely for a factual determination at national level. This is not to singularly blame the Court of Justice. Directive 2021/2118 has used this stipulation as to the use of a vehicle "at the time of the accident" to determine the application of the MVID. Yet this, we respectfully suggest, is as a direct consequence of the lineage of authorities since *Vnuk*[57] and it is not driving the MVID in the protective direction it once held. Indeed, quite the opposite.

Ultimately, the Court of Justice's intervention here confirms the approach to be adopted by Member States as it endorses the reasoning in *María Pilar Bueno Ruiz*[58] and *Línea Directa*.[59] Yet, as to this ruling and those of the previous case authorities noted in this piece, collectively they may fail in securing a uniform interpretation of EU law across the Member States. Advocate General Jacobs has previously concluded "detailed answers to very specific questions will not always promote… uniform application. Such answers may merely

[56] *Id.*

[57] *Vnuk,* Case C-162/13.

[58] *María Pilar Bueno Ruiz,* Case C-431/18.

[59] *Línea Directa,* Case C-100/18.

provoke further questions".[60] It is becoming a common theme that factual scenarios are being increasingly referred to the Court of justice which, as in the sixth case in *AR v Others*,[61] the Court should simply say is a matter for determination by the referring court rather than trying to establish a common interpretation of the law on the basis of the factual jurisprudence being established, and certainly not trying to conclude that the specifics of the case do not attract application of the MVID. Such a scenario has the danger of removing the autonomy of national courts to decide factual issues and to exclude protection of EU rules because the Court opines between damage *to* and *from* the use of a vehicle. It is establishing not the uniform application of EU rules, but rather the outcome of a case. This is, perhaps, territory where the Court of Justice using gentle steps to traverse the MVID's applicability is the better course of action.

Conclusions

AR v Others,[62] is a case which has significance for motor vehicle insurance law throughout the EU. Motor insurers will likely wish to review their policy terms and conditions given this ruling and the use of contractual clauses which may impact on the application of the MVID. Confirming the direct right of action against an insurer is of fundamental concern to the protective and correct application of the MVID and the direction given by the Court of Justice here is to be welcomed. It will ensure certainty of the law throughout the Member States and continue the protection of vulnerable third-party victims of motor vehicle accidents.

[60] Case C-338/95 *Wiener S.I. GmbH v Hauptzollamt Emmerich*, ECLI:EU:C:1997:352, point 50.

[61] *AR and Others,* Case C-618/21.

[62] *Id*.

Of broader concern, and a point which may need to be revisited in the future, is the matter of the (sixth) applicant from the referring court. The claimant's vehicle was damaged by the falling garage door and, accordingly, the Court of Justice determined that the MVID does not apply in these circumstances. This case will be added to those previous authorities, and in so doing will encourage insurers to be mindful of the developing law in this area. Whilst Directive 2021/2118 is certain to make significant changes to the MVID and profoundly alter the Court of Justice's case law in the area since 2014 and *Vnuk*,[63] the current consolidated MVID will be subject to continued application and requiring of interpretation for several years after Directive 2021/2118's 23 December transposition date. The aim and purpose of the MVID, it must be remembered, is to ensure that all applicable vehicles are covered by insurance. As has been demonstrated above, the specifics of in which circumstances that insurance policy should satisfy a claim is a matter for national law, but the Court of Justice is caught in a trap of determining factual issues of when and where the MVID applies. Perhaps with Directive 2021/2118's introduction, it reinstates its remit established in Article 267 Treaty on the Functioning of the European Union of simply looking towards the overarching function of the Directives concerning the compulsory insurance of motor vehicles, leaving the factual assessment, including the necessary diversity and national procedural matters, to the national courts. It is not for the Court of Justice to decide on whether a particular accident is to be covered by that insurance policy, its role is too profound to be put to use in this regard.

6430 Words Used

[63] *Vnuk,* Case C-162/13.