THE HIGH COURT

[RECORD NO.: CA 454/16]

CIRCUIT APPEAL

WESTERN CIRCUIT **COUNTY OF GALWAY**

BETWEEN:

GERARD MONGAN

PLAINTIFF

AND

MARTIN MONGAN AND THE MOTOR INSURERS' BUREAU OF IRELAND

DEFENDANTS

Judgment of Mr. Justice Denis McDonald delivered on 29th May, 2020

Introduction

1. The principal issue which falls for consideration in this Circuit Court appeal is whether the second named defendant ("the MIBI") can be made liable for the injuries sustained by the plaintiff as a consequence of an incident which occurred on 16th June, 2013 outside the plaintiff's home in Renmore, County Galway when the first named defendant (who was uninsured) drove his car towards the plaintiff (who was standing on the footpath at the entrance gate to his home) hitting him head-on, knocking him to the ground and injuring his left knee.

2. The MIBI contends that it has no liability in circumstances where it says that the incident arose not as a consequence of the negligent driving of his vehicle by the first named

defendant but as a result of an assault and battery involving the use by the first named defendant of his vehicle as a weapon rather than as a means of transport.

3. The MIBI relies on Clause 4.1.1. of the Motor Insurers' Bureau of Ireland Agreement dated 29th January, 2009 ("the MIBI Agreement") which provides that the obligation of the MIBI to indemnify a party injured by an uninsured driver is solely in respect of liability for injury or death to a person or damage to property which is required to be covered by an approved policy of insurance under s. 56 of the Road Traffic Act 1961 ("the 1961 Act"). The MIBI contends that s. 56 extends only to liability in respect of the negligent use of a vehicle and does not extend to use with intent to injure.

4. In so far as relevant, s. 56 (1) of the 1961 Act states that a person *"shall not use in a public place a mechanically propelled vehicle unless …a vehicle insurer … would be liable for injury caused by the negligent use of the vehicle by him at that time…".* The MIBI places significant emphasis on the use of the word *"negligent"* in s. 56 (1) and submits that, on the evidence, the actions of the first named defendant are not of a kind which fall within the ambit of the sub-section.

5. The plaintiff does not accept that there is any evidence that the first named defendant used his car as a weapon or that the injuries sustained by him arise as a consequence of the use of a vehicle outside the ambit of s. 56 (1). Counsel for the plaintiff have drawn attention to a number of English authorities in which the English courts, in the context of s. 203 (3) (a) of the Road Traffic Act 1960 (UK) ("the 1960 UK Act") and its successor provisions in 1972 and 1988, have rejected similar arguments to those advanced by the MIBI here.

6. Counsel for the plaintiff argued that the MIBI bears the burden of establishing that the first named defendant used his vehicle as a weapon. Furthermore, counsel submitted that the evidence on the hearing of the appeal falls far short of establishing that the first named defendant used his vehicle in that way. Counsel emphasised that there was no evidence led at

the hearing of the appeal other than the evidence of the plaintiff, his wife and daughter and the investigating Garda (who was not present at the time of the incident).

7. Counsel for the plaintiff also sought to make the case that, even if the first named defendant's use of the vehicle amounted to a deliberate attack on the plaintiff, it was nonetheless a breach by the first named defendant of his duty of care to the plaintiff such that it constituted a *"negligent"* use of the vehicle within the meaning of s. 56 of the 1961 Act.

8. The first named defendant did not participate in the hearing of the appeal and counsel for the plaintiff suggested that it is significant that the MIBI did not call him as a witness. Counsel argued that adverse inferences should be drawn arising from the failure of the MIBI to call the first named defendant as a witness.

The decision of the learned Circuit Court judge

9. Before going further, I should record that, in the Circuit Court, the learned judge found in favour of the plaintiff as against both defendants. It should be noted that the only appeal before the court is the appeal of the MIBI. The first named defendant did not appeal the finding made against him by the learned Circuit Court judge. The appeal first came on for hearing before me at a sitting of the High Court on circuit in Galway on 1st November, 2019. All of the evidence was heard on that day. However, following the conclusion of the evidence, I indicated to counsel for the parties that further submissions were required in order to address the interpretation and effect of clause 4.1.1. of the MIBI Agreement and s. 56 (1) of the 1961 Act. Thereafter, written submissions on behalf of the plaintiff and the MIBI were furnished to me at the end of February 2020. Subsequently, on 6 March, 2020, I was informed by counsel that they proposed to rest on their written submissions. At that point, I reserved judgment.

Findings of fact

10. Before addressing the legal position, I must, in the first instance, make the necessary findings of fact. In this context, I heard evidence from the following witnesses:

(a) the plaintiff, Mr. Gerard Mongan;

(b) the plaintiff's wife, Mrs. Winifred Mongan;

(c) the plaintiff's daughter, Ms. Amanda Mongan; and

(d) Garda Sean McHugh, the investigating Garda.

11. No witnesses were called by the MIBI. The MIBI instead chose to rely on cross-examination of the plaintiff's witnesses and on the admissions made by those witnesses in the course of their evidence including confirmations given by the witnesses that certain parts of statements made by them previously to Garda McHugh are correct. The MIBI also agreed the medical reports described in para. 12 below and sought to rely on them in the manner outlined in more detail in paras. 24 – 26 below.

12. The medical reports of the following medical practitioners were agreed and admitted into evidence on that basis:

(a) The plaintiff's general practitioner, Dr. Sean Higgins, who saw the plaintiff on 6th August 2013 and who provided a report dated 29th April, 2014;

(b) Mr. Cormac Tansey, orthopaedic surgeon, who saw the plaintiff on behalf of PIAB on 5th August, 2015 and who provided a report of the same date;

(c) Dr. Kareena Meehan, consultant psychiatrist, who saw the plaintiff on 2nd September, 2015 and who provided a report dated 8th September, 2015.

13. There is no controversy as to certain aspects of the evidence given on behalf of the plaintiff. Thus, I can readily make findings of fact in the terms set out in paras. 14 to 18 below and also in paras. 36 to 38. There is a dispute as to the findings that should be made in

relation to the balance of the evidence and this dispute is addressed by me in paras. 19 to 35 below.

14. The plaintiff was born on 3rd August, 1973. At the time of the incident, he and his wife, Mrs. Winifred Mongan, were residing in a house in Renmore, Galway. They have a daughter, Ms. Amanda Mongan who was previously married to the first named defendant. She and the first named defendant had a son who was born in June 2009. After one year of marriage, they separated. Subsequently, in 2011, Ms. Mongan had to obtain a Safety Order against the first named defendant. According to the evidence of the plaintiff, the first named defendant had been harassing Ms. Mongan and had been violent towards her. Ms. Mongan had custody of their son and, at the time of the incident, she lived with her son in Castlepark not far from the plaintiff's home in Renmore.

15. On the evening of 16th June, 2013, Ms. Mongan, together with her son, paid a visit to the plaintiff's house in Renmore to celebrate Father's Day. They were joined by a neighbour and by a brother in law of the plaintiff. They marked the occasion with some drinks. As the evening progressed, Ms. Mongan put her son to bed upstairs. They later heard loud music and the sound of a car immediately outside the front gate of the house. The plaintiff went out the front door to investigate followed by Ms. Amanda Mongan and his wife. They saw a red transit van with its engine revving and its radio blaring half on and half off the pavement immediately in front of the gate. The driver was the first named defendant who had one foot on the pavement and one inside the car. All of the witnesses were agreed that he was intoxicated. He demanded to see his son.

16. The plaintiff told the first named defendant to leave. This provoked an angry reaction. The first named defendant started shouting and was verbally aggressive. The plaintiff's daughter described his behaviour as threatening. The plaintiff told the first named defendant that a call had been made for Garda assistance. For completeness, it should be noted that

members of An Garda Síochána attended the scene later but it is unclear to me, on the evidence, whether the call for assistance was made at this point or after the plaintiff was struck by the first named defendant's vehicle as described in para. 18 below. I do not believe that the timing of the call is material.

17. After this initial altercation, the first named defendant reversed the car and appeared to head away. However, he did no more than drive around the block and, very soon, the sound of his car engine was heard again as it returned to where the plaintiff and his wife and daughter were then standing on the pavement at the gate to the front garden.

18. There is a dispute as to the likely motivation of the first named defendant in doing what happened next and, in particular, as to whether he was using his vehicle as a weapon to injure the plaintiff. But there is no dispute that his car swerved off the road onto the footpath and hit the plaintiff head on, knocking him to the ground and injuring his left knee. The cap of the gate pillar was also knocked to the ground and shattered. Immediately before the car struck, the plaintiff pushed his wife to one side so as to keep her out of harm's way.

19. Counsel for the MIBI submitted that the evidence clearly shows that this was a deliberate attack on the plaintiff by the first named defendant. This is disputed by the counsel for the plaintiff who submitted that it is not supported by the evidence. It is therefore necessary for me to make some further findings of fact on the basis of the evidence which I heard, tested against the materials which were put to the plaintiff, his wife and daughter in the course of their cross-examination. In this context, I fully accept that the MIBI bears the burden of establishing that the first named defendant was using his car as a weapon on the occasion in question. I also bear in mind that the MIBI has not called any witnesses to dispute the evidence given on behalf of the plaintiff. This clearly limits the extent to which the MIBI can advance a case which may appear to be at odds with the evidence. That said, I am not bound to accept all of the evidence given by or on behalf of the plaintiff. For the purposes of

making findings of fact, I am entitled to consider the credibility, plausibility and consistency of the evidence and the case made on foot of it.

20. At the hearing of the appeal, the plaintiff and Mrs. Mongan both denied, at various points during their cross-examination, that the car was used by the first named defendant as a weapon to attack the plaintiff. They both stressed that the first named defendant was very inebriated and they suggested that it was impossible to say what was going through his mind or what his intention might have been. However, in the course of her cross-examination, their daughter, Ms. Amanda Mongan gave clear and unqualified evidence that the first named defendant drove the car *"straight at my father".* Ms. Mongan was taken through the statement she made to Garda McHugh on 17th June, 2013, the day after the incident in which a similar account was given by her. She confirmed that the statement was correct. She also gave evidence that, when the first named defendant first arrived outside her father's home, he acted in very threatening manner, appeared to drive away but then, as noted above, he came back and drove straight at the plaintiff. She did not try in any way to dilute or call into question what she had said in her statement to Garda McHugh. She was an honest and straightforward witness.

21. In addition, the plaintiff, in the course of his cross-examination, accepted that, after hitting him on the left knee, the first named defendant reversed his vehicle, drove off but came back a second time and may have been trying to move towards him again but was deflected from doing so when Mrs. Mongan picked up part of the shattered cap of the gate pillar and threw it at the first named defendant's vehicle.

22. In this context, the plaintiff expressly accepted that the following account given in his statement to Garda McHugh on 31st August, 2013 is correct: *"The van was parked up partially on the footpath. I kep (sic) saying 'go away, the Guards is called'. His foot was on the step of the van like he was going to get out. He was shouting and swearing. He was*

threatening me. I was in fear for my family and myself at this stage. He started revving the van. He reversed back. I thought he was going to pull off. My wife… was beside me. ***The next thing I knew the lights of the van were coming towards me.*** *I thought I was dead. I pushed my wife out of the way. The van hit me on the left knee and dropped me to the ground near the pillar at the front of the drive. My wife tried to help me up. I could see him driving like mad around the estate. He came back a second time* ***and tried to drive at us again****. My wife threw a rock and it worked …."* (emphasis added). While counsel for the plaintiff, in their written submissions, have argued that the statement made to Garda McHugh is inadmissible in evidence against the plaintiff, I reject that argument in so far as this extract from the statement is concerned. As noted above, the plaintiff expressly accepted, in the course of his evidence, that this extract from the statement is correct. The extract therefore forms part of the plaintiff's evidence for the purposes of the appeal and I am entitled to have regard to it.

23. That extract from the plaintiff's statement is, in turn, consistent with the statement made by Mrs. Mongan to Garda McHugh also on 31st August, 2013 when she said *"He reversed again to come in a second time. I picked up a stone from the pillar cap and threw it at his van. He drove off…."*. That statement was put to Mrs. Mongan in the course of cross-examination by counsel for the MIBI. She accepted that this was said by her to Garda McHugh but she sought to qualify it by suggesting that the reference to the first named defendant coming back a second time was *"a split second thought"* she had at the time and that, on further reflection, she could not make *"an assumption like that"* in circumstances where the first named defendant was *"highly intoxicated"* and she added that: *"I don't think it was intentional".* I found this explanation to be unconvincing. I formed the distinct impression that this element of Mrs. Mongan's evidence was rehearsed and that, in giving this explanation, she was clearly aware that it might be damaging to her husband's case if a finding was made by the court that the first named defendant had deliberately rammed her

husband. These answers given by Mrs. Mongan mirror those given by the plaintiff himself when some aspects of the agreed medical reports were put to him on his cross-examination (as discussed further below).

24. Ms. Amanda Mongan's description of the incident (as summarised in para. 20 above) is also consistent with the descriptions given by the plaintiff to the medical experts as recorded in the agreed medical reports. According to Dr. Higgins, the plaintiff developed panic attacks and low mood after the incident *"as he felt that this was a direct attempt on his life".* Similarly, Mr. Tansey, in his report, records that the plaintiff told him that: *"... this man drove a van directly at him ..."* and that he is *"...very apprehensive now as the perpetrator of this incident apparently is now back in the country and he is very nervous about future further incidents".* Significantly, this language chimes very closely with the contents of paras. 6 and 9 of the indorsement of claim on the Personal Injuries Summons in which Dr. Higgins' report is expressly relied upon. Paragraph 6 of the indorsement of claim states that Dr. Higgins' prognosis and overall impression was that the plaintiff had suffered what he perceived to be a *"direct life threatening attack".* Paragraph 9 refers to the plaintiff's fear that similar incidents (involving the first named defendant) may occur in the future. As required by s. 14 of the Civil Liability and Courts Act 2004 ("the 2004 Act"), the indorsement of claim was the subject of an affidavit of verification sworn by the plaintiff on 19th September, 2016 in which he deposed at para. 3: *"I say that the assertions, allegations and information contained in the ... Personal Injuries Summons ... which are within my own knowledge are true. I honestly believe that the assertions, allegations and information contained in the ...Summons ... which are not within my own knowledge are true."* As required by s. 14 of the 2004 Act, the plaintiff, in his affidavit also confirmed that he was aware that it is an offence to make a statement in the affidavit that was known by him to be false or misleading in any material respect.

25. The report of Dr. Meehan is in very stark terms and is, again, consistent with the case pleaded and verified on affidavit by the plaintiff. Her report records that the plaintiff's main complaint is: *"... an ongoing feeling of unease that his son in law, now divorced from his daughter, might come back* ***and attack him again.*** *He stated that he has suffered nightmares, sweats and occasionally episodes of wetting the bed due to his anxiety about this."* (emphasis added). Earlier in the report, Dr. Meehan records that the plaintiff told her: *"He stated that his daughter's husband was abusive towards him and Mr. Mongan told him to leave the premises.* ***He then reversed his car and drove towards Mr. Mongan at speed.*** *He recalls seeing the headlights* ***coming towards him*** *before he was struck at knee level ..."* (emphasis added).

26. The plaintiff accepted that he had made these statements to Dr. Higgins and Dr. Meehan. However, he sought to explain the references in Dr. Higgins' report to a *"direct attempt on his life"* by saying that, at the time of his examination by Dr. Higgins, his mind was *"all over the shop. I didn't know what I was saying".* Similarly, with regard to Dr. Meehan's report, he said that he *"was all over the place"* when he met Dr. Meehan, I find these explanations to be unconvincing. Dr. Meehan's report of 8th September, 2015 is impressively detailed and gives no hint that, at the time of her examination of him, the plaintiff was in any way confused or unable to clearly describe what happened. Furthermore, as noted above with regard to Dr. Higgins, the plaintiff has replicated elements of Dr. Higgins' report in his Personal Injuries Summons and has verified this on affidavit in the knowledge that any knowingly false or misleading statement would constitute an offence on his part.

27. I cannot see how the plaintiff can, on the one hand, purport to rely on the medical reports for the purposes of assessing the extent of the injury and damage sustained by him and, on the other, purport to reject those parts of the reports which do not assist the case he

wishes to make on liability. It is particularly important to bear in mind, in this context, that he has made a case that he has suffered psychological damage as a consequence of the incident and that a significant element of this part of his case is that, in the words of para. 9 of the indorsement of claim: *"The accident the subject matter of these proceedings has had a significant psychological impact on him and* ***he fears similar incidents may occur in the future.*** *The Plaintiff is clearly quiet (sic) anxious and is* ***very apprehensive that this individual is now back in the country.*** *The Plaintiff suffers from flashbacks and he has ongoing worry in relation to this."* (emphasis added).

28. In the written submissions delivered in February 2020, a detailed case is made that the *"inconsistent"* statements made to the plaintiff's doctors cannot form part of the evidence in the appeal and that, at most, they go to the credibility of the evidence given by those who made the statements. Reliance is placed, *inter alia*, on the decision of the Supreme Court in *Moloney v. Jury's Hotel plc* (Supreme Court, unreported, 12th November, 1999) and on McGrath *"Evidence",* 2nd. Ed., 2014, at para. 3.117. I intend no disrespect to counsel for the plaintiff by not addressing those submissions in detail in this judgment. In my view, the objections made in the written submissions entirely lack reality in circumstances where the reports have been agreed and admitted in evidence and where the plaintiff has made a case, verified on affidavit, that he has suffered psychological damage arising, at least in part, from his fear that the first named defendant may attack him again. The submissions made on behalf of the plaintiff do not address the consequences that flow from the admission of the reports or the plaintiff's reliance on them for the purposes of proving the extent of the injury suffered.

29. I should also make clear that, in my view, it is questionable that the statements of the plaintiff recorded in the medical reports can be said to be inconsistent with the plaintiff's evidence. They may be inconsistent with certain parts of the plaintiff's evidence as recorded immediately below but they are entirely consistent with other aspects of his evidence such as

that recorded in paras. 21- 22 above. Moreover, in circumstances where the medical reports have been agreed and admitted into evidence on that basis, I do not believe that parts of them can be excluded in the manner suggested in the written submissions. The plaintiff is not entitled to rely on the reports in support of his damages claim and simultaneously exclude some aspects of them which may potentially undermine his case on liability. Even if I am wrong in that conclusion, the statements made to the medical experts are admissible, at the very least, in so far as they go to the credibility of the evidence given by the plaintiff. In this context, it should be noted that, with reference to the issue as to whether the incident constituted an attack on him, the plaintiff gave evidence at the hearing of the appeal (in response to questions put to him on cross-examination) that he did not know what was in the mind of the first named defendant on the night in question. For example, he said, at various points, in the course of his cross examination, that: *"I don't know what he was thinking", "I don't know, was he drunk?", "Did he lose concentration, I don't know"* and *"Did he lose control, I don't know".* In common with a number of the answers given by Mrs. Mongan, these answers struck me as having been rehearsed. Throughout his evidence, the plaintiff came across as very wary of saying anything that might undermine his case on liability.

30. In my view, the suggestions made by the plaintiff and his wife, in the course of their cross-examination, to the effect that the first named defendant was not using his vehicle to intentionally hit the plaintiff are wholly unconvincing. Moreover, they are inconsistent with the evidence of Ms. Amanda Mongan and with the case made by the plaintiff in his Personal Injury Summons and sworn by him to be true. In light of the case made in the Summons, I cannot see how the plaintiff can plausibly suggest that the incident did not involve a deliberate attempt by the first named defendant to injure him.

31. These suggestions by the plaintiff and Mrs. Mongan are also inconsistent with those aspects of the statements made to Garda McHugh that the plaintiff and his wife accepted as

correct. In terms of the credibility of their evidence, the doubts sought to be cast by them on whether the plaintiff was targeted by the first named defendant were also at odds with the account given by the plaintiff to the medical experts as recorded in their reports which were agreed by both parties.

32. I also bear in mind that the first named defendant had a track record of violence against Amanda Mongan (who had to seek a Safety Order for her own protection) and that he was described by all three witnesses present at the time of the incident as reacting aggressively when he was told that he could not see his son.

33. Accordingly, while I fully accept that the burden lies on the MIBI to establish that the vehicle was being used to attack the plaintiff, I believe and so find, on the balance of probability, that, at the moment the vehicle struck the plaintiff on 16th June, 2013, it was driven by the first named defendant in a manner that demonstrates that his object was to hit the plaintiff. In that sense, the MIBI is correct in submitting that the vehicle was being used, at that moment, as a weapon with which to attack the plaintiff. I am reinforced in this conclusion by a consideration of the underlying objective facts about which there can be no dispute. In this context, it is striking that the only attempt by the first named defendant at conversation with the plaintiff was in the course of their first interaction on the evening of 16th June when he arrived at the plaintiff's home with his engine revving and music blaring from the car radio. When his attempt to see his son was rebuffed, he reacted aggressively, drove away, but then drove back and, without making any attempt to speak to any of the three members of the Mongan family present drove directly at the plaintiff, knocking him to the ground. No one suggested in their evidence that the first named defendant braked or skidded. While the plaintiff made a suggestion that the first named defendant may have lost control of his vehicle, he did not describe any movement or action on the part of the first named defendant that indicated a loss of control. Given that the first named defendant made no

attempt on this occasion to speak to anyone, his actions strongly suggest that he was not attempting to do anything other than to hit the plaintiff. In my view, this conclusion is reinforced by the fact that he thereafter attempted to drive at the plaintiff for a second time (until repulsed by a piece of the concrete pier cap thrown by Mrs. Mongan). While Mrs. Mongan has sought to explain her statement to Garda McHugh that she thought he was coming back again a second time to drive at the plaintiff, her explanation that this was a *"split second"* impression at the time, strongly suggests that, on the night in question, she believed that the collision with the plaintiff was a deliberate attack. To my mind, her impression on the night in question (subsequently recorded in the statement made to Garda McHugh) in August 2013 is more reliable than the explanation given several years later at the hearing of this appeal.

34. It has been suggested on behalf of the plaintiff that an adverse inference should be drawn against the MIBI by reason of the fact that the first named defendant was not called as a witness. I do not believe that it is appropriate to do so in circumstances where, there is a fairly obvious reason why the first named defendant was not called. Had he been called to give evidence that he had acted deliberately on the night in question, he would have been entitled to refuse to answer any questions on the grounds that his answers might incriminate him. Accordingly, applying the principles set out in *Wisniewski v. Central Manchester Health Authority* [1998] P.I.Q.R. 324 (as approved in Ireland in *Fyffes plc v. DCC plc* [2009] 2 I.R. 417 and in *Whelan v. Allied Irish Banks plc* [2014] 2 I.R. 199) I do not believe that this is a case in which an adverse inference should be drawn.

35. Accordingly, I find that, at the moment of impact, the first named defendant drove his car towards the plaintiff with a view to striking the plaintiff as the latter stood on the footpath outside his home. It is important to record, however, that there is no evidence to suggest that the first named defendant had originally driven to the plaintiff's home with that object in

mind. On the contrary, it is likely that the first named defendant only formed that object, in a moment of anger while in an inebriated state, after his attempt to see his son was rebuffed by the plaintiff. It seems to me to be reasonable to infer from the circumstances that, as he drove away from the plaintiff's home after his demand to see his son was refused, he became even more angry and he decided, on the spur of the moment, to return and to strike the plaintiff with his car. The fact that he initially drove away, after speaking with the plaintiff, supports the conclusion that it was a *"spur of the moment"* decision.

36. There is no dispute about the balance of the facts. After Mrs. Mongan threw the piece of capping at the first named defendant's vehicle, he drove away from the house but he remained in the vicinity where he was found when Garda McHugh attended the scene. Garda McHugh described the plaintiff and his wife and daughter as shaken and fearful. He arrested the first named defendant on suspicion of driving while under the influence of alcohol. Garda McHugh described the first named defendant as not exhibiting any signs of aggression at that point.

37. In the meantime, the plaintiff was taken by ambulance to University Hospital Galway where he was found to have soft tissue injuries to his left knee and advised that he could expect to have restriction of movement and function in the left knee as well as pain for a number of weeks. In due course, depending on the decision I reach in relation to liability, it may be necessary to consider the plaintiff's complaints and the medical evidence in more detail.

38. The first named defendant was subsequently convicted on 29th January, 2014 in Galway District Court of dangerous driving contrary to s. 52 (1) of the 1961 Act (as amended) and of driving without insurance contrary to s. 56 (1) and s. 56 (3) of the 1961 Act (as amended).

The case made by the MIBI

39. In light of the facts found by me, I must now consider the case made by the MIBI that it has no liability for the injuries sustained by the plaintiff. As noted above, the case made by the MIBI is that it has no liability in circumstances where, at the time of the incident in issue, the first named defendant's vehicle was being used as an instrument to attack the plaintiff. The MIBI contends that such use cannot be said to fall within the ambit of *"negligent"* use of the vehicle within the meaning of s. 56 (1) of the 1961 Act. If it is not negligent use, the MIBI argues that there is no obligation to insure liability for injury caused by such use under s. 56 (1). In turn, it is argued that the provisions of clause 4.1.1. of the MIBI Agreement cannot apply. As noted previously, the obligation of the MIBI to make a payment to a person injured by an uninsured driver is limited to cases where judgment is obtained *"in respect of any liability for injury to person or … damage* ***which is required to be covered by an approved policy of insurance under Section 56*** *…"* (emphasis added).

Section 56 (1) of the 1961 Act

40. Section 56 (1) of the 1961 Act provides as follows: *"(1) a person (in this subsection referred to as the user) shall not use in a public place a mechanically propelled vehicle unless … a vehicle insurer ... would be liable for injury caused by the negligent use of the vehicle by him at that time or there is in force at that time …(a) an approved policy of insurance whereby the user or some other person who would be liable for injury caused by the negligent use of the vehicle at that time by the user, is insured against all sums … which the user … shall become liable to pay to any person … by way of damages or costs on account of injury to person or property caused by the negligent use of the vehicle at that time by the user…".*

41. There are a number of definitions in s. 3 (1) of the 1961 Act which are potentially relevant for this purpose. Thus, s. 3 (1) defines *"use"*, in relation to a vehicle, in non-exhaustive terms, as including *"park".* In turn, s. 3 (1) defines *"park"* as meaning *"keep or leave stationary".* A *"mechanically propelled vehicle"* is defined by the same subs. as meaning, subject to some exceptions which are not here relevant, *"a vehicle intended or adapted for propulsion by mechanical means".*

42. However, there is no definition of *"negligent use"* of a vehicle in the 1961 Act. Nor was I referred to any authorities on the meaning of those words in s. 56 (1) although counsel for the plaintiff helpfully cited the observation of Fennelly J. in *DPP v. Donnelly* [2012] IESC 44, at para. 21, that the injury with which the subsection is concerned is injury caused by *"negligent driving"* of a vehicle. That case was not directly concerned with the meaning of *"negligent use"* and the observation of Fennelly J. should be read in that context. There is no issue in this case that the injury caused by the first named defendant arose by virtue of anything other than the driving of the vehicle. It therefore remains necessary to consider what was intended by the Oireachtas by use of the words *"negligent use"* and, in particular, what was intended by the use of the word *"negligent".* Does the use of that word mean, as the MIBI submits, that the intentional driving or use of a vehicle as a weapon to injure a person does not fall within the ambit of s. 56 (1)?

43. It will be necessary, in due course, to consider the meaning of the words used in s. 56 (1). For the reasons discussed in more detail below, it also seems to me to be necessary to consider the meaning and effect to be given to s. 56 (1) and clause 4.1.1. of the MIBI Agreement in light of the provisions and object of the EU Motor Insurance Directives. Although, s.56 (1) pre-dates Ireland's accession to what was then the European Economic Community, both it and clause 4.1.1. of the MIBI Agreement are relied on by the State for the purposes of demonstrating compliance with the requirements of those directives. Under

European Union law, Member States must put in place appropriate measures to ensure that the use of vehicles normally based in their territory are covered by insurance. That obligation, which is designed to protect the victims of road traffic accidents, was imposed under the provisions of what are known, in a motor insurance context, as the First, Second and Third Directives (namely Council Directives 72/166/EEC, 84/5/EEC and 90/232/EEC respectively) which were subsequently amended on a number of occasions and which have now been replaced by the Sixth Directive namely Directive 2009/103/EC ("the 2009 Directive").

44. As discussed further below, the fundamental obligation imposed by Article 3 (1) of the First Directive (and now re-enacted in Article 3 of the 2009 Directive) is that Member States must ensure that civil liability to third parties in respect of the use of vehicles is covered by insurance. That obligation has been considered and explained in a succession of CJEU judgments which are examined below. As noted above, s.56 pre-dates the enactment of the Motor Insurance Directives but it is relied on by Ireland for the purposes of complying with its obligations under the directives. Although s. 56 (1) has not been altered since Ireland's accession to the EEC in 1972, other aspects of s. 56 have been modified in order to comply with other aspects of the requirements of the Motor Insurance Directives. Thus, for example, s. 56 (2) in its current form was inserted by Regulation 3 (1) of the EC (Road Traffic) (Compulsory Insurance) (Amendment) Regulations 1995 (S.I. No. 353 of 1995) and s. 56 (8) was inserted by Regulation 2 (c) of the EC (Motor Insurance) Regulations 2008 (S. I. No. 248 of 2008). Before examining the EU dimension in further detail, I should, in the first instance, identify the case law both of the CJEU and domestic courts on which the parties seek to rely.

The decisions of the CJEU cited by the MIBI

45. The MIBI has sought to rely on two decisions of the CJEU namely Case C-348/98 *Ferreira* [2000] ECR I-6732 and Case C-514/16 *Rodrigues de Andrade*

ECLI:EU:C:2017:908. Although both of these decisions are of some relevance, it should be noted that these two decisions represent a small fraction of the very large number of judgments delivered by the CJEU in relation to the Motor Insurance Directives and provide an incomplete picture of the extensive body of case law that now exists in relation to the obligations which flow from the Directive and in relation to the enforcement of those obligations by injured parties against guarantee bodies such as the MIBI.

46. In *Ferreira*, the CJEU stated, at para. 27, that the Directives do not go so far as to prescribe the types of civil liability which are required to be covered under a policy of insurance. On the basis of this para., the MIBI argued that, in the absence of EU rules defining the type of civil liability that must be covered, it is, in principle, a matter for the Member States to determine what kinds of civil liability must be covered. Accordingly, the MIBI suggested that there is nothing to prevent Ireland from having in place a requirement that only liability arising from negligent use must be covered. The decision in *Ferreira* is considered, in more detail, at a later point in this judgment. It is sufficient to note, at this point, that, in my view, it would be unsafe to read para. 27 of the judgment in *Ferreira* on its own. It must be read in the context of the judgment as a whole and in the context of a number of later decisions of the CJEU.

47. The MIBI also relied on the subsequent decision of the CJEU in *Rodrigues de Andrade.* In that case, an issue arose as to whether use of a vehicle under the Directives excluded use for a purpose other than driving. In this context, a *"vehicle"* is defined in the Directives as *"any motor vehicle intended for travel on land and propelled by mechanical power".* In *Rodrigues de Andrade*, a tractor was being used on a Portuguese vineyard but not as a means of transport. At the time of the incident in question, the tractor was stationary with the engine running to provide the necessary power to drive a spray pump to apply herbicide to the vines. The tractor overturned, rolled down a hillside and killed a number of vineyard

workers including the wife of the plaintiff. The tractor was insured by CA Seguros ("the insurer"). The plaintiff commenced proceedings against a number of parties including the insurer. The plaintiff argued that the tractor was required to be covered by insurance. This argument was rejected by the first instance court which found that the tractor was not being used as a means of travel. The plaintiff appealed and the appeal court, in turn, made a reference for a preliminary ruling to the CJEU. At para. 40 of its judgment, the CJEU said:

"… in the case of vehicles which, like the tractor in question, are intended, apart from their normal use as a means of transport, to be used in certain circumstances as machines for carrying out work, it is necessary to determine whether, at the time of the accident involving such a vehicle, that vehicle was being used principally as a means of transport, in which case that use can be covered by the concept of 'use of vehicles' within the meaning of Article 3 …, or as a machine for carrying out work, in which case the use in question cannot be covered by that concept."

48. At para. 42, the CJEU concluded that the concept of the *"use of vehicles"* in Article 3 does not cover a situation in which a tractor has been involved in an accident at a time when its principal function was not to serve as a means of transport but to *"generate, as a machine for carrying out work, the motive power necessary to drive the pump of a herbicide sprayer".* In taking that approach, the CJEU pointed out, at para. 37 of its judgment, that motor vehicles referred to in the definitions contained in Article 1(1) of the First Directive *"are irrespective of their characteristics, intended normally to serve as means of transport".* As a consequence, the CJEU explained, at para. 38 of its judgment, that the concept of *"use of vehicles"* within the meaning of Article 3(1) covers *"any use of a vehicle as a means of transport".* There is an obvious distinction between the use of the tractor in *Rodrigues de Andrade* as a source of power rather than as a means of transport and the use of the vehicle by the first named defendant here. While I have concluded that the first named defendant

drove his vehicle with the object of hitting the plaintiff, he was nonetheless, using his vehicle as a means of transport for that purpose. By driving his vehicle in that way, he was able to hit the plaintiff before the plaintiff had an opportunity to stand aside or otherwise avoid the collision.

49. Before leaving the MIBI's submissions in respect of the CJEU case law on the EU Directives, it should be noted that Chapter 4 of the 2009 Directive lays down certain minimum requirements that must be met, in the context of a body such as the MIBI, in respect of claims arising from injuries caused by unidentified or uninsured drivers. In addition, the 2009 Directive contains detailed provisions in relation to the nature of insurance that must be in place in respect of the use of vehicles. For the reasons explained below, it seems to me that s.56 of the 1961 Act must now be read in light of the provisions of the 2009 Directive. To the extent that s.56 is inconsistent with the 2009 Directive, I am required, for the reasons outlined below, to apply the provisions of the Directive to the extent that they are directly effective. Before addressing the 2009 Directive in more detail, I should first deal with the UK authorities on which counsel for the plaintiff relied.

The UK authorities on which the plaintiff relied

50. Counsel for the plaintiff, in their written submissions, have drawn attention to the approach taken by the courts of England and Wales to the UK equivalent to s. 56 of the 1961 Act namely s. 201 of the 1960 UK Act and its successor namely s. 143 of the Road Traffic Act 1972 ("the 1972 UK Act") which provides that it is not lawful for a person *"to use ... a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that person ... a policy of insurance in respect of third party risks as complies with the requirements of this Part of this Act".* It will be noted that this provision refers to *"use"* rather than *"negligent use".* In turn, s. 145 of the 1972 UK Act requires that the policy of insurance must cover liability in respect of death and bodily injury to third parties *"caused*

by, arising out of, the use of the vehicle on a road." Those provisions were subsequently replaced by the Road Traffic Act 1988 (UK). It is unnecessary to consider the latter Act since the two most relevant English authorities addressed the relevant provisions of the 1960 and 1972 Acts respectively.

51. In two important cases dealing with claims by innocent third parties, the English courts have concluded that the UK provisions extend to any use of a vehicle including use of the vehicle to intentionally injure an innocent third party. The first such authority is the decision of the Court of Appeal of England & Wales in *Hardy v Motor Insurers' Bureau* [1964] 2 Q.B. 745. In that case, the plaintiff, a security officer employed at factory premises, was injured when he sought to stop a vehicle which had trespassed on the premises. The driver of the vehicle initially stopped when asked to do so by the plaintiff but, when he was recognised by the plaintiff, the driver sped away dragging the plaintiff with him for some distance along a nearby public road. The driver was uninsured. He was subsequently found guilty of the offence of maliciously causing grievous bodily harm with intent contrary to s. 18 of the Offences Against the Person Act 1861. The plaintiff sought to recover compensation against the Motor Insurers' Bureau ("the UK Bureau"). The UK Bureau contended that it could have no liability in circumstances where it is well settled that a person cannot insure themselves in respect of his own wilful crime. The UK Bureau accordingly argued that the use of the vehicle on the occasion in question was for the purposes of a crime and could not be said to fall within the ambit of s. 201 of the UK 1960 Act.

52. The argument of the UK Bureau was rejected by the English Court of Appeal. At p. 760, Lord Denning M.R. explained that, if the driver had been insured, he could not, for public policy reasons, have successfully claimed an indemnity from his insurer under the policy of insurance. As a matter of public policy no person can claim an indemnity in respect of his own criminal behaviour. He emphasised that the party affected by this rule of public

policy is the wrongdoer. Public policy does not operate in the same way as against an innocent third party. For example, public policy does not require that the claim of an innocent assignee of the insured's rights under the policy should be defeated in the same way. Lord Denning then continued as follows at pp 760 -761:

> *"The policy of insurance which a motorist is required by statute to take out must cover any liability which may be incurred by him arising out of the use of the vehicle by him. It must … be wide enough to cover, in general terms, any use of the vehicle be it an innocent use or a criminal use, be it a murderous use or a playful use. … Of course, if the motorist intended from the beginning to make a criminal use of the vehicle – intended to run people down with it …* - *and the insurers knew that that was his intention, the policy would be bad from its inception…. But that is never the intention when such a policy is taken out…. So the policy is good in its inception. The question only arises when the motorist afterwards makes a criminal use of the vehicle. The consequences then are these: if the motorist is guilty of a crime involving a wicked and deliberate intent, and he is made liable to pay damages to an injured person, he is not himself entitled to recover under the policy. But if he does not pay the damages, then the injured party can recover against the insurers under section 207 of the Road Traffic Act, 1960; for it is a liability which the motorist, under the statute was required to cover. The injured third party is not affected by the disability which attached to the motorist himself.*
>
> *So here the liability of* [the driver] *to Hardy was a liability which* [the driver] *was required to cover by a policy of insurance, even though it arose out of his wilful and culpable criminal act. If* [the driver] *had been insured, he himself would have been disabled from recovering from the insurers. But the injured party would not be*

disabled…. Seeing that he was not insured, the … Bureau must treat the case as if he were."

53. Similar observations were made by Pearson and Diplock L.JJ. (as they then were). As noted above, the MIBI has sought to distinguish this decision (and the subsequent decision of the House of Lords which upheld it) on the basis that the obligation to be insured under s. 56 (1) of the 1961 Act is expressly in respect of negligent use whereas the language of the equivalent UK statutory provision refers only to *"use".* At p. 764, Pearson L.J. highlighted the broad terms of the UK provisions and said that, *prima facie,* any use is included even if it is intentionally criminal unless public policy required the section to be read otherwise. For similar reasons to those of Lord Denning, he said that there were no public policy reasons why the statute should be construed more narrowly where the claimant was an innocent third person who was not party to the criminal activity of the driver.

54. In *Gardner v. Moore* [1984] 1 A.C. 548, the House of Lords was asked by the UK Bureau to overturn the decision in *Hardy* but it refused to do so. In *Gardner*, the plaintiff was injured when the defendant deliberately drove his vehicle on to a public pavement where the plaintiff was walking and intentionally ran him down. By this stage the provisions of the UK 1960 Act had been replaced by the UK 1972 Act. The defendant was uninsured, so the plaintiff sought to recover from the UK Bureau which, in turn, argued that the decision in *Hardy* should be overturned. The UK Bureau relied on similar public policy arguments to those ventilated in *Hardy* and argued that the only form of motor insurance that could be obtained on the market was a policy covering accidents but not wilful or deliberate acts. Accordingly, it was argued that the UK Bureau could not be made liable. The House of Lords rejected these arguments and, instead, approved the approach taken in *Hardy.*

55. While it is useful to note the approach taken in *Hardy* and in *Gardner,* I believe that these decisions must be treated with some caution in an Irish context. As the MIBI has urged,

the difference in language between the Irish and UK statutory provisions (in particular the use of the adjective *"negligent"* in s. 56 (1) of the 1961 Act) is a significant point of difference. Nonetheless, for the reasons discussed further below, there are some aspects of the decisions of the English courts which are of assistance in addressing the issue which I am required to consider in this case.

The plaintiff's arguments in relation to the meaning of *"negligent"*

56. It was also argued on behalf of the plaintiff that the words *"negligent use"* in s. 56 (1) should be construed as extending to any use of a vehicle which falls within the tort of negligence. Counsel for the plaintiff submitted that the behaviour of the first named defendant on the night in question represented a very obvious breach of his duty of care as a driver of a motor vehicle and that it did not matter, in this context, that he may have acted intentionally. Counsel asked rhetorically: how could it be suggested that the first named defendant did not breach his duty of care to the plaintiff?

57. Counsel for the plaintiff also relied on an observation made by the authors of *Charlesworth & Percy on Negligence*, 13th ed., 2014, para. 1-26 where they suggest that intentional conduct is capable of falling within the ambit of the tort of negligence. The authors say:-

> *"The expression 'wilful negligence' has been used in a number of cases usually to characterise conduct which has been intentional as well as careless. In Emblen v. Myers, the defendant had demolished his own house, adjacent to the plaintiff's stable, in such a reckless manner that the roof of the stable was damaged. A submission was made that because the demolition had been deliberate, the plaintiff could not succeed in negligence. Bramwell B. disagreed: 'It is said that the act of the defendant was wilful, and therefore the plaintiff cannot recover on this declaration; but the act was negligent as well as wilful'. So negligence may or may not arise where the damage*

complained of has arisen from some wilful or intentional act. The tort of negligence, as the breach of a duty to take care, is concerned with conduct and not with intention. It cannot be a defence to prove that the defendant intentionally inflicted damage, what is important is the nature of the act which gives rise to a claim. If the driver of a heavy lorry were to deliberately run into a bicycle and destroy it, he could be sued for negligence, just as if he had destroyed it by careless driving. If a trench is dug in the road and a lamp left to warn of its presence and the defendant, seeing the claimant approach, removes the lamp, intending the claimant to fall, there would be liability in negligence. Whatever the intention, the character of the act was, objectively, negligent".

58. I have not been able to find any other commentary on the law of torts where the authors have gone quite so far in suggesting that intentional conduct can be characterised as negligence. I note, however, that, in a joint judgment delivered by Gleeson CJ, McHugh, Gummow and Hayne JJ in the High Court of Australia in *Gray v. Motor Accidents Commission* (1998) 196 CLR 1, at pp 9-10, it appeared to be accepted that there can be cases framed in negligence *"in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff."* That judgment was concerned with whether aggravated damages could be awarded in the context of a negligence claim (something which was doubted by the Supreme Court in *Swaine v. Commrs. Of Public Works* [2003] 1 I.R. 521) but the significant point for present purposes is that the underlying action was framed in negligence even though the plaintiff was deliberately knocked down by an uninsured driver.

59. Counsel for the plaintiff also urged that, to suggest that the first named defendant did not breach his duty of care is to suggest that he fulfilled it, which would be *"an impossible contention on the evidence in this case".*

60. Counsel for the plaintiff referred to *Buckley on Insurance Law*, (4th Ed. 2016). At para. 15-230 of that text, the authors observe that:-

> *"It is a general rule that an insured is not covered by an insurance contract in respect of loss caused by his own intentional act".*

To that extent, Buckley does not support the position of the plaintiff. But, in the same paragraph, Buckley suggests that there is an exception to this principle:-

> *"However, inconsistent with that proposition, or as an exception to it, is the position of the user of a vehicle in a public place who is required by statute (on pain of criminal penalties) to be insured in respect of any liability which he may incur by virtue of the death of or personal injury to any person (or damage to property) which is occasioned by the use of the vehicle in a public place."*

Although Buckley does not identify any authority for that proposition, the authors refer, in para. 15-229 to the decisions in *Hardy* and in *Gardner* and also a subsequent decision of the English Court of Appeal in *Charlton v. Fisher* [2001] 1 All ER (Comm) 769 and say:-

> *"It is well accepted that the compulsory motor insurance legislation requires an 'approved policy' to cover any liability for personal injuries and property damage which are inflicted in a manner which renders the defendant liable to the victim, even where the driver is liable to criminal prosecution. The question as to whether the policy must respond where the injuries are inflicted by a deliberate running down of the victim, or in the course of some other criminal activity was answered in the affirmative in the English cases of Hardy, Gardner v. Moore and Charlton".*

61. There is no indication in Buckley that the authors, in making that observation in para. 15-229, have taken into account the difference between the language used in s. 56 (1) of the 1961 Act, on the one hand, and of the UK statutory provisions, on the other. That said, the

authors, in making the statements in both paras. 15-229 and 15-230, may well have in mind the insurance regime that is required to be put in place pursuant to the EU Motor Insurance Directives (addressed further below).

62. It was also submitted that, if *"negligent use"* in s. 56 (1) did not include intentional conduct, it would also result in a surprising anomaly in that it would mean that the Oireachtas intended the power conferred by s. 57 (1) and (2) of the 1961 Act to be available as against a driver who carelessly caused injury but not as against a driver who intentionally caused injury. While it was accepted that the provisions of s. 57 were declared to be invalid on constitutional grounds in *Cullen v. Attorney General* [1979] I.R. 394, counsel argued that this did not affect the argument as to the proper interpretation of ss. 56 and 57 which were clearly designed by the Oireachtas to be read together. In this context, counsel correctly made the point that the subsequent finding of invalidity in *Cullen* does not affect their argument as to the correct construction of s. 56 and 57. Under s. 57 of the 1961 Act, the District Court, once certain conditions were met, was empowered, on conviction of a person under s. 56 for failure to have insurance, to impose a fine equivalent in amount to the damages that might be awarded to a person injured by the accused's *"negligent use"* of the vehicle. The conditions in question were (a) that an injury was caused to a third person by such negligent use and (b) the court was of opinion that such person *"would be entitled to recover in a civil action against the convicted person damages in respect of that injury".* As I understand the argument made by counsel for the plaintiff, they say that the Oireachtas was unlikely to have intended to give the District Court such a significant power in cases of careless driving but not in the case of driving with intent to injure. They suggest that, otherwise, this would give rise to a surprising anomaly where careless drivers would have been exposed to more significant penalties than a driver who acted with intent to injure.

63. A further submission made by counsel for the plaintiff was that the interpretation of s. 56 (1) canvassed by the MIBI would give rise to absurdity. It would mean that a defendant driver who, in accordance with time honoured practice, was sued solely in negligence could defeat that claim by establishing in evidence that his conduct was significantly more blameworthy and was, in fact, intentional. It was argued that this might only become apparent at the trial in the course of the defendant's evidence when it was suggested it might be too late to amend the pleadings to plead new facts to sustain a new claim in battery or trespass to the person. This, however, seems to me to be a somewhat academic point in this case in circumstances where para. 3 (c) of the defence delivered on behalf of the MIBI specifically pleads that the first defendant drove his vehicle at the plaintiff in order to strike him and that this does not constitute negligent driving. The defence pleads that the first named defendant's driving *"on this occasion was not negligent driving and he was not in breach of duty or in breach of statutory duty… On the contrary, his driving was …a deliberate attack on the plaintiff".*

Discussion and analysis

64. In my view, in order to address the question before the court, it is necessary to consider the relevant provisions of Irish law read against the backdrop of the Motor Insurance Directives and to consider the role which the MIBI Agreement plays in this context. It is also necessary to keep in mind that, although the MIBI Agreement takes the form of a contractual document entered into between the Minister for Transport and the MIBI, its purpose, at least in part, is to give effect to certain aspects of the 2009 Directive. For that reason, it was described by Hogan J. in his judgment in the Court of Appeal in *Law Society v. Motor Insurers Bureau of Ireland* [2016] IECA 60, at para. 18, as *"in substance, a piece of quasi legislation".* That said, in both the Court of Appeal and subsequently in the Supreme Court, all of the judges addressed the MIBI Agreement as a commercial agreement which is to be

construed in accordance with the principles of construction applicable to commercial contracts summarised by Lord Hoffmann in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 W.L.R. 896 at pp 912-913 (subsequently followed in Ireland by the Supreme Court in *Analog Devices v. Zurich Insurance* [2005] 1 I.R. 27). Surprisingly, notwithstanding the issue which arises in relation to the correct construction of Clause 4.1.1 of the MIBI Agreement, neither side referred me to the judgments of the Court of Appeal and the Supreme Court in the *Law Society* case. For the reasons explained in more detail below, I have come to the conclusion that, with reference to the particular provisions of the MIBI Agreement in issue in this case, I am required, in contrast to the *Law Society* case, to construe those provisions in light of the object and purpose of the 2009 Directive. But before attempting to do so, it is necessary to address the relevant legislative provisions applicable in Ireland.

The relevant legislation

65. As noted above, the most immediately relevant provision for present purposes is s. 56 (1) of the 1961 Act. Clause 4.1.1 of the MIBI Agreement expressly cross-refers to s. 56. The relevant terms of that subsection have already been quoted in para. 40 above. That section cannot, however, be construed in isolation. For the reasons explored in more detail below, s. 56 must be read in light of the provisions of the Motor Insurance Directives. It is also necessary to consider s. 56 in the context of the 1961 Act as a whole. As Walsh J. observed in *East Donegal Co-Operative v. Attorney General* [1970] I.R. 317 at p. 341:-

> *"The whole or any part of the Act may be referred to and relied upon in seeking to construe any particular part of it, and the construction of any particular phrase requires that it is to be viewed in connection with the whole Act and not that it should be viewed detached from it. The words of the Act, and in particular the general words, cannot be read in isolation and their content is to be derived from their context.*

Therefore, words or phrases which at first sight might appear to be wide and general may be cut down in their construction when examined against the objects of the Act which are to be derived from a study of the Act as a whole including the long title. Until each part of the Act is examined in relation to the whole it would not be possible to say that any particular part of the Act was either clear or unambiguous".

66. For that reason, I believe that counsel for the plaintiff were correct in pointing to the immediately succeeding section of the Act namely s. 57. Although that section has been declared to be unconstitutional, it does not affect its utility in the context of understanding what was intended by the Oireachtas in enacting s. 56. The two sections are clearly designed to be read together. Section 57 (which is summarised in para. 59 above) purported to empower the District Court, on conviction of a person under s. 56 for failure to have insurance, to impose a fine equivalent in amount to the damages that might be awarded to a person injured by the accused's *"negligent"* use of the vehicle. In my view, there is considerable merit in the argument made by counsel for the plaintiff that the Oireachtas was unlikely to have intended to give the District Court such a significant power in cases of careless driving but not in the case of driving with intent to hit or injure such as might occur, for example, in a road rage incident. While, at this point, I do not believe that this, taken on its own could be said to be determinative, it nonetheless supports the position taken by the plaintiff in these proceedings.

67. Section 56 must also be read against the scheme of the 1961 Act as a whole. In particular, there are a number of other provisions in the 1961 Act which relate to vehicle insurance which are potentially relevant. Thus, for example, s. 58 defines a "*vehicle insurer"* as meaning an undertaking within the meaning of Article 2 (1) of the EC (Non-Life Insurance) Regulations, 1976 as amended by Article 4 of the European Communities (Non-

Life Insurance) (Amendment) (No. 2) Regulations, 1991 which carries on a Class 10 mechanically propelled vehicle insurance business in the State. It should be noted, in this context, that under the EC (Non-Life Insurance) Framework Regulations, 1994 (S.I. No. 359 of 1994) Class 10 insurance embraces "*all liability arising out of the use of motor vehicles operating on the land…".* It will be observed that the word *"use"* in this context is not qualified by the adjective *"negligent".* In turn, the Class 10 definition in the 1994 Regulations is consistent with the provisions of para. A of the Annex to the First Non-Life Insurance Directive – (Directive 73/239 as amended by Directive 84/641) in which the class is expressed in similarly wide terms.

68. Section 62 of the 1961 Act deals with the requirements for an *"approved policy of insurance".* Under s. 62 (1) (b) the insurer must bind *"himself by [the policy] to insure the insured against all sums without limit, which the insured … shall become liable to pay to any person … whether by way of damages or costs on account of injury to person or property caused by the negligent use, during the … period of cover … specified … in the policy, of a mechanically propelled vehicle to which the policy relates …".* Again, it will be seen that, in common with s. 56 (1) and s. 57 of the 1961 Act, s. 62 (1) refers to the *"negligent use"* of a vehicle. It will also be seen that the sub-s. is concerned with insurance cover for injury or damage to third parties. In my view, it is particularly important to bear the latter consideration in mind. The focus is cover for third party damage. The Act is not concerned with an insurer's ability to rely on its rights against an insured person.

69. Section 76 of the 1961 Act is also relevant. Section 76 allows an injured third party to proceed directly against the insurer of a driver of a motor vehicle in circumstances where the injured party has obtained a judgment against the driver which has not been satisfied and where the liability for the injury falls within the scope of cover which is required to be in place under s. 56. Thus, even where an insurer may have repudiated liability as against the

insured, an injured third party may still be able to recover directly against the insurer. As appears from the extract of the judgment of Lord Denning in *Hardy,* quoted in para. 52 above, the equivalent provision in the UK 1960 Act was a significant factor underpinning the decision in that case.

70. Section 78 deals with the MIBI. It provides that no insurer may carry on a Class 10 insurance business in the State unless it is a member of the MIBI. The role played by the MIBI is described in some detail in the judgment of Charleton J. in the Supreme Court in *Farrell v. Whitty* [2015] IESC 39. For present purposes, it is unnecessary to repeat that detail here.

71. Although the provisions of the 1961 Act predate Ireland's accession to the EEC (as it then was) it seems to me that, in circumstances where some of its provisions (including s. 56) are now relied upon by the State as the basis for Ireland's compliance with its obligations under the 2009 Directive and where s. 56 has been amended from time to time to comply with the State's obligations under the Motor Insurance Directives in force, the provisions of the 1961 Act cannot be read on their own. They must be read in conjunction with the obligations placed on the State by the 2009 Directive. This was emphasised by Peart J. in *Smith v. Meade* [2009] 3 I.R. 335 at p. 348 where Peart J., having cited the decision of the CJEU in Case C-106/89 *Marleasing* [1990] ECR I- 4135, said that it was "*inescapable"* that the court was required to read s. 65 (as amended by the EC (Road Traffic) (Compulsory Insurance) (Amendment) Regulations 1992 (S.I. No. 347 of 1992)) in light of the wording and purpose of the Third Directive. In this context, quite apart from the *Marleasing* principles (discussed in more detail below) it seems to me that, as a consequence of the decision of the CJEU in Case C-378/17 *Minister for Justice and Equality v. Workplace Relations Commission* ECLI:EU:C:2018:979, I am obliged to ensure that EU law is fully effective, disapplying, if needs be, any national provisions or national case-law that are contrary to EU

law. Since the Motor Insurance Directives were designed to confer rights on injured parties, it is clear that the 2009 Directive, insofar as it creates such rights, is intended to have direct effect. In case C-356/05 *Farrell v. Whitty* [2007] ECR I-3093 at para. 38, the CJEU has held that the rights conferred by Article 1 of the Third Directive were sufficiently unconditional and precise to have direct effect. While that decision (which is examined in more detail below) dealt specifically with Article 1 of the Third Directive, there can be no doubt that the same principle applies to many of the provisions of the 2009 Directive. As outlined further below, the CJEU has also made it clear, in a subsequent phase of the *Farrell v. Whitty* litigation, that such provisions of the Directives are enforceable by private parties directly against the MIBI. In these circumstances, I believe that it is necessary to examine the relevant provisions of the 2009 Directive and the approach taken by the CJEU in interpreting and giving effect to that directive and its predecessor provisions. In this context, in a long line of cases in relation to the Motor Insurance Directives, the CJEU has taken an approach which has strongly reinforced the rights of injured third parties. Before examining those decisions, there are a number of aspects of the MIBI Agreement to which I should first draw attention.

The MIBI Agreement

72. The MIBI Agreement is the successor to a series of similar such agreements which have been in place since 1955. Thus, the first such agreement long predates Ireland's accession to the EEC (as it then was). However, as the MIBI submitted to the Supreme Court in the *Law Society* case (in a submission that is summarised in para. 26 of the judgment of O'Donnell J.) the current MIBI Agreement "*now satisfies an important State obligation under Directive 2009/103/EC which requires the State to make provisions for 'a body to guarantee that the victim will not remain without compensation where the vehicle which caused the accident is uninsured or unidentified".*

73. The link between the MIBI Agreement and the 2009 Directive is expressly noted in Clause 1.2 of the agreement where it is stated that the agreement *"encompasses"* the 2009 Directive.

74. Although I have previously quoted what I believe to be the most relevant part of Clause 4.1.1 of the MIBI Agreement, I should, for completeness, quote it in full as follows:-

> *"4.1.1 Subject to the provisions of clause 4.4, if Judgement/Injuries Board Order to Pay in respect of any liability for injury to person or death or damage to property which is required to be covered by an approved policy of insurance under Section 56 of the Act is obtained against any person or persons in any court … or the Injuries Board … whether or not such person or persons be in fact covered by an approved policy of insurance and any such judgement is not satisfied in full within 28 days from the date upon which the person or persons in whose favour such judgement is given become entitled to enforce it then MIBI will so far as such judgement relates to injury to person or damage to property and subject to the provisions of this Agreement pay or cause to be paid to the person or persons in whose favour such judgement was given any sum payable or remaining payable thereunder in respect of the aforesaid liability including taxed costs … or satisfy or cause to be satisfied such judgement whatever may be the cause of the failure of the judgement debtor".*

75. There are a number of features of Clause 4.1.1 that should be noted:-

(a) In the first place, it refers to *"**any liability** for injury to person or death or damage to property which is required to be covered by an approved policy of insurance under Section 56 …;"* (emphasis added). The use of the words *"any liability"* suggests that Clause 4.1.1 is intended to have a wide ambit but the MIBI have argued that those words are clearly qualified by the words

"which is required to be covered by an approved policy of insurance under Section 56";

(b) Secondly, Clause 4.1.1. expressly states that the clause applies whether or not the person or persons against whom judgment is recovered is *"in fact covered by an approved policy of insurance".* Those words are sufficiently wide to cover not only cases where the driver is wholly uninsured but also cases where an insurer has repudiated liability under a policy of insurance. In para. 2 of his judgment in the *Law Society* case, O'Donnell J. described both of those cases as *"undoubtedly covered by the MIBI Agreement".* This conclusion is reinforced by a consideration of Clause 3.11 of the Agreement under which a judgment obtained by the injured party is to be assigned to MIBI or its nominees. As the judgments of the Court of Appeal and the Supreme Court in the *Law Society* case indicate, this would permit the MIBI, in an appropriate case, to pursue recovery against an insured driver. This might be appropriate, for example, in circumstances where an insurer has repudiated liability or relied upon an exclusion clause so as to deny cover to the insured by reason of some default or misconduct on the part of the insured. In such cases the MIBI, after compensating the injured party, may well wish to pursue an indemnity claim as against the driver against whom the judgment has been obtained by the injured party.

(c) There are, however, a number of circumstances in which use of the vehicle will not give rise to liability on the part of the MIBI. These are identified in Clauses 5.1 and 5.2 of the Agreement and, as discussed further below, they are clearly intended to mirror certain aspects of Article 13 of the 2009 Directive. Clause 5.1 deals with circumstances where the vehicle is stolen or *"taken by*

violence". In such cases, Clause 5.1 provides that the liability of the MIBI shall not extend to any judgment or claim in respect of injury, death or damage *"while the person injured or killed … voluntarily entered the vehicle which caused the damage or injury and MIBI can prove that they knew it was stolen or taken by violence".* Clause 5.2 deals with cases where the MIBI can prove that, at the time of the accident, the injured person knows that there was no approved policy of insurance in place. In such cases, Clause 5.2 provides that the liability of the MIBI shall not extend to any judgment or claim in respect of the injury or death of such person *"while the person injured or killed was by his consent in or on such vehicle …".*

(d) It should also be borne in mind that, although s. 56 predates any of the Motor Insurance Directives, Clause 4.1.1. of the MIBI Agreement serves to give effect to the 2009 Directive and it could hardly have been intended that the cross reference therein to s. 56 was to be construed without regard to the nature of the insurance that is required to be put in place pursuant to that Directive.

76. In my view, and as noted in para. 71 above, the backdrop of the 2009 Directive is a particularly important consideration to keep in mind. As noted above, Clause 1.2 expressly records that the Agreement *"encompasses the Sixth Motor Insurance Directive which codifies the Five existing EU Motor Insurance Directives".* As noted in para. 64 above, in their respective judgments in *Law Society v. Motor Insurers Bureau of Ireland,* both the Court of Appeal and the Supreme Court addressed the interpretation of the MIBI Agreement as a commercial contract. However, the issue in that case (in respect of insolvent insurers) was not covered by the 2009 Directive and, for that reason, the 2009 Directive does not feature as a significant issue, in that case, in the context of the interpretation of the MIBI Agreement. I

note also that, in *White v. White* [2001] 1 W.L.R. 481, the House of Lords held that the relevant directives then in force constituted an important part of the factual matrix against which the equivalent UK agreement fell to be considered and construed. The House of Lords did not, however, consider that the *Marleasing* principle should be applied in interpreting the UK agreement.

77. I do not believe, however, that it would be sufficient for me to proceed solely on the basis that the 2009 Directive forms part of the factual matrix against which the MIBI Agreement is to be construed. Unlike *Law Society v. Motor Insurers Bureau of Ireland,* the obligations under Clause 4.1.1 of the MIBI Agreement in issue in this case (relating to liability arising from injury caused by an uninsured driver) are intended to give effect to the 2009 Directive. That element of the MIBI Agreement serves to satisfy the State's obligation to implement the 2009 Directive in so far as the existence of a guarantee body is concerned. It therefore seems to me that, in considering the meaning of the MIBI Agreement, insofar as it purports to give effect to the 2009 Directive, I should have regard to the well-established EU law principle that a purposive construction should be applied to any national measure intended to give effect to the requirements of an EU directive (see Case C-106/89 *Marleasing* [1990] ECR I-4135). While, in *White v. White,* at p. 488, Lord Nicholls suggested that the *Marleasing* principle *"cannot be stretched to the length of requiring contracts to be interpreted in a manner that would impose on one or other of the parties' obligations which, Marleasing apart, the contract did not impose…."*, it seems to me that the *Marleasing* principle cannot be excluded merely because the State has chosen to implement its obligations under the 2009 Directive by an agreement with the MIBI rather than by some form of delegated legislation. Moreover, as noted above, the decision of the CJEU in the *Workplace Relations Commissions* case seems to me to impose a duty on the court to give effect to any of the directly effective terms of the 2009

Directive to the extent that there is any inconsistency between those terms and any national legislative or administrative measures.

78. I appreciate that the MIBI is a private entity and is not, as such, an office of State. However, in the context of the enforcement of the plaintiff's rights under the Directive, it is clear that the MIBI is to be treated as being in an equivalent position to an emanation of the State. This follows from the decision of the CJEU in Case C-413/15 *Farrell v. Whitty* ECLI:EU:C:2017:745. That was the second reference made by the Irish Courts to the CJEU arising out of the same set of proceedings involving the MIBI. At para. 41 of its judgment in that case, the CJEU, having analysed the role played by the MIBI, concluded that: -

> *"41. The provisions of a directive that are unconditional and sufficiently precise may… be relied upon against an organisation such as the MIBI".*

The provisions of the 2009 Directive relevant to the facts of this case are, in my view, both unconditional in their terms and sufficiently precise. Accordingly, the rights which the CJEU has, in a succession of cases, held to be available to an injured party under the Motor Insurers Directives, can be enforced against the MIBI, notwithstanding that it is, technically, a private party. In these circumstances, I believe that it is necessary to have regard to the provisions of the 2009 Directive and to the extensive body of case law of the CJEU in relation to it and in relation to the earlier Motor Insurance Directives. Thus, the provisions of the 2009 Directive appear to me to be of importance, not only in considering s.56 of the 1961 Act but also in any consideration of the MIBI Agreement itself. Even if I am wrong in that conclusion, it is clear, that, at minimum, the 2009 Directive represents an important element of the factual matrix against which the MIBI Agreement falls to be construed.

The 2009 Directive

79. An important underlying objective of the 2009 Directive is to ensure that victims of road traffic accidents are compensated in respect of injuries or damage suffered by them and that there is appropriate insurance is in place for this purpose which satisfies the minimum requirements of the directive. Article 3 requires each Member State to *"ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance."* In turn, Article 9 lays down the minimum amounts of cover that must be available under a motor insurance policy. Article 13 sets out the only permissible exclusions from cover that may be imposed (whether under the terms of an individual policy of insurance or under national legislative provisions). To further reinforce the protection available to the victim, Article 18 requires Member States to ensure that an injured party will have a direct right of action against the insurer *"covering the person responsible against liability|".*

80. Mirroring the requirements stated in Article 3, Recital 3 to the 2009 Directive states that:-

> *"Each Member State must 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 insurance cover are to be determined on the basis of those measures."*

81. Both Recital 3 and Article 3 refer simply to the *"use of vehicles".* They do not use the language used in s. 56 (1) of the 1961 Act namely ***"negligent** use"* (emphasis added). That said, there are several references in the 2009 Directive to the word "*accident"*. Thus, for example, Recital 22 states that personal injuries and damage to property suffered by:

> *"pedestrians, cyclists and other non-motorised road users, who are usually the weakest party in an accident, should be covered by the compulsory insurance of the*

vehicle involved in the accident where they are entitled to compensation under national civil law. This provision does not prejudge the issue of civil liability, or the level of awards of damages in respect of a given accident, under national legislation".

There are also references to *"accidents"* in Recital 42 and in Article 10 (addressed in more detail below) which are directly relevant to guarantee bodies such as the MIBI. It will therefore be necessary in due course to consider the concept of *"accident"* for the purposes of the 2009 Directive.

82. Article 13 deals with exclusion clauses in policies of insurance. Article 13 (1) requires Member States to take all appropriate measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3 is deemed to be void in respect of claims by third parties who have been victims of an accident where that statutory provision or contractual clause excludes from cover the use of vehicles by unauthorised persons, unlicensed persons or persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned.

83. Article 13 (2) deals with stolen vehicles or vehicles obtained by violence. It permits Member States to provide that the guarantee body (such as the MIBI in Ireland) is to pay compensation instead of the insurer of the stolen vehicle. However, it is clear from Article 13 (2) read in conjunction with Article 13 (1) that there can be no exclusion (whether under national law or under the terms of a policy of motor insurance) which excludes cover in respect of injuries suffered by innocent third parties even where the vehicle in question has been stolen or taken by violence. The only circumstance in which such an exclusion can be invoked is where the injured party has voluntarily entered the vehicle in question knowing that it had been stolen. Article 13 (2) is mirrored in the terms of Clause 5 of the MIBI Agreement (discussed in para. 75 (c) above). The only circumstance in which a Member

State may deviate from this position is where the victim may obtain compensation for the damage suffered from *"a social security body"*. Ireland has not chosen to take that course. It is clear from the terms of the opening paragraph of the preamble to the MIBI Agreement that it is intended to extend the scope of the MIBI's liability to compensation for victims of road accidents involving uninsured or stolen vehicles.

84. Article 13 (3) is significant for present purposes since it deals with exclusion clauses in respect of the driving of a vehicle by an intoxicated driver. While Article 13 (3) deals with this issue in the context of claims by passengers in the vehicle driven by an intoxicated driver, it seems to me to follow that the Directive proceeds on the basis that intoxication cannot be used to exclude cover (either under the terms of an individual policy or under national legislation) in respect of claims by innocent third parties. Article 13 (3) provides as follows:-

> *"3. Member States shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy which excludes a passenger from such cover on the basis that he knew or should have known that the driver of the vehicle was under the influence of alcohol or of any other intoxicating agent at the time of an accident, shall be deemed to be void in respect of the claims of such passenger".*

85. Even prior to the enactment of the 2009 Directive, the CJEU had made clear that attempts by insurers to deny cover in cases of intoxication were not permissible under the first, second and third Directives. This was established in Case C-129/94 *Ruiz Bernaldez* [1996] ECR I-1829. In that case, an issue arose before the Spanish courts as to whether the claimant was disentitled to insurance cover in circumstances where he had caused significant property damage. The accident was caused by the claimant who drove while intoxicated. Under the relevant Spanish compulsory insurance rules, an insurer had no obligation to

indemnify the driver of a vehicle in respect of property damage where the damage was caused while the driver was intoxicated. The Spanish court made a reference to the CJEU for a preliminary ruling as to whether, it was permissible, under the First Directive, to exclude cover in respect of damage caused by a driver of a motor vehicle while intoxicated. At that time, there was no express provision contained in the Directives which outlawed an exclusion clause on grounds of intoxication of the driver. Advocate General Lenz took the view that one of the principal purposes of the Directives was to prohibit (with certain narrow exceptions) the operation of any exclusions from insurance cover as against an injured person. In para. 29 of his opinion, he referred to Recital 7 to the first Directive to the effect that *"it is in the interest of victims that the effects of certain exclusion clauses be limited to the relationship between the insurer and the person responsible for the accident".* At para. 38 of his opinion, he suggested that the Directives lay down a minimum requirement to the effect that *"exclusions from insurance cover are invalid at any rate as against the victim".* In para. 39 he continued as follows:-

> *"39. In my opinion, this approach justifies the further conclusion that any objections by the insurer, based on his contract with the insured, concerning any exclusions from cover are invalid as against the victim. If even the exclusions from cover listed in Article 2 (1) of Directive 84/5, which are considered to be objectively justified, do not exempt the insurer, then still less should an exclusion from liability … lead to the insurer's liability for damage being excluded as against the victim. Moreover, this conclusion is supported by the Directives' overall objective, to which I have already referred, namely the protection of victims."*

86. At para. 46 of his opinion, the Advocate General also touched on the liability of a national guarantee body such as the MIBI. He expressed the view that there can be no gap in cover. The injured party must be entitled to recover from either the insurer or the guarantee

body. Having drawn attention to the narrow circumstances in which the Directives permit exclusions from cover in respect of victims, he said:-

> *"46. 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."*

87. The opinion of the Advocate General summarised in para. 85 above was subsequently upheld by the CJEU which stressed that the purpose of the Motor Insurance Directives was to enable third party victims of accidents caused by motor vehicles to be compensated for all of the damage to property and personal injury sustained by them up to the limits set by the Directive. In its judgment, the CJEU did not address the issue canvassed in para. 46 of the Advocate General's opinion (quoted in para. 86 above) but it provided valuable guidance as to the object and purpose of the Motor Insurance Directives. At paras. 13-20, the CJEU said:-

> *"13. The preambles to the directives show that their aim is firstly to ensure the free movement of vehicles normally based on Community territory and of persons travelling in those vehicles, and secondly of guaranteeing that the victims of accidents caused by those vehicles receive comparable treatment irrespective of where in the Community the accident has occurred ….*
>
> *14. For that purpose the First Directive, having regard to the agreement between the national insurers' bureaux, established a system based on the presumption that vehicles normally based on Community territory are covered by insurance …. Article 3(1) … thus provides that Member States are, subject to the derogations in Article 4,*

to take all appropriate measures to ensure that civil liability in respect of the use of vehicles is covered by insurance.

15. The original version of that article left it to the Member States, however, to determine the damage covered and the terms and conditions of compulsory insurance.

16. In order to reduce the disparities which continued to exist between the laws of the Member States with respect to the extent of the obligation of insurance cover …, Article 1 of the Second Directive required compulsory cover, as regards civil liability, for both damage to property and personal injuries, up to specified sums. Article 1 of the Third Directive extended that obligation to cover for personal injuries to passengers other than the driver.

17. Article 1(4) of the Second Directive also improved the protection of victims by requiring the Member States to set up or authorize bodies responsible for providing compensation for damage to property or personal injuries caused by unidentified or uninsured vehicles.

18. In view of the aim of ensuring protection, stated repeatedly in the directives, Article 3(1) of the First Directive, as developed and supplemented by the Second and Third Directives, must be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all the damage to property and personal injuries sustained by them, up to the amounts fixed in Article 1(2) of the Second Directive.

19. Any other interpretation would have the effect of allowing Member States to limit payment of compensation to third-party victims of a road-traffic accident to certain types of damage, thus bringing about disparities in the treatment of victims depending

on where the accident occurred, which is precisely what the directives are intended to avoid. Article 3(1) of the First Directive would then be deprived of its effectiveness.

20. That being so, 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."

88. Having regard to the objective of the Directives, the CJEU came to the conclusion that, in cases of damage or injury caused to third parties by an intoxicated driver, the compulsory insurance contract required under the Directives may not provide that the insurer has no obligation to pay compensation to such third parties. However, this does not affect the position as between insured and insurer. Thus, the insurer who is forced to make a payment to a person injured by an intoxicated driver may retain the right under the insurance contract to claim an indemnity in such cases against the insured person. This was confirmed in para. 24 of the judgment where the CJEU said:-

"... Article 3(1) of the First Directive is to be interpreted as meaning that, without prejudice to the provisions of Article 2(1) of the Second Directive, a compulsory insurance contract may not provide that in certain cases, in particular where the driver of the vehicle was intoxicated, the insurer is not obliged to pay compensation for the damage to property and personal injuries caused to third parties by the insured vehicle. It may, on the other hand, provide that in such cases the insurer is to have a right of recovery against the insured".

89. The approach taken in *Ruiz Bernaldez* was further reinforced by the decision of the CJEU in Case C-537/03 *Candolin* [2005] ECR I-5745. That case concerned provisions of Finnish law which restricted the right to recover under an insurance policy where the driver had a blood alcohol content over a specified limit. One of the passengers in a vehicle (in

which the driver and all passengers were drunk) was killed and serious injuries were suffered by all of the other passengers. The Finnish court, at first instance, took the view that none of the passengers should be entitled to any compensation in circumstances where they should have noticed the driver's drunken state. The Turku Court of Appeal subsequently referred a question to the CJEU for a preliminary ruling. The CJEU strongly reiterated what had been said in *Ruiz Bernaldez* and stated at paras. 18-21:-

> *"18. In view of the aim of protecting victims, the Court has held that Article 3(1) of the First Directive precludes an insurer from relying on statutory provisions or contractual clauses in order to refuse to compensate third-party victims of an accident caused by the insured vehicle (Ruiz Bernaldez, paragraph 20)*
>
> *19. The Court has also held that the first subparagraph of Article 2(1) of the Second Directive simply repeats that obligation with respect to provisions or clauses in a policy excluding from insurance the use or driving of vehicles in particular cases (persons not authorised to drive the vehicle, persons not holding a driving licence, persons in breach of the statutory technical requirements concerning the condition and safety of the vehicle) (Ruiz Bernaldez, paragraph 21)*
>
> *20. By way of derogation from that obligation, the second subparagraph of Article 2(1) provides that certain persons may be excluded from compensation by the insurer, having regard to the situation they have themselves brought about (persons entering a vehicle which they know to have been stolen) (Ruiz Bernaldez, paragraph 21).*
>
> *21. However, as it is a provision which establishes a derogation from a general rule, the second subparagraph of Article 2(1) of the Second Directive must be interpreted strictly".*

90. The approach taken by the CJEU in these cases has been repeatedly reiterated and reinforced in subsequent case law. In Case C-356/05 *Farrell v. Whitty*, an issue arose in

relation to a previous version of the MIBI Agreement under which the MIBI was entitled to refuse to compensate the victim of a road traffic accident in circumstances where the victim was travelling in a vehicle which had not been designed or constructed with seating accommodation for passengers. The CJEU held that the concept of *"passenger"* in the Directives covered all passengers, wherever they were physically located within the vehicle. In addition, the CJEU reiterated that it was not open to Member States to carve out exceptions or derogations in addition to those which are specified in the Directives. At paras. 27-28 of the judgment, the CJEU said:-

> "*27. ... 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) ....*
>
> *28. However, the Community legislature did not provide any derogation with respect to a separate category of persons who may be the victims of a road traffic accident, namely those who were on board a part of a 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*".

91. In my view, the approach taken in *Farrell v. Whitty* shows very clearly that the victim of a road traffic accident must be compensated unless the circumstances fall within one of the specific exclusions from cover expressly recognised under the 2009 Directive. It is important to emphasise that this principle applies only with respect to the victim. There is nothing to prevent an insurer (or the MIBI for that matter) from seeking indemnity against an insured in cases where the injuries sustained by the victim fell within the terms of a particular exclusion contained in a policy of insurance. In other words, the rights of insurer and insured *inter se* are not affected by the approach taken in these cases.

92. The approach taken by the CJEU to attempts by Member States to provide for restrictions in insurance cover which go beyond what is permissible under the Directives is also illustrated by the decision of the CJEU in Case C-211/07 *Commission v. Ireland* [2008] ECR I-00033 in which the CJEU addressed the lawfulness of Clauses 5.1 and 5.2 of the pre-existing version of the MIBI Agreement which purported to exclude liability in respect of persons injured or killed in an accident not only where they knew that the driver was uninsured but also where they ought reasonably to have known about the lack of insurance. The CJEU found the relevant provisions of the then existing MIBI Agreement to be unlawful. At para. 14 of its judgment in that case, the CJEU stated that:-

> *"14…. by excluding from the right to compensation persons who entered any uninsured vehicle, without restricting that exclusion to persons present in an uninsured vehicle which caused damage or injury … to persons who, at the time of the accident, were aware that the vehicle which they had entered was uninsured, clauses 5.2 and 5.3 of the Agreement infringe … the Directive."*

The reliance by the MIBI on *Ferreira*

93. As noted in para. 45 above, counsel for the MIBI have sought to rely on the decision of the CJEU in *Ferreira* where the CJEU noted, in para. 27 of its judgment, that Article 3 of the First Directive does not state what type of civil liability, for risk or for fault, is to be covered by insurance under national laws. In para. 28, the CJEU therefore concluded that, in the absence of any EU rules defining the type of civil liability to be covered by compulsory motor insurance, it is "*in principle for the Member States to lay down the system of civil liability applicable to road-traffic accidents".* However, it seems to me that this observation on the part of the CJEU must be read in conjunction with what the CJEU stressed in the next paragraph of its judgment where it said:-

> *"29. It follows that, as Community law stands at present, the Member States are free to determine the type of civil liability applicable to road-traffic accidents.* ***However, they must ensure that the civil liability arising under their domestic law is covered by insurance which complies with the provisions of the three directives in question."*** (emphasis added).

94. As I understand the judgment, the CJEU recognised that it is up to the Member States to determine the type of civil liability applicable to road-traffic accidents but this is subject to an important qualification that whatever type of civil liability is imposed by a Member State in respect of road traffic accidents must be the subject of compulsory insurance which complies with the provisions of the Directives (now the 2009 Directive). In *Candolin* (discussed in para. 89 above), the CJEU emphasised, at para. 28, that national provisions which govern compensation for road accidents cannot deprive the provisions of the Motor Insurance Directives of their effectiveness.

95. The distinction between civil liability applicable to road-traffic accidents, on the one hand, and insurance in respect of such civil liability is well illustrated by the decision of the CJEU in Case C-409/09 *Lavrador* ECLI:EU:C:2011:371 in which the CJEU considered the provisions of Article 570 of the Portuguese Civil Code which provides that, in circumstances where an injured person has contributed to the occurrence or aggravation of the injury, the court is to determine, on the basis of the seriousness of the fault of both parties and the consequences resulting from their actions, whether compensation is to be awarded in full, or in part, or is not to be awarded at all. In that case, a child riding a bicycle was injured by a vehicle insured by a Portuguese insurer. The accident resulted in the death of the child. At the time of the accident, the child was travelling on the wrong side of the road. Because the child was on the wrong side of the road, the case brought by his parents against the insurer was dismissed both at first instance and on appeal. The parents then appealed to the

Portuguese Supreme Court which made a reference to the CJEU for a preliminary ruling on whether Article 1of the Third Directive permitted the limitation or exclusion of liability on the ground that a child victim of the accident had been partly or exclusively responsible for the accident. In paras. 24 and 25, the CJEU reiterated what had been said in *Ferreira* and said:-

> *"24. The First Directive, as amplified and supplemented by the Second and Third Directives, thus requires the Member States to ensure that civil liability in respect of the use of vehicles normally based in their territory is covered by insurance, and specifies, inter alia, the types of damage and the third-party victims to be covered by that insurance….*
>
> *25. However, it should be noted that the obligation to provide insurance cover against civil liability for damage caused to third parties by motor vehicles is separate from the extent of the compensation to be afforded to them on the basis of the civil liability of the insured person. Whereas the former is defined and guaranteed by European Union legislation, the latter is, essentially, governed by national law …".*

96. The court concluded that the relevant provision of the Portuguese Civil Code was not a limitation on insurance cover against civil liability but was a limitation on civil liability itself and therefore not covered by the Directives. At para. 31 of the judgment, the CJEU stated:-

> *"31. It should be pointed out that, in the case in the main proceedings, in contrast to the facts which led to the judgments in Candolin … and in Farrell, the right to compensation for the victims of the accident is affected not by a limitation of the cover against civil liability by the insurance provisions, but by a limitation of the insured driver's civil liability under the applicable civil liability rules".*

97. In my view, this makes very clear that the Directives will only apply to provisions of national law which address the right of recovery against insurance companies or against a guarantee body such as the MIBI. They do not address issues relating to the underlying civil liability of a driver of a motor vehicle. This is left to the provisions of national law. However, as the judgment in *Ferreira* made clear, where national law provides for civil liability of a driver, the Member States must ensure that such liability is covered by insurance which complies with the requirements of the Directives. Applying that principle to the present case, there is no provision in Irish law which prevents an innocent injured party from pursuing the driver of a motor vehicle who causes damage to the injured party even where the driver acts intentionally or recklessly rather than negligently. Any innocent injured party will be entitled to pursue the driver of the vehicle irrespective of the state of mind or intention of the driver. Thus, even in cases where the driver deliberately runs a pedestrian down, there is no restriction in Irish law imposing civil liability on the driver in such circumstances. While there might be a debate as to which tort should be invoked as a cause of action, there can be no doubt that anyone injured in such circumstances could hold the perpetrator liable. Were it otherwise, there would be a significant concern that the State, in not affording a remedy, would be in breach of its obligations under Article 40.3.2 of the Constitution under which the State, guarantees, by its laws, to vindicate any injustice done to the person of every citizen. It follows, in my view, that Irish law must ensure compliance with the Directives insofar as any claim of the injured party against an insurer or the MIBI is concerned arising out of injuries sustained in such circumstances.

98. Accordingly, I do not believe that the argument made by the MIBI on the basis of the decision of the CJEU in *Ferreira* assists its case. The provisions of Clause 4.1.1 of the MIBI Agreement and s. 56 of the 1961 Act are concerned with the availability of insurance and the availability of an indemnity where no such insurance cover exists. They are not provisions

which regulate civil liability of drivers of motor vehicles in respect of damage done to innocent third parties. Moreover, the provisions of the MIBI Agreements (in force from time to time) and s. 56 of the 1961 Act have been treated by the CJEU as provisions concerned with insurance in both *Commission v. Ireland* (discussed above) and in *Farrell v. Whitty*.

The application of the 2009 Directive to the MIBI

99. The application of the Motor Insurance Directives to the MIBI cannot be doubted. The decisions of the CJEU in *Commission v. Ireland* and both of its decisions in *Farrell v. Whitty* demonstrate very clearly that the provisions of the Directive are as relevant to a body such as the MIBI as they are to individual insurers. While the Directives aim to ensure that compulsory insurance is in place which meets the specific requirements laid down in the Directives in so far as third parties are concerned, it is clear that, in cases where such insurance is not in place, the injured party should be entitled to pursue a claim against a body such as the MIBI. As outlined in para. 86 above, in *Ruiz Bernaldez*, Advocate General Lenz stressed, in para. 46 of his opinion, that there can be no gaps in the duty to compensate the victim. He made clear that this is a guiding principle of the Directives. As he said, the national guarantee body must be regarded as *"covering accident victims who would otherwise be unprotected. The reason for acquiring such a body to be established is the concern to protect victims".*

100. Thus, in the context of bodies such as the MIBI, recital 14 to the 2009 Directive expressly states that: *"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. 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. 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 view of the danger of fraud."

101. In turn, Article 10 (1) requires that each Member State should set up or authorise a body with the task of providing compensation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle "*for which the insurance obligation provided for in Article 3 has not been satisfied".*

102. As noted in recital 14, there are only limited circumstances envisaged under the 2009 Directive where a body such as the MIBI may deny compensation to the victim of an accident caused by an uninsured driver. Among those circumstances is where, as provided in Article 10.2, a passenger, who suffers injury in a vehicle driven by an uninsured driver, knows that the driver is uninsured. None of those limited circumstances apply here.

103. On the other hand, I must bear in mind that both recital 14 and Article 10 (dealing with bodies such as the MIBI) expressly use the word *"accident".* That is also the language used by the CJEU in its judgments. That begs the question whether that word is apt to describe the intentional striking of a victim by a car driven by an uninsured driver.

104. The CJEU has also made it clear that the Directives only apply in relation to use of a vehicle consistent with its normal function as a vehicle. Thus, as discussed above, in *Rodrigues de Andrade*, the CJEU determined that damage caused by a tractor that had been used for the purposes of supplying motor power rather than as a means of transport is not within the ambit of the Directives.

105. More recently, in Case C-162/13 *Vnuk* ECLI:EU:C:2014:2146, the CJEU again emphasised that the protection given by the Directives to injured parties arises in respect of the use of a vehicle which is consistent with its normal function. In that case, the plaintiff was standing on a ladder in a farmyard in Slovenia. He was injured when the ladder was struck by a trailer attached to a tractor causing him to fall. At the time of the incident, the

driver of the tractor was attempting to manoeuvre the trailer into a barn. The insurer argued that the tractor was not being used on the road but in a privately owned farmyard and accordingly was not covered. The Slovenian court made a reference to the CJEU seeking guidance as to whether Article 3 (1) of the First Directive covered such a manoeuvre of a tractor in a farmyard.

106. In answering that question, the CJEU drew attention to the concept of *"vehicle"* as defined in Article 1 (1) of the First Directive where it is defined as meaning: *"any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailers, whether or not coupled".* At para. 38 of its judgment, the CJEU held that a tractor to which a trailer is attached plainly satisfies that definition. That did not, of itself, resolve the question referred by the Slovenian court. The next question which the CJEU had to resolve was what is meant by the concept of *"use of vehicles".* In answering that question, the CJEU pointed out that the scope of that concept cannot be assessed by reference to the law of any individual Member State. The concept must be given an independent and uniform meaning under EU law.

107. The CJEU carried out a comparative examination of the different language versions of Article 3 (1) of the First Directive, from which it emerged that there were differences between one language version and another. According to the French language version (which was shared by the Spanish, Greek, Italian, Dutch, Polish and Portuguese versions) Article 3 (1) refers to the obligation to ensure against civil liability in respect of the *"circulation*" of vehicles (which led the German and Irish governments to submit that the insurance obligation relates only to accidents caused in the context of road use). However, the English language version (which was shared by the Bulgarian, Czech, Estonian, Latvian, Maltese, Slovakian, Slovenian and Finnish language versions) referred to the concept of *"use"* of vehicles without providing any further details. The Danish, German, Lithuanian, Hungarian,

Romanian and Swedish language versions referred, more generally, to the obligation to take out insurance against civil liability in respect of vehicles and, as the CJEU observed at para. 45 of its judgment, this appears to envisage that the obligation to ensure against civil liability is in respect of the use or operation of a vehicle *"irrespective of whether that use of operation takes place in the context of a situation involving road use or not".*

108. At para. 46 of its judgment the CJEU made clear that a literal interpretation of one or more language versions of a multilingual text of EU law, to the exclusion of the others, cannot prevail. Where there is divergence between the language versions, the provision in question must be interpreted by reference to the general scheme and purpose of the rules of which it forms part.

109. In examining the general scheme and purpose of the Directives, the CJEU clarified that, although the Directives do not contain any express definition of the meaning of concepts such as *"use"* or *"accident"*, these concepts must be understood in light of the objectives of the Directives (which includes the objective of protecting the victim). At paras. 48-49 of its judgment, the CJEU said:-

> *"48. … it is important to point out that none of the directives relating to compulsory insurance contains a definition of what is meant by the concepts of 'accident', 'use' or even 'use of vehicles' for the purposes of those directives.*
>
> *49. However, those concepts must be understood in the light of the dual objective of protecting the victims of accidents caused by motor vehicles and of liberalising the movement of persons and goods with a view to achieving the internal market pursued by those directives."*

110. At para. 50 of the judgment, the CJEU stressed that the First Directive was part of a series of directives which came "*progressively to define the obligations of Member States concerning civil liability in respect of the use of vehicles".* The court drew attention in

particular to its repeated statements that one of the objectives of the Directives is to guarantee that the victims of accidents caused by vehicles receive comparable treatment irrespective of where in the EU an accident may occur. It also emphasised the way in which the protection of the victim had been progressively strengthened over the course of the enactment of the various Motor Insurance Directives then in force. At para. 52 the court stated that:-

> *"52. Furthermore, the development of the European Union legislation concerning compulsory insurance shows that [the] objective of protecting the victims of accidents caused by vehicles has continuously been pursued and reinforced by the European Union legislature."*

111. In support of its observations at para. 52, the CJEU, in paras. 53-55 of its judgment, highlighted the developments which had occurred in the enactment of the Directives between 1984 and 2005 during which time the rights of victims were progressively enhanced. The CJEU then set out its conclusions in very clear terms in paras. 56-59 of its judgment as follows:-

> *"56. In the light of all of those factors, and in particular of the objective of protection pursued by the First to Third Directives, the view cannot be taken that the European Union legislature wished to exclude from the protection granted by those directives injured parties to an accident caused by a vehicle in the course of its use, if that use is consistent with the normal function of that vehicle.*
>
> *57. In that regard, it is also important to point out that, according to part A of the Annex to Directive 73/239, as amended by Directive 84/641, the class of direct insurance activity relating to 'Motor vehicle liability' concerns 'all liability arising out of the use of motor vehicles operating on the land (including carrier's liability)'.*
>
> *58 ….*

59. Accordingly, in the light of all of the foregoing considerations, the answer to the question referred is that Article 3(1) … must be interpreted as meaning that the concept of 'use of vehicles' … covers any use of a vehicle that is consistent with the normal function of that vehicle. That concept may therefore cover the manoeuvre of a tractor in the courtyard of a farm in order to bring the trailer attached to that tractor into a barn, … which is a matter for the referring court to determine".

112. While counsel for the MIBI did not refer to this decision (or to many other of the seminal decisions of the CJEU such as *Ruiz Bernaldez* and *Farrell v. Whitty*) in their submissions, I apprehend that, had they done so, they would make a similar point in relation to it as they did in relation to *Rodrigues de Andrade* and they would be likely to draw attention to the observation made by the CJEU, in para. 56, to: -

"… the protection granted by those directives [to] *injured parties to* ***an accident*** *caused by a vehicle in the course of its use,* ***if that use is consistent with the normal function of that vehicle".*** (Emphasis added).

113. In this context, counsel for the MIBI have strongly relied on the fact that the actions of the defendant in striking the plaintiff with his vehicle were intentional rather than accidental and that the first named defendant used his vehicle as a weapon which is not the normal function of a motor vehicle. Their argument has always been that such use falls outside the ambit of s. 56 (1) and, while their arguments on the impact of the 2009 Directive, were quite limited, I have no doubt that, had they considered the case law on the Directive in more detail, they would argue that the Directive applies solely to accidents in the sense of unintended incidents.

114. At first blush, it might well appear that there is considerable force to any such contention on the part of the MIBI. However, on a careful consideration of the object and purpose of the 2009 Directive and its provisions and the relevant CJEU case law, I am of the

view that any such contention would be misplaced. I have formed that view for a number of reasons:-

(a) In contrast to *Rodrigues de Andrade* the first named defendant's vehicle was, in fact, being driven at the time of the incident. It was not being used solely as a source of power. To hit the plaintiff, the first named defendant had to drive the vehicle at him. While deliberately colliding with the plaintiff might not appear, at first sight, to constitute the normal function of a motor vehicle, the same can be said of any occasion where a vehicle strikes an innocent third party. No vehicle is designed to be driven into an innocent third party whether that occurs as a consequence of carelessness, recklessness or intent. No one would dispute that, although careless driving would not, in ordinary speech, be considered to be the normal function of a motor vehicle, injuries caused by such use are plainly within the scope of the Directive. It seems to me to follow that, if injuries caused by careless driving fall within the scope of the Directive, injuries caused by the driving of the vehicle with intent to cause injury will also fall within its scope. Crucially, both types of injury arise as a consequence of the driving of the vehicle which is its normal function.

(b) It should be recalled, in this context, that, in *Rodrigues de Andrade*, the CJEU, in para. 38 of its judgment stressed that the concept of *"use of vehicles"* within the meaning of the Directives covers *"**any use** of a vehicle as a means of transport"* (emphasis added). The decision in *Vnuk* is entirely consistent with *Rodrigues de Andrade*. In both cases, the CJEU stressed that use of a vehicle must be seen in the context of a means of transport. As para. 59 of the judgment in *Vnuk* makes clear, this concept is sufficiently wide to cover even the manoeuvre of a tractor in a farmyard to bring a trailer attached to that tractor into a barn. Thus, even a

relatively small level of movement of a vehicle was considered to come within the concept of use for the purposes of the Directives.

(c) The broad scope of what is covered by the Directive is well illustrated by a consideration of Article 13. As noted above, Article 13 expressly outrules exclusion clauses which deal with (i) injuries caused by the driving of a vehicle by an unauthorised or unlicensed person; (ii) injuries caused by a stolen vehicle or where the vehicle was obtained by violence; and (iii) injuries to passengers in a vehicle driven by an intoxicated driver. The fact that such exclusions are not permissible starkly illustrates the broad scope of the Directives. Any owner of a motor vehicle in this jurisdiction will be well familiar with the way in which insurers will often limit cover to the insured (with or without certain other named drivers) and those driving the vehicle with the insured's consent. But the Directive goes much further in so far as the rights of injured third parties are concerned and requires that cover should be available even in cases where a person is injured by a driver who has stolen the vehicle (with or without violence). While many lay people might not consider joyriding or other use of stolen vehicles to be consistent with the *"normal use of a vehicle",* the Directive plainly takes a much broader approach and intends that innocent third parties who are injured by such a vehicle will be entitled to be compensated unless they fall within the very narrow ambit of the exclusions permitted under Articles 10(2) or 13. The only exclusions permissible in this context are where the injured party entered the stolen vehicle in the knowledge that the vehicle was stolen or in the case of a guarantee body such as the MIBI where the injured party knew that the driver was uninsured. While, under Article 13(2), Member States are permitted to make the relevant guarantee body liable in cases which fall within the scope of that provision rather than the

insurer of the vehicle, it is clear that the Directive envisages that, one way or the other, the injured party is to be compensated either by the insurer or the guarantee body.

(d) Article 13 does not appear to me to make any distinction between cases where the driver of the stolen vehicle intentionally causes damage (where, for example, the stolen vehicle rams a police vehicle injuring a member of the police force) and cases where, through carelessness or thoughtless bravado, the driver of the stolen vehicle happens, unintentionally, to cause damage to a passer-by or a person in another vehicle.

(e) Article 13(3) (dealing with intoxication) is particularly relevant for present purposes. It very plainly envisages that, even in cases where damage is done by an intoxicated driver, the injured party must still be compensated unless he or she falls within the very narrow ambit of the permitted exclusion (which is not relevant here). Again, driving while intoxicated might appear to a layperson to involve abnormal use of a vehicle. Nonetheless, the Directive takes a much broader view. As Article 13(3) and the previous decision of the CJEU in *Ruiz Bernaldez* make very clear, the fact that the driver of a vehicle which causes injury to a third party may have been intoxicated at the time, will not affect the injured party's right to compensation. While the insurer or the guarantee body will not be prevented from pursuing the driver, the injured party must, nevertheless, be compensated either by the insurer or by the guarantee body. As Advocate General Lenz emphasised in *Ruiz Bernaldez*, there must be no gap in the duty to compensate the victim.

(f) In the context of intoxication, it is important to bear in mind that there are a whole range of circumstances in which an intoxicated driver may cause damage or injury

to an innocent third party. These range from carelessness and inattention on the one hand to alcohol fuelled road rage on the other. Yet, Article 13(3) makes no distinction between this range of circumstances. It rules out any exclusion even in cases where a passenger in the vehicle driven by the intoxicated driver knew or ought to have known that the driver was under the influence of alcohol or any other intoxicating agent.

(g) It is true that, in common with several other provisions of the 2009 Directive, Article 13(3) refers to *"an accident"*. Classically, under Irish law, an *"accident"* means, in an insurance context, some unintended event. However, as explained by the CJEU in *Vnuk*, the concepts underlying the Directive must be understood in light of its objectives and as autonomous EU conceptions. The CJEU has consistently held that one of the primary objectives of the Motor Insurance Directives is the aim of ensuring the protection of victims. In *Vnuk*, the court gave considerable guidance as to the approach to be taken in relation to those concepts which are not defined in the Directives. As noted above, the CJEU emphasised that such concepts are to be interpreted in light of the aim of the EU legislature to protect victims. This is evidenced by the progressive strengthening of protection for victims which has taken place over the course of the enactment of the Directives. Although the CJEU, in that case, was concerned with the meaning of *"use"*, it is clear from para. 48 of its judgment that the same approach is to be taken in relation to each of the undefined concepts. This must, accordingly, extend to the concept of *"accident"*. Having regard to the approach taken by the CJEU, it must follow that the concept of *"accident"* is not to be restrictively or narrowly construed. On the contrary, it must be construed in light of the objective of the 2009 Directive.

(h) When one approaches the matter in that way, I do not believe that one could plausibly suggest that the word *"accident"* should be read as confined to cases involving careless or negligent driving. In my view, it would completely undermine the obvious aim of the Directive (i.e. to ensure the protection of victims) if its application was restricted to unintended events giving rise to injury but excluding incidents where a driver intentionally inflicted injury on an innocent third party. That would have the surprising result that incidents caused by a sober driver giving rise to intentional injury to an innocent third party would not be covered while injuries caused by an intoxicated driver or by the driver of a stolen vehicle would be covered. It would mean, for example, that, other than in the case of an intoxicated driver, an injured third party would not be compensated in respect of damage done in a *"road rage"* incident. In these circumstances - and having regard to the very clear guidance given by the CJEU - it seems to me that the word *"accident"* should be read broadly to cover not only unintended incidents but also cases where a driver has acted intentionally in striking an innocent third party.

(i) As *Vnuk* illustrates, it is not appropriate to consider the meaning of a word in a directive purely by reference to one language version. Nonetheless, it is interesting to note that, although the word *"accident"* in English is often considered to relate to an unintended event, there have been cases, particularly in a road traffic context, where courts have taken a broader view. This is well illustrated by two decisions of the English courts namely *Chief Constable of West Midlands Police v. Billingham* [1979] 1 WLR 747 and *Chief Constable of Staffordshire v. Lees* [1981] RTR 506. In *Billingham* a police officer was investigating a disturbance. He parked a police car on a hill. While he was

investigating the disturbance at a nearby house, the defendant released the brakes of the police vehicle and the car rolled down a hill and caused damage. The police inspector made inquiries and formed the belief that the defendant was responsible and he called to his house and he required him to take a breath test. He refused to do so and was subsequently charged, *inter alia*, with failing to provide a specimen of breath contrary to the UK 1972 Act. Under that Act, the power of a police officer to demand a breath test only arose in the aftermath of an *"accident".* The question accordingly arose whether the incident in question (involving the deliberate release of the handbrake) could be said to constitute an *"accident".* Counsel for the defendant argued that there had been no accident because what had occurred was the result of the deliberate action of the defendant. Bridge LJ (as he then was) dismissed the defendant's argument in the following terms at p.753: -

> *"I approach the matter here by asking whether in the ordinary man's understanding of the word…the man in the street would say in such circumstances as those with which we are here concerned that an accident had occurred owing to the presence of a motor vehicle on a road.*
>
> *Taking other examples before coming to the particular incidents here, it is quite clear in my judgment… that if mischievous persons placed an obstruction on a railway line, and in the result a train was derailed, any ordinary person would say there had been a railway accident.*
>
> *Also to take an example which was given…in the course of argument in this case, if a drunken driver deliberately drives into the back of another car, again I think any ordinary person would say that there had been an accident occurring owing to the presence of a motor vehicle on a road.*

I hesitate to attempt a definition, lest, my judgment should in future be quoted as if it were writing something into the statute. But it seems to me that 'accident' in this context is perfectly capable of applying to an untoward occurrence which has adverse physical results, notwithstanding that one event in the chain of events which led to the untoward consequence was a deliberate act on the part of some mischievous person. Applying the test whether an ordinary man would say in these circumstances that an accident had occurred owing to the presence of a motor vehicle on a road, I would answer the question affirmatively".

(j) Subsequently, in *Chief Constable of Staffordshire v. Lees,* there was deliberate conduct by a motorist. He drove through a locked gate onto a parkland road causing significant damage. The question was whether an *"accident"* had occurred for the purposes of the application of the UK 1972 Act. Bingham J. (as he then was) said at p.510: -

"It would be an insult to commonsense if a collision involving a motor car arising from some careless and inadvertent act entitled a constable to exercise his powers under the Act but a similar result caused by a deliberate anti-social act did not".

In that case, the court also noted that, among the meanings to be found in the Oxford English Dictionary for the word *"accident"* is *"an unfortunate event, a mishap".* The decision in this case and in *Billingham* were subsequently followed by a majority of the Court of Appeal in England in *Charlton v. Fisher* [2001] 1 All ER (Comm) 769 (which was among the authorities cited in the written submissions of counsel for the MIBI);

(k) It is important to stress that these decisions of the English Courts were not made in the context of the Motor Insurance Directives. Nonetheless, they offer helpful insights into the way in which the word *"accident"* (as used in the English language) can be construed depending on the circumstances. However, as previously noted, it would be wrong to consider the meaning of the word *"accident"* solely by reference to one of the language versions of the 2009 Directive. Nonetheless, the fact that the word *"accident"* can have an elastic meaning in English is of some relevance in interpreting the concept of an *"accident"* under the 2009 Directive, particularly having regard to the objective of the directive to protect innocent third party victims. This is not peculiar to the English language. According to my understanding, the word *"Unfall"* which is used in the German language version of the Directive means not only *"accident"* but also a *"crash"* or *"casualty"* or *"misfortune"*. Similarly, the word *"sinistre"* in the French language version of the Directive is not confined to *"accident"* but can also mean *"damage"* and it can also encompass a total disaster or a loss or catastrophe. As I understand it, the word is often used in an insurance context in France to designate any circumstance that can give rise to a claim. In the Spanish version of the 2009 Directive, the words *"accidente"* and *"siniestro"* are both used. The latter can mean something sinister. Thus, even looking at the ordinary meaning of the words in other languages (without regard to the underlying objective of the 2009 Directive) it is clear that there is scope for giving a wider meaning to the word *"accident"* than might ordinarily be applied in an insurance context. When, in addition, the underlying objective of the 2009 Directive is taken into account, it seems to me to be very clear that the word *"accident"* should not be confined to purely unintended incidents.

(l) I fully appreciate that, as between insurer and insured, it might appear to be very surprising that intentional misconduct on the part of the insured should be regarded as accidental. However, it is crucial to bear in mind that the objective of the 2009 Directive is the protection of the injured third party. As noted above, the CJEU has repeatedly stressed the underlying objective of the Motor Insurance Directives to protect the position of the victim. As the extracts from the judgment of the CJEU in *Ruiz Bernaldez* (quoted in paras. 87 and 88 above) illustrate, the CJEU has accepted that, in cases of misconduct by an insured, the insurer (or the guarantee body) can pursue the insured for an indemnity in respect of the compensation paid to the victim.

(m) Moreover, the incident which occurred here should not be considered solely from the perspective of the first named defendant. While he may have acted intentionally, there was nothing intentional, on the part of the plaintiff, in suffering the injuries sustained by him. He was an entirely innocent party standing lawfully on the footpath. From his perspective, this was an entirely unintended event. It is clear that he did everything he could to avoid the event including pushing his wife out of the way of the fast approaching car once he saw that the headlights of the first defendant's car were pointing directly at them.

115. For all of the reasons outlined in para. 114 above, I have come to the conclusion that an injury caused to a person in the position of the plaintiff here falls within the ambit of cover required under the 2009 Directive notwithstanding that the driver of the vehicle which caused the injury acted intentionally. In reaching this view, I have given consideration as to whether it might be necessary, in this case, to make a reference to the CJEU for a preliminary ruling on the interpretation of the 2009 Directive. However, the case law of the CJEU has already established a very clear line of authority on the interpretation of the Motor Insurance

Directives and I am of the view that the guidance given by the CJEU, in its existing case law, is sufficient for me to reach the conclusion as to the meaning and object of the 2009 Directive to enable me to decide the issues which arise for determination in this case. In light of the clear guidance given by that case law, I am convinced that the same result would be arrived at by the courts of the other Member States.

116. Having regard to the decision in Case 283/81 *CILFIT* [1982] ECR 3415, I am also mindful of the obligations which arise for a national court against whose decisions there is no judicial remedy under national law. However, I am satisfied that I am not such a court. While s. 39 of the Courts of Justice Act, 1936 provides that the decision of the High Court on an appeal from the Circuit Court *"shall be final and conclusive and not appealable"*, this provision must now, in light of the decision of the Supreme Court in *Pepper Finance Corporation (Ireland) DAC v. Cannon* [2020] IESC 2, be read subject to Article 34.5.4 of the Constitution. Article 34.5.4 has the effect that my decision can still be the subject of an appeal to the Supreme Court provided the intended appellant satisfies that court that the constitutional criteria for leave to appeal are satisfied. That said, I have been very conscious at all times that, but for Article 34.5.4, the High Court, in a case of this kind, is a court of final appeal and, for that reason and as a consequence of the obligations imposed on the court by the *Workplace Relations Commission* case, I have taken the view that it was necessary for me to undertake a more comprehensive consideration of EU law than had been addressed in the submissions made to me by counsel. I also confirm that I considered whether, before delivering judgment, I should invite further submissions from counsel on the case law of the CJEU discussed above. But I have taken the view that an opportunity was previously given for the delivery of submissions and it would unduly delay the resolution of these proceedings were I to invite a further round of submissions. I bear in mind, in that context, that, although I

had asked for submissions at the conclusion of the hearing on 1st November, 2019, the written submissions of the parties were not made available until late February, 2020.

117. In light of the views expressed in paras. 114 to 116 above, I have come to the conclusion that the 2009 Directive requires that the injury suffered by a person in the position of the plaintiff as a consequence of an incident of the type which occurred on 16th June, 2013 (as described in paras. 14 -35 above) must be covered by a policy of motor insurance. I am of the view that, under the 2009 Directive, the fact that the first named defendant, in his inebriated state, at the moment of impact, had the object of injuring the plaintiff, does not mean that liability for the injury was not required to be covered under a policy of insurance of the kind required by the directive.

118. Given the decisions of the CJEU on the direct effect of the Motor Insurance Directives and on the horizontal enforcement of its provisions against the MIBI by an injured party, it may be unnecessary to go any further. However, for completeness, I now turn to consider the provisions of s. 56 of the 1961 Act and Clause 4.1.1. of the MIBI Agreement in light of the conclusions which I have reached about the object and effect of the 2009 Directive. For the reasons discussed in paras. 71 and 77 respectively above, I believe that both s. 56 and Clause 4.1.1. must now be read in light of the language and purpose of the 2009 Directive. While s. 56 pre-dates any of the Motor Insurance Directives, it has been amended from time to time by the addition and substitution of a number of sub-sections in order to give effect to the directives such that Fennelly J. in *Donnelly*, at para. 9, described it as *"... a somewhat unsatisfactory patchwork of provisions, some of them clearly outdated".* As noted earlier, although s. 56 (1) itself has not been amended, it is nonetheless relied on by the State for the purposes of satisfying the requirements of the Directives. In these circumstances, I believe that it must be construed, in accordance with the *Marleasing* principle, in so far as possible in a manner which is consistent with the language and purpose

of the Directives. Although s. 56 (1) was not originally designed to give effect to the Directives, the various amendments made to s. 56 since 1972 were clearly designed to update s. 56 so that effect could be given to the Directives. The legislature has, accordingly, had to actively consider the changes that were required to s. 56 generally and the fact that no changes were made to s. 56 (1) reinforces the conclusion that the legislature considered the sub-s. to be capable of being interpreted in a manner consistent with the Directives.

119. There are, of course, limits to the *Marleasing* principle. As the CJEU observed in Case C-268/06 *Impact* [2008] ECR I-2483, at para. 100, the *Marleasing* principle does not permit an interpretation of national law which is *contra legem.* In this context, it seems to me that s. 56 (1) is capable of being construed in a manner which is consistent with the 2009 Directive and which, at the same time, is not *contra legem.* While I acknowledge that the views of the authors of *Charlesworth & Percy on Negligence* quoted in para. 57 above may be somewhat uncommon in so far as they suggest that intentional conduct can constitute negligence, the fact that the authors of such an authoritative text have expressed such a view is nonetheless significant. It demonstrates that the word *"negligent"* is capable of being given a wide meaning. An added factor to be borne in mind is the point (discussed in para. 66 above) made by counsel for the plaintiff that s. 56 should be construed in a manner consistent with s. 57. I agree with counsel for the plaintiff that it is unlikely that the Oireachtas could have envisaged that s. 57 would only apply where a driver caused injury as a consequence of careless driving but not where a driver intentionally caused injury. Having regard to the principles of construction of statutes outlined by Walsh J. in *East Donegal,* the provisions of ss. 56 and 57 must be read, in so far as possible, in a consistent way. When this factor is added to the view expressed by *Charlesworth & Percy*, it seems to me that this provides a legitimate basis on which to construe the reference to *"negligent use"* in s. 56 (1) consistently

with the 2009 Directive so as to cover not only careless driving of a vehicle but also reckless driving and driving with intent to injure.

120. In turn, when one considers Clause 4.1.1. in light of the provisions and object of the 2009 Directive, it follows that it will likewise extend to cover liability for the injury done to the plaintiff as a consequence of the driving of the vehicle by the first named defendant in the manner described above on 16th June 2013. This conclusion is reinforced by a consideration of other aspects of the MIBI Agreement including the express recital therein that the agreement was specifically put in place to *"encompass"* the 2009 Directive and by the provisions of Clause 5 which are clearly intended to mirror certain of the terms of Article 13 of the 2009 Directive. In those circumstances, if I am wrong in my conclusion as to how s. 56 (1) should be interpreted in light of the 2009 Directive, it is not plausible to suggest that Clause 4.1.1 should be read by reference to how s. 56 might have been interpreted at the time it was initially enacted in 1961. It seems to me to be clear that the MIBI Agreement was intended to be consistent with the Directive and that, accordingly, the reference to s. 56 therein can only have been intended to encompass an interpretation of that section which accords with the Directive.

121. Even if I am wrong in adopting the approach set out in paras. 118 – 120 above, this cannot affect the liability of the MIBI. As a consequence of the decisions of the CJEU, the relevant provisions of the 2009 Directive plainly have direct effect and are enforceable directly against the MIBI. Moreover, as the decision in the *Workplace Relations Commission* case requires, I am obliged to apply the provisions of directly effective EU law where there is a conflict between those provisions and national law. In those circumstances, the plaintiff must succeed against the MIBI whether or not s. 56 (1) and Clause 4.1.1. can be interpreted in the manner suggested by me above.

Conclusion on liability

122. Having regard to the views expressed above, it follows that the MIBI is liable in respect of the injury sustained by the plaintiff as a consequence of the driving of an uninsured vehicle by the first named defendant on 16th June, 2013. In this context, I do not believe that this conclusion is affected in any way by the nature of the torts invoked in the Indorsement of Claim on the Personal Injuries Summons. While the torts invoked are confined to negligence, breach of duty and breach of statutory duty (including a breach of s. 53 of the 1961 Act which prohibits dangerous driving), the facts giving rise to liability are clearly spelled out. In those circumstances, I do not think that I need to concern myself with the question as to whether the plaintiff ought to have expressly pleaded a case against the first named defendant by reference to the torts of battery or trespass to the person or on the basis of some intentional tort. No one has been prejudiced by the way in which the case was pleaded. No one has identified any additional defence or advantage that might have been available to the defendants if the plaintiff had invoked a different tort. Moreover, although, as noted in para. 63 above, para. 3 (c) of the defence specifically pleaded that the incident did not constitute negligence or breach of duty, no pleading point was raised in the submissions made on behalf of the MIBI. The reality is that the first named defendant is plainly liable to the plaintiff for the injury suffered by him. In such circumstances, having regard to the provisions of Clause 4.1.1. of the MIBI Agreement, s. 56 of the 1961 Act and the 2009 Directive, the MIBI is required to step into the shoes of the first named defendant to indemnify the plaintiff.

123. Accordingly, in so far as liability is concerned, I will dismiss the appeal of the MIBI and affirm the decision of the learned Circuit Court Judge.

Assessment of damages

124. In light of my finding on liability, it is now necessary to assess damages. According to the medical reports before the court, the plaintiff was quite dazed and confused after the

incident. He had immediate pain in his left knee and found it difficult to walk. He was helped into his home by his brother-in-law. There was immediate swelling of his left knee and he was taken by ambulance to University Hospital in Galway where he underwent an X-ray and physical examination. This ruled out any underlying fracture. He was advised that he had suffered soft tissue injuries to the knee and that he could expect to have restriction of movement and function of the left knee together with pain for a number of weeks. He was not detained in hospital but was advised to attend his general practitioner. He subsequently attended Dr. Higgins six weeks after the accident. At that stage, he was found to have limitation in his left knee. He also described that he was unable to swim or exercise and that he had difficulty climbing stairs. He even found that walking caused some difficulty. He complained that the pain was *"quite bad"* at night and that in the intervening six weeks since the incident, he had experienced difficulty sleeping. He also complained that he had been very *"shook up"* after the incident and developed panic attacks and low mood in the following weeks. Dr. Higgins prescribed sleeping tablets and commenced him on an anti-depressant mirtazapine. At that point, Dr. Higgins considered that his symptoms should fully resolve within a period of a further six months.

125. When he was subsequently seen by Mr. Cormac Tansey on behalf of PIAB in August 2015, he was no longer taking any medication or pain killers but he still complained of flashbacks and what he described as *"flare-ups"* of his left knee from time to time which involved swelling of the knee. On a scale of ten, he rated discomfort at *"about 3 to 4 out of 10".* He also complained of discomfort going upstairs and when kneeling on the left knee.

126. On examination by Mr. Tansey, he was found to walk with a very slight limp but that there was a good range of motion in the left knee. He could perform a straight leg raise without any problems. There was no extensor lag. There was no spongy block to full

extension. Mr. Tansey described his left knee as *"stable"* but with some tenderness over the medial patellofemoral joint.

127. Mr. Tansey expressed the opinion that, while the plaintiff had some ongoing symptoms in his left knee, these should improve and that he would benefit from physiotherapy. Mr. Tansey also expressed the view that he was hopeful that the symptoms then experienced by the plaintiff would gradually settle down but that, due to the nature of the impact, he may have some ongoing symptoms in relation to his left knee into the future.

128. Mr. Tansey also expressed the opinion that the *"significant psychological impact of this incident and worry about similar incidents in the future should not be underestimated and, in my opinion, this is having the most significant impact on him at the present time".*

129. Thereafter, the plaintiff was seen by Dr. Kareena Meehan, consultant psychiatrist, on 2nd September, 2015. At that point, his main complaint was an ongoing *"feeling of unease that his son-in-law, now divorced from his daughter might come back and attack him again".* He complained of nightmares, sweats and occasional episodes of bed wetting. Dr. Meehan noted that he had not received any counselling and she recommended that such counselling should take place. She suggested that the plaintiff should make a full recovery within six months if he attended such counselling. She expressed the view that a full recovery should be expected.

130. In his own evidence, the plaintiff confirmed that, by the end of 2015, he had recovered. He had no ongoing complaints either of a physical or a psychological kind. In the circumstances, the assessment of damages is confined to the pain and suffering sustained by the plaintiff in the past.

131. On the basis of the agreed medical evidence, it is clear that the plaintiff sustained both a physical injury to his left knee and also a psychological injury. Insofar as the physical injury to the knee is concerned, there was obviously a period of significant pain and

discomfort in the weeks immediately after the incident. Thereafter, as appears from the report of Mr. Tansey, the pain appears to have been intermittent but nonetheless troubling on occasion (such as when the plaintiff had to kneel on his left knee). It is also clear that the plaintiff was unable to carry out any form of strenuous exercise in the period after the incident. However, by the end of 2015, the plaintiff's physical symptoms had resolved. Furthermore, there was no bony injury and no evidence of any long term damage. In those circumstances, it seems to me that the injury sustained by the plaintiff to his knee falls within the moderate category described in the Book of Quantum published by PIAB which describes injuries to the knee that are characterised by *"obvious swelling, extensive bruising, pain and reduced function of the knee joint and leg with a full recovery expected".* The range of values contained in the Book of Quantum run from €16,900 to €23,400. In my view, having regard to the nature of the injury sustained here and the fact that there was still some difficulty experienced by the plaintiff in 2015 more than two years after the incident, it seems to me that the appropriate measure of damages in respect of the pain and suffering sustained by the plaintiff as a consequence of this physical injury is €20,500.

132. With regard to the psychological injury sustained by the plaintiff, it is quite clear on the basis of the agreed medical evidence that the plaintiff had significant psychological difficulties after the incident and was still experiencing some level of such difficulties in 2015. The psychological effects were clearly very unpleasant and it is striking that Mr. Tansey (who is not himself a psychiatrist) highlighted them in his report. In the circumstances, it seems to me that an appropriate award of damages for the psychological pain and suffering sustained by the plaintiff in the period from June 2013 to the end of 2015 is the sum of €15,000. On that basis, the total award of damages for pain and suffering to the plaintiff will be €35,500.

133. I was not informed of any special damages sustained by the plaintiff and in those circumstances the total award to be made to the plaintiff is €35,500.

The order to be made

134. The appeal of the MIBI is accordingly dismissed. I affirm the findings of the learned Circuit Court judge on liability. Damages are assessed as aforesaid at €35,500. There will be judgment for that sum. In the event of a dispute as to costs, I will invite the parties to submit their observations in relation to costs by email addressed to the County Registrar within 14 days from today following which I will give a written ruling on costs. I should make clear, however, that it is difficult to see why costs should not follow the event in the usual way and, if the order for costs can be agreed between the parties, the County Registrar should be so informed by email within 14 days from today.