State liability: betwixt & between Brexit (Pt 1)

In his latest *NLJ* mini-series, Nicholas Bevan explains why the ECJ ruling in *Farrell 2* opens up hundreds of new claims for accident victims wrongly excluded from cover by defective UK law

IN BRIEF

- The direct effect of Directives is widened.
- Directives can be invoked as though set out in statutory form.
- MIB directly liable for gaps in the Road Traffic Act 1988.

The European Court of Justice (ECJ)'s ruling in *Farrell v Whitty, Minister for the Environment and others* [2017] EUECJ C-413/15 (*Farrell 2*) is the most important ruling on state liability for over a quarter century. Its impact extends beyond the Motor Insurance Directives it addresses. Its effect is to extend the range of organisations that are capable of being pinned with a direct liability to compensate individuals adversely affected by a state's failure to implement a Directive.

Farrell 2 explains how national courts should apply the bundle of criteria (set out in paras [18] to [20] of *Foster v British Gas* [1990] (Case C-188/89) that are indicative of organisations so closely associated with the state that they are be fixed with the direct effect of the provisions of a directive. It also clears the way for motor accident victims to seek redress directly from the Motor Insurers' Bureau (MIB) by relying exclusively on European Union (EU) law, independently of the complex and sometimes conflicting provisions of Pt VI of the Road Traffic Act 1988; the European Communities Rights Against Insurers Regulations 2002; the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 and / or the MIB's private law agreements with the Secretary of State for Transport set out in four concurrent schemes.

The MIBs liability stems from the assumption of its role in discharging the state's obligations under Arts 10 and 24 of Directive 2009/103/EC On Motor Insurance (the Directive). These require every member state to set up or authorise a body responsible for guaranteeing the compensatory entitlement of victims of uninsured or unidentified motor vehicles in accidents at home and abroad in the EU. *Farrell 2* is a game changer: it equips claimants with a new right of action. This empowers private individuals to seek compensatory redress for gaps in the government's implementation of the Directive by invoking the wording of its provisions to enforce the rights so conferred against the MIB; as though they were fully transcribed into a statute.

Perfect timing

The timing of this ruling seems particularly apposite, as it addresses an emerging problem that stems from the Prime Minister's decision to trigger Art 50. The UK's notice to quit has placed the UK into a liminal state where it remains a full member of the EU (and, subject to the primacy of EU law) but where the influence of the latter is already on the wane due to the prospect of Brexit.

This phenomenon is particularly acute in the field of motor insurance, where successive governments have failed to bring our national law provision into line with the minimum standard of the compensatory guarantee prescribed by Art 3 of the Directive (see 'On the Right Road?' *NLJ*, Pts 1 to 4; 163 *NLJ* 94, 163 *NLJ* 130, 163 *NLJ* 160, 163 *NLJ* 193).

This disparity is the subject of a wide-ranging judicial review in R (on the application of *RoadPeace v Secretary of State for Transport*, that was heard in mid-February. Subsequent rulings from the Court of Justice have confirmed many of its grounds. The Government has even publicly conceded some points. For example, it admits that s of the 145 Road Traffic Act 1988 wrongly excludes private land from compulsory cover. Yet it has played every trick in the book to delay implementing the necessary reforms, including launching a consultation exercise on *Damijan Vnuk* launched more than two years after that ruling exposed its systemic default.

This ambiguous approach both to the UK's treaty obligations and to the rule of law can be seen elsewhere, (see 'Catching An Ebbing Tide', *NLJ*, 9 June 2017), that considers the Supreme Court's refusal to engage with the clear and obvious conflicts of EU law with the Road Traffic Act 1988. Even the judgment in *RoadPeace* is unaccountably delayed.

So a ruling that enables accident victims to avoid these institutional obstructions to their legal rights is good news.

In this first of two articles, the focus is on the wider implications of *Farrell 2*. The second article will feature the case facts and consider the MIB's new and extensive liability for the government's failure to implement the Directive, before addressing various procedural matters.

The broader issue

As explained in 'Putting Wrongs to Rights '(Pt 1), Directives are not intended to have direct effect. They cannot be invoked in claims between private individuals. Citizens must usually depend on their state to implement a directive's legislative objective into national law before they can invoke the rights intended to be conferred by the directive.

However, the ECJ has perforce developed

an exception to the rule against direct effect. The rationale is set out in pragmatic terms in *Ursula Becker v Finanzamt* Münster-*Innenstadt* [1982] CJEU (Case 8/81) as follows: '…in cases in which the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court ….' (para [23]).

The initial intention was to confine this exception to instances where '…the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise…' (ibid, para [24]) and to their being invoked against the state.

Becker effectively introduces a two-stage test. The first, looks to the directive to be invoked. The rights conferred must be set in sufficiently clear and absolute terms. The second stage looks to the circumstances in which the exception can be invoked. Paragraph 24 anticipates the doctrine of EU law consistent construction, most recently expounded in *Bernhard Pfeiffer and others*, [2004] EU:C:2004:584 C-397/01 to C-403/01 as well as state liability as expounded in *Francovich and others* [1991] ECR I 5357 C 6/90 and C 9/90.

It was not long before the second scenario, of state liability, was extended to embrace organisations and public bodies that are not obviously part of central government. For example, in *Marshall* [1986], EU:C:1986:84 Case 152/84 a claimant successfully invoked the provisions of the Equal Treatment Directive 76/207 against a public-sector hospital.

In *Foster v British Gas* [1990], EU:C:1990:313 Case C-188/89, a claimant successfully invoked the same directive against a wholly state owned public utility company. After restating *Becker's* rationale, the court set out its conclusions thus: '[18] On the basis of those considerations, the Court has held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organizations or bodies which were subject to the authority or control of the State **or** had special powers beyond those which result from the normal rules applicable to relations between individuals.' (Emphasis added.)

The court then lists a number of examples where direct effect has applied, including the tax authority in *Becker*, as well as the public hospital in *Marshall*. It then proceeded to applied this principle to case before it: '[20] It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State **and** has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.' (Emphasis added.)

A careful reading of paras [18] and [20] reveals that while the former lists factors adjudged to be consistent with direct effect (as alternatives); the latter appears to prescribe a test with three cumulative criteria.

A wrong turning

In *Byrne v MIB and anor* [2007] EWHC 1268 (QB) Mr Justice Flaux applied the triple factors in para [20] of *Foster* strictly, as though they were a statutorily imposed conjunctive requirement, and without proper regard to the rationale justifying direct effect. He held that because the MIB was not an emanation of the state it was not bound by the direct effect of the Motor Insurance Directives. His findings were criticised by this author in 'On The Right Road?' Pt 3, *NLJ,* 15 February 2013, and again in 'Putting Wrongs To Rights', *NLJ*, Pt 2, 3 June 2016. These views are vindicated by *Farrell 2*.

> *"Farrell 2 is a game changer: it equips claimants with a new right of action"*

Farrell 2

This ruling was made in the context of a reference from the Irish Supreme Court featuring the same directives but against Motor Insurance Bureau of Ireland (MIBI). The ECJ has clarified how its earlier ruling in *Foster* should be applied:

- Paragraph 20 in *Foster* is to be read in the light of para 18 and the factors listed there are alternative scenarios. If one of the factors is not present that does not in itself preclude direct effect.
- When determining whether an individual can invoke a directive against an organisation not obviously part of central government the national courts should be guided by the policy considerations set out above, in *Becker* and *Marshall*.

Farrell 2 provides its own gloss: 'organisations or bodies which are subject to the authority or control of the State or which possess special powers beyond those which result from the normal rules applicable to relations between individuals' … 'can be distinguished from individuals and must be treated as comparable to the State, either because they are legal persons governed by public law that are part of the State in the broad sense, or because they are subject to the authority or control of a public body, or because they have been required, by such a body, to perform a task in the public interest and have been given, for that purpose, such special powers,' (para [34]). 'Accordingly, a body or an organisation, even one governed by private law, to which a Member State has delegated the performance of a task in the public interest and which possesses for that purpose special powers beyond those which result from the normal rules applicable to relations between individuals is one against which the provisions of a directive that have direct effect may be relied upon,' (para [35]).

Conclusions

Leaving to one side the specific findings relevant to the MIBI or the MIB, the following wider points are worth emphasising. First, the court has consistently refrained from formulating an abstract test for direct effect. It even avoids shorthand terms such as 'emanation of the state'. *Farrell 2* mandates a purposive approach to deciding whether an organisation is caught by the direct effect of a Directive: one informed by the policy rationale in *Becker.*

Second, consequently, the various criteria (both those listed in paras [18] and [20] of *Foster* and in paras [34] and [35] of *Farrell 2*) are no more than bundles of factors that the ECJ has ruled to be consistent with the proper application of this special rule. They are indicative; not prescriptive.

Third, direct effect under *Foster/Farrrell 2* principles applies where the rights invoked under a directive have not been implemented at all. If there has been an incomplete attempt at implementation then a consistent construction should be resorted to first.

Fourth, an action based on *Foster/Farrell 2* principles remains a private law action despite being a manifestation of direct vertical effect. Accordingly, the litigation risks associated with a *Francovich* action do not apply.

Farrell 2 has the potential to expose many more private organisations to a derivative liability to compensate individuals affected by the state's failure to implement a right intended to be conferred under a directive. The liability is a vicarious one in that it is justified by policy considerations as opposed to any failing on the defendant's part. This EU law remedy will probably lapse into obsolescence on Brexit. However, this judgment and Advocate General Sharpston's opinion is required reading for all litigators. **NLJ**

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