From British Gas to Irish insurance – how the UK courts have been wrong about the status of the Motor Insurers’ Bureau for twenty years (or why the word “or” is important in ECJ judgments)

Farrell v Whitty [2017] EUJC C-413/15

The European Court of Justice’s ruling in Farrell, a case referred by the Supreme Court of Ireland, has effectively brought down the curtain on two decades of argument about the status of the MIB in this jurisdiction. The dispute was whether it was purely a private body, or whether it was effectively part of the state. Could victims of uninsured drivers claim against the Motor Insurers’ Bureau (MIB) in cases where European directives on the scope of motor insurance had been inadequately implemented into UK law? Or did a victim had to sue the state in a Francovich action for damages for breach of the state’s duty under European law to implement the directive correctly? Until Farrell, the courts in this country had found in favour of the MIB being a private body, not “an emanation of the state”, and so the terms of the directives could not be relied upon against it by victims.

Whether a MIB-type body was purely private or an emanation of the state had been a vexed question in this jurisdiction, as well as in Ireland, for many years. In deciding that the victim can rely on the terms of the insurance directives against the Motor Insurers’ Bureau of Ireland (MIBI), the ECJ has made life simpler and easier for victims since they do not have to bring a Francovich claim against the state. Furthermore, the ECJ’s decision that MIBI is an emanation of the state is given in terms that make it very difficult to see that there could be any different answer in this country for our MIB.

So a victim no longer has to risk losing in the MIB claim (with the associated delay and costs) and no longer has to run the risk in a Francovich action of failing to prove that the state’s breach was sufficiently serious to sound in damages, leaving the claimant wholly uncompensated.

How did we get here, and why was it ever thought that a state-backed compensation body required to exist by European law was not an “emanation of the state”?

First, a little reminder of European law principles, which (for the time being, at least) are central to the issues here. Under the EU Treaty, member states have to transpose EU directives into national legislation. If they fail to do so
correctly, or if they fail to do so within the prescribed time, they are in breach of their obligation. Once a directive has been transposed into national law, people can rely on their rights under the national law. However, if the directive has not been transposed by the required date, or if it has been inaccurately transposed, people can rely on the terms of the directive itself as against the member state, and against any entity that is an “emanation of the state”.

The logic is that it ill-behoves the state, in its various guises and capacities, to rely on its own failure to comply with European law to deny a litigant the rights that he or she would have had under national law if the state had implemented the directive. This is so whether the entity in question had any personal or corporate blame for the failure of the state to comply with European law – so a county council, for example, cannot be blamed for a government not introducing legislation, or for Parliament not passing legislation, but it is an “emanation of the state” and so a litigant can rely on unimplemented directives to bridge the gap in the national law.

Purely private entities who are defending a claim from another private litigant based on a directive are allowed to rely on the provisions of national law even if that does not properly implement a European directive, since directives do not have “direct effect” as between private litigants – in such circumstances, the claimant would lose against the private entity and would have then to sue the state in a Francovich claim for damages for failing to comply with its European law obligation to transpose the directive into national law correctly and within the required timescale.

So what happened to Elaine Farrell?

Nearly twenty-two years ago, in January 1996, a drunk and uninsured driver (Whitty) drove his van at speed on a twisty road and crashed in Tallaght, Dublin. Four passengers were sitting in the rear of the van, not in seats but sitting unrestrained in the goods compartment. One of them, Ann Marie Farrell, was killed. Her sister, Elaine, was injured and sought compensation from MIBI. Under Irish law at the time, there was in fact no obligation for a driver to have insurance to cover passengers in a part of the vehicle that was not designed and constructed with seating accommodation, and so MIBI was under no liability under Irish law to compensate her. The question then arose as to whether Ireland had complied with its obligations under the various European directives relating to compulsory motor insurance. On a first reference of Elaine’s case to the European Court of Justice, it was held that Ireland had not complied – national law should have required passengers in the goods compartment to be covered by insurance.

As Ireland was in breach of European law to ensure that the scope of compulsory insurance (and therefore MIBI’s obligations in cases of uninsured drivers) gave her proper compensation, Elaine Farrell received an undisclosed settlement, and she dropped out of the litigation, which then became a straight fight between the Irish state and MIBI as to who had to pay her. This depended on whether MIBI was an “emanation of the state” in European law – whether someone in Elaine’s position could rely on the principle of direct effect against MIBI, or had to sue the state under Francovich.

What’s the statutory position?

The Irish legislative position is that, by s.78 of the Road Traffic Act 1961, no-one can provide motor insurance within Ireland unless they are members of MIBI. Under UK law, a policy of motor insurance can only be issued by an “authorised” insurer, where “authorised” means being a member of the MIB (section 145 and 95 of the Road Traffic Act 1988). So, in both countries, membership of MIBI/MIB is a statutory pre-requisite to being allowed to operate in the motor insurance field. Furthermore, the directives required member states to set up or authorise a body to compensate victims of uninsured or untraced drivers, subject to certain exceptions – in other words, if MIBI/MIB did not exist, then they would have to be invented.

What have the courts in this country said?

Back in 1998, the Court of Appeal of England and Wales considered the combined cases of Mighell v Reading, Evans v MIB and White v White [1999] PIQR P101. (As it happens, I was second junior counsel to the MIB at first instance in Mighell for the European law arguments – for a (very) nominal brief fee as I was still a pupil – but sadly my services were not required for the multi-handed trip to the Court of Appeal). One of the issues on the appeal was whether the MIB was an emanation of the state – Gage J in Mighell and HHJ Potter in White having decided that it was (and having been vindicated by the ECJ twenty years later).
Schiemann LJ (later to become the UK’s judge at the ECJ, incidentally) said that they had erred in taking the view that since the MIB had been effectively nominated by the state to carry out this task then the directive could be regarded as having direct effect. He said, relying on an ECJ decision called Wagner Miret, that it was wrong to base a decision on direct effect on what had been done in a particular member state to implement the directive, since it was open to the UK government to fulfil its obligations with or without the MIB. Neither he nor Swinton Thomas LJ found it necessary to reach a decision on the question of the MIB being an “emanation of the state”.

The only member of the Court of Appeal to reach a decision on that, albeit obiter, was Hobhouse LJ. He said that it was not – the MIB was a private law entity, and while it had a statutory position as noted already, the MIB predated the UK’s membership of the EU and the directives. It acted on its own behalf in the commercial interests of its members, not as a delegate of the state or on the state’s behalf, and it assumed private law contractual obligations with the Secretary of State.

Was that the last word here?

No. In Byrne v MIB [2007] EWHC 1268 (QB), Flaux J revisited the issue. The claimant argued, and he accepted, that European law had moved on from Wagner Miret and that the relevant directive could have direct effect since the UK had designated the MIB as the body for implementing the directive. However, he said that the MIB was not an emanation of the state. He looked at the conditions laid down by the ECJ in Foster v British Gas for deciding if an entity was an “emanation of the state” – “namely (i) that it performs a public service (ii) under the control of the state and (iii) it has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.” Emphasis added to “and”, for reasons that become apparent later.

Flaux J said that providing compensation to victims of uninsured drivers was a public service, but there was no state control of the way that the MIB carried out its functions, nor were there any special powers – the Road Traffic Act provision did not give powers to the MIB.

Was that the last word here?

Nearly. Less than 3 months after Byrne, a circuit judge in Canterbury CC referred questions arising in a credit hire dispute involved an uninsured driver to the ECJ, including the question of direct effect and emanation of the state (McCall v Poulton). The MIB appealed the decision to refer, but by the time the Court of Appeal considered it, the High Court of Ireland in Elaine Farrell’s case had decided that MIBI was an emanation of the state (as we shall see in a moment). As Waller LJ said, “It is difficult to think that a body such as the MIB or its equivalent should be an emanation of the state in one member country and not in another.” The decision to refer was upheld, but the case was settled and so accordingly the ECJ never got to rule on the reference.

So why did the High Court in Ireland decide that MIBI was an emanation of the state?

The judge in Elaine Farrell’s case (Birmingham J.) noted that Advocate General Stix-Hackl on the first reference of Farrell had agreed with the European Commission’s stance that that MIBI could be put on the same footing as the Irish state such that the relevant provisions of the directive could be directly enforced against it, but he noted that the ECJ reached no concluded view. He said that the ECJ had moved away from a rigid interpretation of the criteria in Foster v British Gas – the emphasis now appeared to be on whether the body had been given responsibility for providing a public service.

He did not agree with Flaux J’s “checklist” approach to Foster and said that other cases in the Court of Appeal in England and Wales had made it clear that a body could be an emanation of the state without being under state control. In the end, the Foster approach was one way, but not the only way, of showing that a body was an emanation of the state, since Foster itself said that a body with the three attributes mentioned above (public service, control of the state, special powers) “is included in any event” among those against whom directives have direct effect – i.e. the test was not an exhaustive definition.

He said that MIBI performed the functions of a body authorised under the relevant part of the directive, and it was irrelevant that MIBI predated the directives or Ireland’s membership of the EU, or that the authorisation came by agreement not statute. The state had control of the requirements of insurance that MIBI had to cover when insurance was absent, and the statutory basis of MIBI membership for participation in the Irish motor insurance
market showed that it was not a typical private body entering obligations voluntarily.

One added feature, not found in the UK MIB agreement, was that in some circumstances where there was a dispute between a claimant and MIBI, the relevant government minister could decide the issue. For these and other reasons, MIBI was “in substance, if not in form, a quasi-State claims agency giving effect to an important aspect of public social policy”, and was an emanation of the State. Even if the Foster three-part test had to be applied rigidly, he would have reached the same result and the opposite conclusion to Flaux J.

And what has the ECJ now said?

MiBI appealed to the Supreme Court of Ireland, which referred the case to the ECJ. In its ruling, the ECJ has looked again at Foster. It noted that in paragraph 18 of that decision, it had talked about “organisations or bodies which were subject to the authority or control of the State or had special powers” (my emphasis – can you spot the point?). It said that the tripartite test (the one relied on by Flaux J) used the words “is included in any event” – as Birmingham J had noted – to show that it was not an exhaustive test for finding emanations of the state. So therefore, said the ECJ, direct effect was possible against a body that did not have all the characteristics of the tripartite test.

Turning to the specific position of MiBI, it said that such compensation bodies undertook a task in the public interest that was inherent in the obligation imposed on member states by the directive; and Irish legislation making membership of MiBI compulsory for all insurers carrying on motor insurance in the country meant that MiBI had “special powers”, since it was then a private organisation that had the power to require insurers to become members of it and to contribute funds for the performance of the task imposed upon it. Therefore the directive could be relied upon directly against MiBI.

Nothing was said about whether MiBI was or was not under the control of the state – once the public interest role was established, it was clearly enough for the ECJ that MiBI had these special powers under statute.

So is there any distinction between the MIB and MiBI?

None that is immediately obvious. The public interest point is the same. The legislative wording used to require all motor insurers to belong to the MIB is not the same as that used in Ireland, but the net effect is the same – all motor insurers in the UK have to be members of the MIB and to fund its compensatory role. The presence of any state control is not required, so any differences between the relationship of state and compensatory body in Ireland and in the UK are immaterial to the end result.

What does this mean for litigants?

In the vast majority of cases, it will make no difference. Where the claim is within the MIB agreement, there is no issue. It is only where the claim is outside the MIB agreement but it is arguable that the claim is within the wording of the relevant insurance directive that there is a change. In these rare cases, the claimant can sue the MIB under the agreement and, as a fall-back, sue the MIB under the directive, rather than having to sue the state in a parallel or successive Francovich claim.

The other important messages are that “or” and “and” do not mean the same thing – a point that even as experienced a lawyer as Flaux J missed in Byrne – and that ECJ judgments must be read very carefully.