

CHAPTER SIX
LIABILITY NOT BASED ON CONDUCT

6.2. LIABILITY FOR ACCIDENTS

6.2.1. ROAD TRAFFIC ACCIDENTS

6.2.1.D. EUROPEAN LAW

Introductory Note

So far there are no treaties that harmonize the substantive law relating to liability for motor vehicle accidents.¹ However, there is a European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles of 20 April 1959 which came into force on 22 September 1969.² But the practical effect of that Convention remains limited, as it has been ratified by five countries only.³ In any event, it has been overtaken by the EC Directives which are reprinted below.⁴

Directive 72/166 of 24 April 1972⁵ **6.EC.21.-23.**
relating to insurance against civil liability in respect of the use of motor vehicles and to the enforcement of the obligation to insure against such liability
and
Second Directive 84/5 of 30 December 1983⁶
relating to insurance against civil liability in respect of the use of motor vehicles

¹ The European Convention on Civil Liability for Damage caused by Motor Vehicles of 14 May 1973, ETS No. 79, has not yet been ratified by a sufficient number of States to enter into force. See von Bar I at 394, para. 378.

² ETS No. 29, 720 UNTS 119.

³ Austria, Denmark, Germany, Greece, Norway and Sweden.

⁴ See also the Convention on the Law Applicable to Traffic Accidents (1970), Actes et documents de la Onzième session, Vol. III, 193, which is a product of the Hague Conference on Private International Law.

⁵ [1972] OJ L 103/2, as amended by Directive 72/430 of 19 December 1972, [1972] OJ L 291/162, as well as by Directive 84/15 and Directive 90/232, *infra*, **6.EC.22.-23.**

⁶ [1983] OJ L 8/17, as amended by the Act of Accession of Spain and Portugal, [1985] OJ L 302/23 and by Directive 90/232, *infra*, **6.EC.23.**

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and

*Third Directive 90/232 of 14 May 1990⁷**relating to insurance against civil liability in respect of the use of motor vehicles***A. Directive 72/166****6.EC.21.**

Article 1. For the purposes of this Directive:

1. 'vehicle' means any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled;
2. 'injured party' means any person entitled to compensation in respect of any loss or injury caused by vehicles;...
4. 'territory in which the vehicle is normally based' means
 - the territory of the State in which the vehicle is registered;...

Article 2. 1. Member States shall refrain from making checks on insurance against civil liability in respect of vehicles normally based in the territory of another Member State.

Likewise, Member States shall refrain from making such insurance checks on vehicles normally based in the territory of a third country entering their territory from the territory of another Member State. Member States may, however carry out random checks...

Article 3. 1. Each Member State shall, subject to Article 4, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures.

2. Each Member State shall take all appropriate measures to ensure that the contract of insurance also covers:

- according to the law in force in other Member States, any loss or injury which is caused in the territory of those States;
- any loss or injury suffered by nationals of Member States during a direct journey between two territories in which the Treaty establishing the European Economic Community is in force, if there is no national insurers' bureau responsible for the territory which is being crossed; in that case, the loss or injury shall be covered in accordance with the internal laws on compulsory insurance in force in the Member State in whose territory the vehicle is normally based...

Article 7. 1. Every vehicle normally based in the territory of a third country or in the non-European territory of a Member State must, before entering the territory in which the Treaty establishing the European Economic Community is in force, be provided either with a valid green card or with a certificate of frontier insurance establishing that the vehicle is insured..."

⁷ [1990] OJ L 129/33.

B. Directive 84/5

6.EC.22.

Article 1. 1. The insurance referred to in Article 3 (1) of Directive 72/166/EEC shall cover compulsorily both damage to property and personal injuries.

2. Without prejudice to any higher guarantees which Member States may lay down, each Member State shall require that the amounts for which such insurance is compulsory are at least:

- in the case of personal injury, 350,000 ECU where there is only one victim; where more than one victim is involved in a single claim, this amount shall be multiplied by the number of victims,
- in the case of damage to property 100,000 ECU per claim, whatever the number of victims.

Member States may, in place of the above minimum amounts, provide for a minimum amount of 500,000 ECU for personal injury where more than one victim is involved in a single claim or, in the case of personal injury and damage to property, a minimum overall amount of 600,000 ECU per claim whatever the number of victims or the nature of the damage...

4. Each Member State shall set up or authorize a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied... However, Member States may not allow the body to make the payment of compensation conditional on the victim's establishing in any way that the person liable is unable or refuses to pay. [last sentence added by Directive 90/232, Art. 3]

However, Member States may exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured.

Member States may limit or exclude the payment of compensation by that body in the event of damage to property by an unidentified vehicle.

They may also authorize, in the case of damage to property caused by an uninsured vehicle an excess of not more than 500 ECU for which the victim may be responsible...

Article 2. 1. Each Member State shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3 (1) of Directive 72/166/EEC, which excludes from insurance the use or driving of vehicles by:

- persons who do not have express or implied authorization thereto, or
- persons who do not hold a licence permitting them to drive the vehicle concerned, or
- persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned,

shall, for the purposes of Article 3 (1) of Directive 72/166/EEC, be deemed to be void in respect of claims by third parties who have been victims of an accident.

However, the provision or clause referred to in the first indent may be invoked against persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen.

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Member States shall have the option — in the case of accidents occurring on their territory — of not applying the provision in the first subparagraph if and in so far as the victim may obtain compensation for the damage suffered from a social security body.

2. In the case of vehicles stolen or obtained by violence, Member States may lay down that the body specified in Article 1 (4) will pay compensation instead of the insurer under the conditions set out in paragraph 1 of this Article; where the vehicle is normally based in another Member State, that body can make no claim against any body in that Member State.

The Member States which, in the case of vehicles stolen or obtained by violence, provide that the body referred to in Article 1 (4) shall pay compensation, may fix in respect of damage to property an excess of not more than 250 ECU for which the victim may be responsible.

Article 3. The members of the family of the insured person, driver or any other person who is liable under civil law in the event of an accident, and whose liability is covered by the insurance referred to in Article 1(1) shall not be excluded from insurance in respect of their personal injuries of that relationship...

C. Directive 90/232

6.EC.23.

Article 1. Without prejudice to the second subparagraph of Article 2(1) of Directive 84/5/EEC, the insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle.

For the purposes of this Directive, the meaning of the term 'vehicle' is as defined in Article 1 of Directive 72/166/EEC.

Article 2. Member States shall take the necessary steps to ensure that all compulsory insurance policies against civil liability arising out of the use of vehicles:

- cover, on the basis of a single premium, the entire territory of the Community, and
- guarantee, on the basis of the same single premium, in each Member State, the cover required by its law or the cover required by the law of the Member State where the vehicle is normally based when that cover is higher...

Article 5. 1. Member States shall adopt the necessary measures to ensure that the parties involved in a road traffic accident are able to ascertain promptly the identity of the insurance undertaking covering the liability arising out of the use of any motor vehicle involved in the accident..."

Notes

(1) The first steps towards harmonization of compulsory motor vehicle insurance were taken with Directive 72/166, which at Art. 3 requires all Member States to introduce compulsory insurance for civil liability in respect of the use of vehicles (as

defined in Art. 1(1)).⁸ Subsequent Directives defined the forms of loss or injury to be insured against and the drivers to be covered, as well as the classes of injured persons to be protected.⁹

The Directives are based on mutual recognition: Member States must recognize the insurance policies issued in the Member State where the vehicle is normally based, i.e. where its licence plate has been lawfully issued.¹⁰ Art. 2 of Directive 90/232 carries that idea to its logical conclusion by providing for a “single insurance policy”, whereby Member States must ensure that compulsory insurance policies cover the entire EC territory on the basis of a single premium, with a level of cover for each Member State corresponding to the domestic law requirements of either the Member State in question or the Member State where the vehicle is normally based, whichever is higher.

(2) The Directives do not specify which risks must be covered by compulsory insurance. Art. 3(1) of Directive 79/166 states only that the terms and conditions of the compulsory insurance are to be determined by Member States, thus raising the issue of whether policies may contain terms that limit the insurer’s liability towards third-party victims in particular circumstances. Such was the situation in *Ruiz-Bernaldez*, where the insurance policy did not extend to damage arising from drunken driving; in its judgment of 28 March 1996, the ECJ held that “Art. 3(1) of [Directive 72/166/EEC] 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”.¹¹ In order to reach that conclusion, the ECJ relied on the aim of the Directives, which is to provide protection to third party victims in respect of personal injury and damage to property at least up to the amounts specified in Art. 1(2) of Directive 84/5.¹² Accordingly, the Court held that the exclusion for intoxicated drivers was not permissible.

The judgment does not prevent insurers from incorporating exclusion clauses in their policies, but it prevents the enforcement of such clauses as regards third-party liability

⁸ For a brief description of the state of the law before and after Directive 72/166 and the role played by the Green Card referred to in Art. 6 and 7 of Directive 72/166, see the Opinion of Advocate-General Jacobs in Case C-73/89, *Fournier v. van Werven* [1992] ECR I-5640 at para. 6-12.

⁹ See Art. 1(1) and (2) and Art. 2(1) of Directive 84/5, and Art. 1 of Directive 90/232 in conjunction with Art. 3 of Directive 84/5. See further R. Merkin and A. Rodger, *EC Insurance Law* (London: Longman, 1997) at 55-56 and 63-65.

¹⁰ Art. 1(4) of Directive 72/166, as interpreted by the ECJ in Judgment of 9 February 1984, Case 344/82, *Gambetta Auto v. Bureau central français* [1984] ECR 591; Judgment of 9 February 1984, Case 64/83, *Bureau central français v. Fonds de Garantie Automobile* [1984] ECR 689; Judgment of 12 November 1992, Case C-73/89, *Fournier v. van Werven* [1992] ECR I-5621.

¹¹ ECJ, Judgment of 28 March 1996, Case C-129/94, *Ruiz Bernaldez* [1996] ECR I-1829 at para. 20.

¹² *Ibid.* at para. 18.

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within the scope of the Directives.¹³ Such a clause then remains operative so far as the assured is concerned (it may confer upon the insurer a right of recourse against the assured) and in relation to damage suffered by third parties beyond the monetary limits of compulsory insurance.

(3) The Directives do not give victims a direct right of action against insurers.¹⁴ The Directives “operate on the assumption that, if the victim obtains judgment against the assured, the insurer will indemnify the assured who will in turn pay the insurance moneys to the victim” with ensuing problems when the assured becomes insolvent.¹⁵ Many national laws, however, grant such a direct right of action to the victim. Art. 5 of Directive 90/232 facilitates the exercise of such right by obliging the Member States to enable victims to ascertain promptly the identity of the insurer. In a proposal for what would be a Fourth Directive, the Commission suggested the introduction throughout the EU of such a direct right of action.¹⁶

(4) Art. 1(4) of Directive 84/5 requires Member States to entrust an organization with the task of providing compensation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle that is not insured in accordance with the insurance obligation, at least up to the amounts that must be covered by compulsory insurance.¹⁷

¹³ R. Merkin and A. Rodger, *EC Insurance Law* (London: Longman, 1997) at 60.

¹⁴ Such a direct right of action is provided in Annex I, Art. 6(1) of the European Convention of 20 April 1959 referred to *supra*, 6.2.1.D., Introductory Note.

¹⁵ R. Merkin and A. Rodger, *EC Insurance Law* (London: Longman, 1997) at 67.

¹⁶ *Proposal for Fourth Directive on Motor Vehicle Insurance*, COM(97)510final.

¹⁷ R. Merkin and A. Rodger, *EC Insurance Law* (London: Longman, 1997) at 68-71.