CRASH TEST

Richard Edwards questions the logic of a recent Court of Appeal ruling on insured passenger victims

Many readers will already be familiar with the *Benjamin Wilkinson v Churchill Insurance* litigation on the interpretation of compulsory insurance obligations under the Road Traffic Act 1988.

Its recent settlement before a scheduled Supreme Court hearing - following an almost Sisyphean-like struggle - brings the opportunity to review its history, and the significant implications for RTA insurers and claimants. The outcome shows the tension between English and European motor insurance arrangements, which will continue unless the UK adopts a 'vehicle-based' system. With respect, I suggest that the Court of Appeal's approach, which represents English law for now, is flawed and will lead to further uncertainty and litigation.

Background

On 23 November 2005, Ben Wilkinson allowed his friend Mr Fitzgerald (F) to drive his car, with himself and another as passengers. F had been drinking. Ben was a named driver, although the policy holder for the vehicle was his mother. Ben knew F was not insured under his own policy, although he alleged that he had previously told him he had separate insurance (a fact denied by F). Sadly, F lost control of the vehicle and collided with another car. Ben suffered a severe brain injury.

Ben commenced proceedings and obtained judgment against F with permission for his own insurers, Churchill, to raise contributory negligence, it being alleged that he knew or should have known F had been drinking alcohol. On 17 July 2008, a preliminary trial was ordered to determine whether Churchill were required to indemnify F, and if it had any right to recover any sum awarded to Ben under s.151(8) of The Road Traffic Act 1988 (RTA).

EU Legislation

Turning to the statutory framework in place, the First, Second and Third EU Motor Insurance Directives have now been consolidated by Directive 2009/103/EC ('the 2009 Directive').

The Directives set out to ensure the free movement of vehicles normally based on EU territory, and of persons travelling in them. They seek to guarantee that the victims of accidents caused by such vehicles receive comparable treatment irrespective of where in the EU the accident has occurred. In addition, they look to protect potential victims who are motor vehicle passengers, by closing gaps in compulsory motor insurance cover that exist in certain Member States. Article 3 of the 2009 Directive obliges each Member State to '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'.

Under Article 12, expressed to be without prejudice to Article 13(1) (more about which below), the insurance that Member States are required to put in place under Article 3 is to cover liability for personal injuries to all passengers - other than the driver - arising out of the use of a vehicle. Article 13 was of central importance to the proceedings, and states:

Each Member State shall 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 shall be 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 insurance the use of driving of vehicles by:

(a) Persons who do not have express or implied authorisation to do so;

(b) Persons who do not hold a licence permitting them to drive the vehicle concerned;

(c) Persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned.

However, the provision or clause referred to in point (a) of the first sub-paragraph may be invoked against persons who voluntary enter the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen.

Accordingly, attempts to exclude from insurance protection those passengers who are victims of accidents where the vehicle is driven by someone who does not have authority to drive it, or hold a driving licence, or is in breach of requirements as to the condition and safety of the vehicle, are regarded as void. Only where someone knowingly enters a stolen vehicle would any exclusion be effective.

The UK Legislation

The UK first implemented its EU obligations through the Motor Vehicle (Compulsory Insurance) Regulations

1987, subsequently enacted as s.151 RTA. Section 151(4) preserves an insurer's entitlement to exclude liability towards those who allow themselves to be carried in vehicles they know to be stolen. Section 151(5) provides:

Notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, he must, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment –

(a) As regards liability in respect of death or bodily injury, any sum payable under the judgment in respect of the liability, together with any sum which, by virtue of any enactment relating to interest on judgments, is payable in respect of interest on that sum...

(c) Any amount payable in respect of costs.

Insurers are thus obliged to pay out to an accident victim entitled to the benefit of a judgment - even if the insurer would otherwise be entitled to avoid or cancel the policy. At issue in the proceedings was the operation of s.151(8):

Where an insurer becomes liable under this section to pay an amount in respect of a liability of a person who is not insured by a policy... he is entitled to recover the amount from that person or from any person who –

(a) is insured by the policy... by the terms of which liability would be covered on the policy insured or persons..., and

(b) caused or permitted the use of the vehicle which gave rise to the liability.

Churchill's case was that although under s.151(5) it was obliged to satisfy the judgment obtained by Ben, it was entitled to recover the same amount a nanosecond later, because he was insured by the policy (s.151(8)(a)), and he caused or permitted the uninsured use of the vehicle giving rise to the liability (s.151(8)(b)).

The High Court decision

Blair J delivered his decision on the preliminary issue in June 2009 ([2009] EWHC 2197). The claimant submitted that, in practical terms, the insurer's argument that it had a right to recoup the value of the judgment under s.151(8) would deprive him of any benefit of the judgment. This would create a new class of victim who would not be entitled to the benefit of insurance, in breach of the Motor Directives. It was argued the Directives created a narrow exception in respect of those who voluntarily entered a vehicle knowing it was stolen. By s.151(8), this exclusion was impermissibly extended. Efforts by Churchill to succeed on technical points concerning the application of the legislation to the facts of the case were rejected by Blair J, who held that the requirement to make payment in satisfaction of judgment under s.151(5) was to be applied in the substantive - and not simply the formal - sense. It was noted that European jurisprudence, in particular the decision of the ECJ in *Candolin* [2005] ECR 1-5745, made it clear that national provisions governing compensation for road traffic accidents could not deprive the Motor Directives of their effectiveness. Satisfaction of a judgment followed by immediate recoupment of the proceeds, or otherwise a claim defeated on the basis of circuitry of action, did not achieve the objective of the Directives, which were intended to extend insurance cover to passenger victims of RTAs.

Further, *Candolin* made it clear that the fact that an injured passenger was also the owner of the vehicle, the driver of which had caused an accident, was irrelevant. Given the protective aims of the Directives, the legal position of the owner of the vehicle who was a passenger in it at the time of an accident must be the same as that of any other passenger victim.

Churchill also argued that the claimant's proposed interpretation of s.151(8) - which would mean it would not be applied against those who were entitled to the benefit of a judgment under s.151 - was impermissible on the basis that it inflicted too much violence upon the language of the legislation. Accordingly, without a permissible method of interpretation, the claimant's proper remedy lay in a *Francovich* claim against the government for failing to properly implement the Directive. Although Blair J was not persuaded to imply the wording to s.151(8) urged by the claimant, it was held the insurer could not exercise its right of recovery under s.151(8) to negate its obligation to Ben to satisfy judgment under s.151(5), as this would conflict with the purpose of the Directive.

Coincidentally, eight days before Blair J's judgment, HHJ Godfrey took the opposite view in a case presenting similar facts, *Tracey Evans v Adam Cockayne, Equity Claims and MIB*. On 4 August 2004, Ms Evans permitted Mr Cockayne to drive her motorcycle, insured with Equity, with her as pillion passenger. The motorcycle was involved in a collision with a lorry, and Ms Evans suffered serious injuries. Mr Cockayne, who was insured under a policy to drive his own motorcycle but no other, was therefore uninsured. It was found that under s.151(8), the insurers were entitled to recoup the

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value of any judgment Ms Evans obtained against Mr Cockayne, and so no compensation would be payable.

Court of Appeal – first decision

The Court of Appeal heard the combined appeals of Churchill Insurance against the decision of Blair J and Ms Evans against the decision of HHJ Godfrey ([2010] EWCA Civ 556). The Court of Appeal decided to refer the interpretation of the Directives to the Court of Justice of the European Union, but crucially, rejected as unreal and contrary to English law the insurers' argument that recoupment of a judgment sum immediately after the judgment was met did not negate the victim's rights under the judgment.

The CJEU decision

In the CJEU (C-442/10), the UK Government and the European Commission joined the fray. The former sided with the insurers, while the latter backed the claimants.

The CJEU stated that, since the Court of Appeal held that s.151(8) had the effect of excluding automatically from the benefit of insurance a passenger who was a victim of a road traffic accident, insured to drive the vehicle himself and who had given permission to an uninsured driver to drive, then this was an issue that concerned the compatibility with EU law of a provision that limited the extent of civil liability insurance cover. It was not an issue concerning the compatibility with EU law of a rule governing civil liability, and so the issue would be for the national court to determine. It was further held that under the Directives, the only distinction that was permissible in terms of insurance coverage for accident victims was as between the driver of the vehicle and passengers. The former could be excluded from the insurance cover, but the latter could not. Further, the derogation entitling insurers to exclude from compensation those who voluntarily enter the vehicle knowing it was stolen was to be interpreted restrictively, and applying only in that case. Accordingly, it mattered not whether permission that was given to the non-insured driver could be regarded as expressed or implied authorisation, as the exclusion was not applicable in the circumstances. It was also held that the fact that the claims would have failed under the MIB scheme was irrelevant. Furthermore, whether or not the victim knew the driver was uninsured; believed the driver was uninsured; or had simply not considered the issue at all, was equally irrelevant to the interpretation of the 2009 Directive. The CJEU did note that Member States retained the power to formulate their own law with regards to civil liability, provided they complied with EU law and did not deprive the Directives of its effectiveness. Accordingly (at paragraph 49 of the judgment) it said: '... national rules, formulated in terms of general and abstract criteria, may not refuse or restrict to a disproportionate extent the compensation to be made available to a passenger by compulsory insurance against civil liability in respect of the use of motor vehicles solely on the basis of his contribution to the occurrence of the loss which arises. It is only in exceptional circumstances that the amount of compensation may be limited on the basis of an assessment of that particular case.' This passage assumed huge significance when the case returned to London.

Court of Appeal – second decision

By this stage, the Secretary of State for Transport (SST) had intervened. The issues now were:

1. Could s.151(8) be interpreted in a way that rendered it compatible with the EU Motor Directives;

2. If so, how should the section be interpreted?

The claimant position was that s.151(8) should be amended to make it clear that the insurers' right of indemnity could not be exercised against a person entitled to judgment under s.151. The insurers and SST argued for an interpretation that would allow the application of the indemnity against insured passenger victims who had permitted uninsured use of the vehicle, provided that any recovery was proportionate and determined according to the circumstances of the case.

The lead judgment ([2012] EWCA Civ 1166) was given by Aikens LJ, who observed the CJEU had recognised that the Directives did not seek to harmonise national rules governing civil liability in respect of motor accidents, and that Member States remained free to determine the rules of civil liability applicable to road accidents. The only qualifications to this were that, firstly, Member States were obliged to ensure that civil liability arising under national law was covered by insurance compatible with the Directives and, secondly, that national provisions must not deprive the Directives of their effectiveness.

It was important, therefore, to determine whether s.151(8) could be regarded as a provision of civil liability law, or was a provision that defined or limited the scope or extent of insurance cover. Generally, where the national provision was a rule governing 'civil liability', then its applicability could only be restricted so far as was necessary to ensure it did not deprive the Directives of their effectiveness. If, however, the national provision concerned the extent to which a passenger can benefit from civil liability insurance cover, then it could not conflict with the objectives or provisions of the Directive.

Aikens LJ considered the principles that applied when interpreting national laws based on EU Directives. Pursuant to article 4(3) of the Treaty on European Union 1992, Member States have a duty to take all appropriate measures - whether general or particular - to ensure that an obligation imposed by a Directive is fulfilled. Pursuant to the ECJ in *Pfeiffer* (Case C-397/01 to C-403/01) national courts must use interpretive methods recognised by national law to avoid any conflict between domestic law and a Directive, and to try to achieve the result required by the Directive.

Aikens LJ identified the wide parameters for the purposive interpretation of domestic law which can be used by the courts to fulfil EU law obligations, explained by *Vodafone 2 v Revenue & Customs Commissioners* [2010] Ch 77.

The claimants argued the insurers' interpretation was impermissible, as it introduced a 'fault-based' system, changing the nature of the regime and going against a cardinal feature of s.151(8), which was a right of indemnity not dependent on fault. The insurers argued that the basis of recovery under s.151(8) was that the insured was at fault for causing or permitting the uninsured to drive the vehicle. Accordingly, the right of recovery, while not automatic, could be exercised when it was proportionate to do so on the facts of the particular case, and this was consistent with the decision of the CJEU.

Aikens LJ considered that s.151(8) contained elements of both a national law governing civil liability, and a law concerning the extent to which an insured could benefit from compulsory motor insurance cover. The claimants argued that their interpretation was compatible with the decision of the CJEU, particularly when one had regard to the fact that an insured passenger victim, who caused or permitted the uninsured person to drive the vehicle, could not in English law have their damages reduced for that reason alone. Accordingly, the claimant's interpretation was consistent with the right of the Member State to fashion its own national rules on civil liability.

Aikens LJ rejected this argument. It was noted that in *Candolin*, the ECJ had reached judgments regarding what national rules could and could not do concerning the right to compensation under compulsory motor insurance law. In particular, it had said that national rules could not 'on the basis of general or abstract criteria' deny a passenger victim totally of the right to be compensated by the compulsory motor insurance, or limit that right in a 'disproportionate manner'. Aikens LJ also observed that the ECJ had held that it was for the national courts to see if exceptional circumstances existed which might justify a limit on the right to compensation, and if so, such a limit had to be proportionate. In doing so, Aikens LJ considered that the ECJ had laid down the permissible scope of national rules that concerned a passenger victim's right to compensation under compulsory motor insurance provisions. Aikens LJ found that approach had been applied by the CJEU in the present case.

The Court of Appeal judge therefore concluded that a close analysis of the CJEU's judgment was needed, firstly to establish if it was permissible to have national rules that restricted the passenger's right to recover compensation through compulsory motor insurance, and secondly, the possible scope of any such restrictions.

Aikens LJ considered paragraph 49 of the CJEU judgment (above) was directed towards any national rules that could impinge upon the extent to which a passenger could recover compensation through motor insurance. It was not solely concerned with national rules concerning civil liability. In addition, it referred to all types of passenger victim - whether or not they were insured - and applied to national rules that refused or restricted the right to compensation 'solely on the basis of [the passenger's] contribution to the occurrence of the loss which arises'. Lastly, it did not appear to be confined to any particular national rule concerning 'civil liability', or concepts that an English lawyer would call 'causation' or 'contributory negligence'.

Accordingly, Aikens LJ held that where an insured passenger victim either caused or permitted an uninsured driver to use the vehicle, which gave rise to the liability that the insurer had to meet under s.151(5), then s.151(8) was a right based on the insured passenger victims' *contribution* to the *occurrence of the loss*. This, in Aikens LJ's view, permitted the Court to interpret s.151(8) in a way that retained an insurer's right to seek an indemnity from the insured when they are a passenger victim, and ensured that, in the case of the insured passenger victim, the interpretation would comply with the restrictions that had been envisaged by the CJEU. It was submitted by the insurers and the SST that their proposed wording would achieve that result. The claimants' argument - that the insurer/SST submission would change the character of s.151(8) by rendering it dependent on establishing fault, or applicable only after making qualitative assessment - was rejected. In Aiken LJ's view, s.151(8) required two pre-conditions to be filled before the right of indemnity could be claimed. It must be found that the insured caused or permitted the use of the vehicle, and that the use of the vehicle gave rise to the liability. Accordingly, the interpretation offered by the insurers/SST did not go against a fundamental principle of s.151(8), and was to be preferred.

Consequently, while the claimants could recover damages from the insurers, this interpretation of s.151(8) entitled the insurers to seek recovery of any judgment sum from the claimants - but only so far as that recovery was proportionate. In a separate decision, the Court of Appeal made an issue-based costs order, although this has now been superseded.

The claimants sought permission to appeal the Court of Appeal's ruling on the interpretation of s.151(8). However, after permission had been obtained, settlements of both Ben's claim and that of Miss Evans were negotiated, and so the appeals did not receive the consideration of the Supreme Court.

Comment

The Court of Appeal's interpretation of s.151(8) reflects the law as it stands.

The effect of the decision is that insured victims who cause or permit the uninsured use of a vehicle – which then gives rise to an accident - are exposed to an application by the insurer called upon to pay compensation arising from the accident, to recover a proportionate amount from the compensation payable to the insured passenger victim. What is proportionate is to be determined according to the circumstances of the case, in a manner which the Court of Appeal unhelpfully failed to define. It is worth noting that insurers will argue that the proportionate recovery now allowed extends to damages and costs.

It remains to be seen how this judicially created principle of 'victim insurance fault' will be applied, and further litigation will surely follow. It has been suggested that the court may look to develop a tariff type approach, with the level of reduction dependent on the victim's knowledge and level of enquiry into the driver's insurance position. During submissions in the Court of Appeal, an analogy was made with contributory negligence through failure to wear a seat belt or riding with a drunken driver. But insurers will argue that there should be no similar ceiling on recovery as applies in those cases.

It is worth keeping in mind that in an appropriate future case or group of cases, claimants may make another attempt to take the point to the Supreme Court, to overturn what Ben's legal team firmly believed was the erroneous decision of the Court of Appeal.

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The author wishes to thank all of Ben's legal team for their help in the preparation of this article.