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King's Bench Walk

Litigating motor claims: how has Europe changed the landscape?

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May 2022

Introduction

- Accompanying paper
- We will cover:
  - Background and overview
    - Road Traffic Acts
    - EU Motor Directives
    - Cases
  - European Union (Withdrawal) Act 2018
  - Motor Vehicles (Compulsory Insurance) Act 2022
  - Where are we now?
    - Is there / isn't there a contractual insurer? – consequences
    - Key points in the post-Brexit landscape

Background

- Compulsory motor insurance has been a statutory requirement in the UK since the Road Traffic Act 1930
- The nature of the statutory insurance framework has changed over time and has become factually (if not legally) entwined with the obligations of the MIB
- The current statutory regime in the Road Traffic Act 1988 was enacted to ensure compliance with the European Directives but in certain aspects it does not achieve that goal

Background

- Between 1930 and about 2010, in England and Wales:
  - A "vehicle" meant a "motor vehicle"
  - Insurance was only compulsory on a road or other public place
  - Insurers were allowed to refuse claims made by PHs who were injured as passengers in their own vehicles when the driver was uninsured
  - Insurers were allowed to refuse claims by claimants who were in a vehicle they knew to be stolen or unlawfully taken
  - Insurers could avoid an RTA liability by avoiding a policy for misrepresentation (after an accident)
  - MIB could avoid paying out where C was in a vehicle he/she knew to be uninsured (to drive the vehicle, even if a policy covering the vehicle was in place)

Background

- Those propositions were all impacted and affected by the EU Motor Insurance Directives
- Article 3(1) of the Sixth Directive requires member states (subject to very limited exceptions) "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"
  - NB: no geographical limits
  - Under Art. 10, a guarantee body can escape liability if it can prove C knew veh was uninsured
  - Under Art.13, an insurer can escape liability if it can prove C knew veh was stolen
- Dissonance between the RTA and the Directive did not become apparent until 2010s…

Wilkinson v Churchill

- In *Wilkinson v Churchill* [2012] EWCA Civ 1166
  - C was insured to drive the vehicle
  - He allowed himself to be driven as a passenger in the vehicle by an uninsured driver
  - He brought a claim and sought to rely on section 151(5)
  - The insurer refused to pay out, relying on section 151(8), which entitles a right of recovery against the person who caused or permitted the use of the vehicle
  - A reference was made to the CJEU, and the matter ultimately came back to the Court of Appeal
  - The CA declared that to comply with the Directive section 151(8) had to be read to include the words "save that where the person insured by the policy may be entitled to the benefit of any judgment to which this section refers, any recovery by the insurer in respect of that judgment must be proportionate and determined on the basis of the circumstances of the case"
  - What does "proportionate" in this context mean? There are no reported cases

Vnuk (et al)

- In *Vnuk v Zavarovalnica Triglav* (C/162/13) a tractor knocked a man off a ladder on a farm.
  - The CJEU decided that the Directives had no geographical limitation on the extent of the obligation to insure and that obligation included private land.
  - The court also decided that the concept of the use of vehicles covers any use of the vehicle that is consistent with the normal function of that vehicle.
- *Torreiro v AIG Europe Limited* (C334/16) the insurers of an all terrain military vehicle used during a Spanish military exercise were required to provide compensation when it overturned and injured soldiers because that use was an ordinary use of the vehicle as a means of transport
- *Andrade v Salvador* (C-514/16) an employee was killed when a stationary tractor which powered a spraying device fell down a terrace. Use of the vehicle at the time of the accident was not a use consistent with its normal function as a means of transport
- In *BTA Baltic Insurance v Baltijas* (C-648/17) a passenger opened a car door and damaged another car. The question for the CJEU was whether the act of opening a car door was *"use of a vehicle consistent with its normal function"*.

Fidelidade

- In *Fidelidade-Companhhia de Seguros v Caisse Suisse* (C 287/16) the CJEU decided that the motor Directives precluded national legislation which permitted insurers to avoid paying compensation to injured third parties on the basis of false representations on the part of the policyholder.

- The MotorVehicles (Compulsory Insurance) (MiscellaneousAmendments) Regulations 2019 amended section 152 to remove the right of an insurer to obtain a declaration after an accident that it is entitled to avoid a policy and thereby avoid its section 151 liability to meet a judgment.

- The amendment came into force on 1st November 2019 and only section 152 declarations obtained before that date are effective to remove the section 151 liability

Colley v Shuker

- In Colley v Shuker the Claimant (C) was injured in an RTA in a vehicle driven by Daniel Shuker (D1). The vehicle had been insured by D1's father with UKI but D1 was not insured to drive under the policy and C knew that he was uninsured. UKI obtained a declaration under section 152
- (In addition to other arguments) MIB argued that it was not obliged to compensate C because C knew that D1 was uninsured.
- That argument failed. Freedman J found that in order to be able to rely on the exclusion permitted by the Directive it was necessary for MIB to show that at the time of the accident the vehicle was uninsured. It was not sufficient that the driver was uninsured. In this case the vehicle was insured at the time of the accident and only became "uninsured" when UKI later avoided the policy.
- The judgment was (unsuccessfully) appealed to the CA on other grounds

Brexit

- The position re EU law is governed by the European Union (Withdrawal) Act 2018 as amended ("the EUWA").
- The effect of the EUWA is to convert the body of EU law as it applied to the UK before 31st December 2020 into domestic law.
- This is termed "retained EU law" and there are 5 categories which include (1) direct EU legislation (2) directly effective rights (3) EU derived domestic legislation (4) retained case law and (5) retained principles of EU law.
- Since the RTA 1988 was implemented to give effect to the Motor Directives it is "EU derived domestic legislation" and the Motor Directive elements of it remain effective.
- It is arguable whether the Directives themselves are retained EU law. It is probable that they are to the extent that the rights contained within them have been recognised by the CJEU or the English courts
- If a principle of EU law was recognised as a general principle of EU law by the CJEU in a case decided before the withdrawal day then that principle will form part of the retained EU law after exit day as a retained principle of EU law

Brexit

- EU law which has been assimilated into English law by virtue of decisions of English courts before the withdrawal day will be retained EU law.
- By section 6(3) of the EUWA the meaning and effect of any retained EU law is to be decided in accordance with retained case law and retained general principles of EU law by the lower English courts
- The EUWA empowered Ministers to make regulations to permit a "relevant court" to depart from retained EU law. That power has been exercised and the "relevant courts" are the Court of Appeal and the Supreme Court but in deciding whether to take that course the *"relevant court must apply the same test as the Supreme Court would apply in deciding whether to depart from the case law of the Supreme Court"*
- The English courts are not bound by any decisions of the CJEU after the withdrawal day, but the court may "have regard" to any later decision of the CJEU
- The English courts can no longer refer any issue to the CJEU

'The *Vnuk* Extermination Act'

- *Also known as The Motor Vehicles (Compulsory Insurance) Act 2022
- Received Royal Assent on 28 April 2022 – is due to come into effect prospectively (and not retrospectively) two months thereafter (28 June 2022)

- The Act amends the RTA 1988 as follows:

"*(1)To the extent that Article 3 of the 2009 Motor Insurance Directive (as it had effect at any time) is relevant to any question as to the interpretation or effect of any provision of this Part, references in that Article to liability in respect of the use of vehicles are to be read as not including liability in respect of the use in Great Britain of vehicles—*

(a)other than motor vehicles, or

(b)otherwise than on a road or other public place."

'The *Vnuk* Extermination Act'

- The effect of this is to cancel *Vnuk* insofar as it applied to English law on the question of any question of the need for compulsory insurance on private land
- There is also an attempt ('*motor vehicles and only motor vehicles*') to limit the scope of the *Vnuk* line of authorities as to vehicles
- Query what difference will this make in practical terms…?

Contractual Insurer?

- First question: is the insurer required to indemnify as a matter of contract
  - NB: the majority of motor policies do not impose geographical restrictions vis-à-vis road/public place
- YES:
  - C needn't worry about public/private land
  - C needn't worry about serving slippery Ds, as they can sue insurer under 2002 Regs
  - C cannot be forced to sue other tortfeasors
  - C needn't give section 152 notice (but a good idea to do so anyway)
  - D insurer can conduct the litigation in name of their insured (and Pt 20 in their name)
  - D insurer may be able to seek contributions from other insured tortfeasors (probably not RTA insurers, and certainly not MIB)

Contractual Insurer?

- NO:
  - Unless tortfeasor good for money, more complex for C
  - If accident was on road or public place, no change
  - For accidents prior to 28 June 2022, can deploy *Vnuk* arguments
  - If accident was on private land after 28 June 2022, and there is no contractual insurer, it will be difficult for C (NB: most but not all PL policies will exclude – worth checking)
  - All routes to compensation require judgment against tortfeasor
  - MIB (or Art.75 insurer) can force C to sue other parties (and practically speaking, RTA insurers can as well, although they have no legal right)
  - Section 152(1) notice is required to RTA insurers / MIB must be properly notified
  - Insurers will try to pass liabilities off to each other
  - Insurers will investigate what C knew about the vehicle, and its insurance status

Key Points Post-Brexit

- Indemnity position is not irrelevant to C
  - If there are indemnity issues, C should get to bottom of it, and plead properly
- Some insurers take bad points on indemnity – always worth exploring
- Post-*Cameron*, service on driver remains required (although insurers have mostly been v sensible to avoid costs being incurred on satellite litigation re service)

Key Points Post-Brexit

- **Road or public place**
  - Likely to see arguments to bottom out meaning of "public place"

- **Stolen/unlawfully taken**
  - Current disputes as to whether Directives permit exclusion on the basis of "unlawfully taken" as well as stolen

Key Points Post-Brexit

- **Knew vehicle was uninsured**
  - As MIB did not appeal this part of *Colley v Shuker*, the argument is not available in most cases
  - Query: how can a C "know" veh is not covered by any policy at all, short of doing an MID search??

- **Use not permitted**
  - Continues to be battleground since demise of declarations under section 152(2)
  - Potential *Shogun Finance v Hudson* argument in fraud cases, but not yet run
  - Increasing attempts by insurers to create new categories of use: "commuting", "courier", "food delivery"
  - Post *Fidelidade* would *Bristol Alliance v Williams* be decided the same way?

THANK YOU