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Court of Appeal upholds *Francovich* liability finding ~

Defective implementation of EC Directive governing claims by victims of untraced drivers was a "sufficiently serious" breach of Community law to make UK liable in damages

***Byrne v Motor Insurers Bureau and the Secretary of State for Transport* [2008] EWCA Civ 574**

June 2008

Alan Bates

The Court of Appeal has upheld the decision of the High Court that:

(i) the UK scheme for compensating victims of untraced drivers failed properly to implement the Second EC Motor Insurance Directive; and

(ii) that failure was a "sufficiently serious" breach of Community law so as to render the UK liable for *Francovich* damages to individuals who had lost out as a result of the failure.

The Court of Appeal's judgment clarifies the principles by reference to which a failure properly to implement a Directive may be found to have constituted a "sufficiently serious" breach, and is likely to smooth the path of future *Francovich* damages claimants seeking redress for losses arising from defective implementation.

Background

The Motor Insurers' Bureau ("MIB")

The MIB is a company limited by guarantee and was established in 1946. Pursuant to agreements with the Secretary of State for Transport, the MIB provides compensation both for victims of negligent uninsured drivers, and for victims of negligent drivers who may have been insured but have not been traced. The MIB's funds are derived from a compulsory levy on insurers who underwrite policies of motor insurance in the UK.

The MIB's current compensation scheme in respect of victims of untraced drivers came into existence pursuant to the Untraced Drivers Agreement ("UDA") concluded in November 1972 between the MIB and the then Secretary of State. Under the terms of the UDA, a victim of negligence of an untraced driver can apply to the MIB for compensation. The MIB will then carry out an investigation, and if satisfied that the requirements of the UDA are fulfilled, will pay compensation calculated in the same way that a court would have calculated damages in a successful tort action against the driver. The right to claim damages from the UDA was, however, subject to

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clause 1(1)(f) of that agreement, which provided that compensation would be payable only if claimed within three years of the date of the accident. In contrast with the limitation period applicable to tort claims, no provision was made for the three year period specified by the UDA to be suspended for any period during which the person entitled to make the claim remained a minor.

In 1984 the Second Motor Insurance Directive (Council Directive 84/5/EEC) came into being. Article 1(1) of that Directive required Member States to adopt compulsory insurance regimes for motor vehicles, so as to provide compensation for both personal injuries and property damage caused by negligent drivers. Article 1(4) required, in the following terms, Member States also to provide compensation arrangements for victims of untraced drivers:

"*Each Member State shall set up or authorise 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 ….*

[E]ach Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by this body, without prejudice to any other practice which is more favourable to the victim."

Since the UK had, by means of the UDA, already established a scheme for compensating victims of untraced drivers, the Secretary of State for Transport considered that the result which Article 1(4) required to be achieved by the Member States could be achieved in the UK by leaving the existing UDA scheme in place.

Ben Byrne

On a June day in 1993, 3-year-old Ben Byrne was hit by a car while crossing the road with his father and sustained injuries that required hospital treatment. The driver of the car did not stop and was never traced. Assuming the driver was negligent, Ben was entitled to claim compensation under the UDA.

Unfortunately, however, Ben's parents were not aware of the UDA compensation scheme and did not become aware its existence until October 2001 (i.e. more than three years after the date of the accident). At that time, Ben was 12 years old and therefore still a minor. Had he been injured by an insured driver whose identity was known, he could have claimed compensation from that driver's insurer, if necessary by bringing a tort claim against the driver. That was so notwithstanding that the accident had happened more than 8 years previously, since the Limitation Act 1980 provides that time does not start to run against a minor with a personal injury claim until he has obtained his majority. Ben would therefore have had until his 21st birthday to bring his claim. As no such suspension was provided for in the UDA, however, the MIB maintained that Ben was not entitled to any compensation from its fund, more than three years having passed since the date of the accident without any claim having been lodged within that time.

In 2006 Ben, who was by then aged 16, brought proceedings in the High Court against the MIB and the Secretary of State, arguing that the imposition of a shorter limitation period for claims by minors under the UDA scheme, than was applicable to a tort claim against an identified insured driver, was incompatible with Article 1(4) of the Directive. In so arguing, his lawyers relied on the judgment of the European Court of Justice ("ECJ") in Case C-63/01 *Evans v Secretary of State and Motor Insurers Bureau* [2003] ECR I-14447, in which the ECJ had stated as follows:

"[27] It is thus clear that the Community legislature's intention was to entitle victims of damage or injury caused by unidentified or insufficiently insured vehicles to protection equivalent to, and as effective as, that available to persons injured by identified and insured vehicles."

Ben argued that it was clear from that statement that the limitation period applicable to claims by victims of untraced drivers under the compensation scheme could be no shorter than that applicable to tort claims brought against drivers whose identities were known. Ben sought damages from the MIB for breach of the UDA on the basis that it had to be interpreted consistently with the Directive, or alternatively for breach of obligations arising under the Directive that he claimed were directly applicable to the MIB under EC law. In the further alternative, Ben claimed damages from the Secretary of State, pursuant to the doctrine of Member State liability laid down by the ECJ in Case C-6/90 *Francovich* [1991] ECR I-5357, for failure to properly implement the Directive.

The points of principle raised in the proceedings were ordered to be determined as preliminary issues on the basis that the facts alleged by Ben regarding the accident were established.

Judgment of the High Court on the preliminary issues

The preliminary issues were determined at first instance by Flaux J who gave judgment in June 2007.

Flaux J held that Ben was correct in his contention that the maintenance of a shorter limitation period for claims by minors under the UDA scheme, than was applicable to a tort claim against an identified insured driver, was incompatible with the Directive which, as the ECJ had stated in the *Evans* case, required that victims of untraced drivers be given protection equivalent to that available to victims of identified insured drivers. The imposition of a time-bar on claims on the compensation scheme by minors was therefore incompatible with the Directive.

The provision of the UDA imposing the three year time limit could not, however, be read in such as way as to be compatible with the Directive. Nor did the Directive have direct effect against the MIB, which was not an emanation of the State.

It followed that Ben had lost out as a result of the UK's failure to properly and fully implement the Directive. Flaux J therefore went on to consider the question of whether the UK was in principle liable to pay *Francovich* damages to those who had lost out as a result of that failure. It was common ground between the parties that Article 1(4) of the Directive was intended to confer rights on individuals, and it had to be assumed for the purposes of determining the preliminary issues that there was a direct causal link between the breach of the UK's obligation under that Article and loss or damage which Ben had sustained. Accordingly, the crucial question which Flaux J had to determine in relation to *Francovich* damages was whether or not the UK's failure to properly implement the Directive constituted a "sufficiently serious breach" of EC law, that being a condition precedent to Member State liability under the *Francovich* doctrine.

In order to establish that the "sufficiently serious breach" threshold had been crossed by the UK's failure, Ben relied, in particular, on evidence, in the form of a letter written in 1987 by an official in the Department of Transport to the MIB, that the Department had at that time realised, when concluding a new agreement with the MIB applying to uninsured (rather than untraced) drivers, that a time limit for applications to the MIB that was shorter than the limitation period applicable to tort actions for the same damage was likely to be incompatible with the Second Directive. As a result of that realisation, the agreement governing claims in respect of damage caused by uninsured drivers included time limit provisions that corresponded with the provisions of the Limitation Act. The Department had not, however, acted to amend the time limits in the UDA.

That failure to revisit the time limits in the UDA in 1987 amounted, in Flaux J's view, to an "inexcusable lack of thoroughness", and was compounded by the subsequent failure in 2003 to adequately review the UDA in the light of the ECJ's judgment in *Evans*. The UK was therefore responsible for an "extremely serious breach" of EC law which the Secretary of State could not properly excuse by reference to the fact that other Member States had also implemented time limits that were shorter than the limitation periods applicable to claims against identified insured drivers in those countries. In that regard, Flaux J noted that the UK had not relied in any way on the conduct of those other Member States.

It followed, in Flaux J's judgment, that the principal *Francovich* criterion of a "sufficiently serious breach" had been satisfied, and that Ben Byrne could therefore invoke the Member State liability doctrine in order to claim damages against the Secretary of State.

The MIB and the Secretary of State appealed arguing, *inter alia*, that, even if Flaux J's interpretation of Article 1(4) of the Directive was correct, his criticism of the Department as having displayed an "inexcusable lack of thoroughness" was unjustified on the evidence before him. The 1987 letter reflected the view of a single civil servant, and was insufficient to show that the Department realised, or was seriously culpable in not having realised, that the time limit provided for in the UDA was incompatible with the Directive. Given that other Member States had made the same mistake as the UK, the full import of the relevant requirement of Community law could not fairly be said to have been obvious.

Judgment of the Court of Appeal

The Court of Appeal dismissed the appeal, upholding the conclusions of the High Court both that the time limit for lodging a claim under the UDA should not have been shorter than the limitation period for tort claims, and also that the UK's failure to achieve that end constituted a "sufficiently serious breach".

In relation to that second conclusion, however, the Court of Appeal adopted somewhat different reasoning to that of Flaux J. In particular, the Court of Appeal found it unnecessary to endorse Flaux J's finding that there had been an "inexcusable lack of thoroughness" by the Department of Transport in 1987. Rather, the Court of Appeal focused on the summary provided by the ECJ in *Evans* of the principal factors relevant to establishing Member State liability:

"… the clarity and precision of the rule infringed, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed to the adoption or maintenance of national measures or practices contrary to Community law."

In the instant case, any loss caused to Ben by the failure properly to implement the Directive was not caused intentionally by the UK, and the Secretary of State had not suggested that the UK's failure could be mitigated by reference to the position taken by any Community institution. The Court of Appeal therefore focused on "the clarity and precision of the rule infringed" and whether the UK's error "was excusable or inexcusable".

In relation to those questions, the Court of Appeal, in contrast to Flaux J, was reluctant to attach any great significance to the "slender evidentiary thread" provided by the 1987 letter and, more particularly, the comment contained within it that appeared to imply a realisation by the Department of the need for the time limits for

making a claim on the MIB to be no shorter than the limitation periods applicable to a tort claim against an identified insured driver. There was no evidence as to either the status of the writer of that letter, or the background to his comment; and, in any event, that comment simply reflected the view taken by one or more civil servants within the Department, and it remained possible to take a different view (as, for example, the Republic of Ireland's Government did).

The Court of Appeal instead attached more importance to "objectively discernible factors", most importantly the ECJ's judgment in *Evans* in 2003. Prior to that judgment, there had been room for two views as to whether or not Article 1(4) required the time limit for claims on the compensation scheme mandated by that provision to be no shorter than that applicable to claims against identified insured drivers. In paragraph 27 of the *Evans* judgment, however, the ECJ had unambiguously stated the need to ensure equivalent protection. That statement was at least a warning of the need for the UK to revisit whether the question of whether the UDA was providing such equivalence. Had that been done, the result would have been to identify what was, at the very least, a serious risk that the time limits in the UDA were not compliant with Article 1(4) and that a failure to remedy the defect would cause serious prejudice to a significant group of complainants. Thus, had the warning been heeded, there was a reasonable likelihood that the UDA would have been amended in time to assist Ben Byrne.

The "sufficiently serious" criterion laid down by the ECJ for *Francovich* liability was not a hard-edged test. It required a value judgement by the national court, taking account of the various factors summarised by the court in *Evans*. In the present case, there were three points of importance: the relative precision of the requirement, following *Evans*; the serious consequences of failure to comply with that requirement; and the clear warning given in *Evans* of the need to make the comparison. In the view of the Court of Appeal, having regard to those matters, liability was in principle established. That was so irrespective of how many other Member States may also have failed to implement the Directive correctly.

Comment

The Court of Appeal's judgment helpfully refocuses the "sufficiently serious breach" test on the question as to how obvious it was, at the time when the claimant's loss was suffered, that the relevant Directive required the achievement of the particular result that the Member State failed to achieve. That is plainly an objective question calling for an analysis both of the extent to which the relevant requirement was at that time clear and precise, and whether the Member State's failure can be regarded as excusable (for example, because the Member State was misled by the view previously taken by the Court or the Commission). Save where the Member State has deliberately chosen to ignore or contravene a requirement of Community law, the "sufficiently serious breach" test should not depend on the subjective state of mind of the Member State or its officials. Nor, therefore, should the claimant for *Francovich* damages be expected, in order to establish liability, to point to evidence that ministers or civil servants have previously demonstrated a realisation of the Directive's true import.

Also to be welcomed is the Court of Appeal's rejection of the "inexcusable lack of thoroughness" phrase, which had the potential to evolve into a quasi-legal standard, perhaps with the effect of raising the evidential bar for claimants of such damages to a level that would not be compatible with the "sufficiently serious breach" standard.

The Court of Appeal's judgment therefore to some extent smoothes the way for future *Francovich* damages claimants, who will not be restricted by the inevitable difficulties of obtaining evidence concerning the internal deliberations of government departments many years ago, but can instead simply ask the Court to make a decision as to the obviousness or otherwise of what Community law required. Further, the fact that other Member States have also made the same mistake is, at most, just one factor to be taken into account when considering whether the Community law requirement was "clear and precise" at the material time, and will not prevent liability being established where that standard is satisfied.

Nicholas Paines QC and Josh Holmes represented Ben Byrne.

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