Suing Persons Unknown: The EC Motor Insurance Directive and Cameron v Liverpool Victoria

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The facts

Cameron v Liverpool Victoria[1] is the first case to reach the highest court on suing unnamed persons. Ms Bianca Cameron's Ford Fiesta was hit negligently by a Nissan Micra, which went on to hit another vehicle without stopping. She and her passengers suffered personal injuries; her car was a write-off; and she incurred charges for a replacement car. The Nissan's registration number was taken by a passing taxi. Its driver committed criminal offences under s.170 Road Traffic Act 1988 in not stopping and not reporting the accident to the police.

A notice was served by the police on the registered keeper of the Nissan, requiring him to identify the driver, but as is common, he did not co-operate and was convicted of the criminal offence of not giving the information required. The registered keeper may prefer to take the penalty points and the fine to avoid the consequences were the information to be disclosed. The registered keeper was not insured to drive the vehicle. There was insurance on the Nissan, which the insurers said was obtained by fraud using a fictitious name as the policy-holder.

Department for Transport data for 2015 shows that more than 17,000 cases in Great Britain involved a hit and run driver, 12 per cent of all road accidents involving injury. There were serious injuries in 9 per cent of them, and some deaths. Leicester University's Criminology Department, in research published in 2017 by the Motor Insurance Bureau (MIB), found that:

> "Hit-and-run drivers are predominantly male and have a number of motoring related convictions that are indicators of poor or irresponsible driving … around one in four … have careless driving offences and one in five drunk driving offences on their record."

The convictions, if disclosed, would require larger premiums. The most common motive was "self-preservation", such as hiding the commission of a crime, including driving while uninsured. The perpetrator's driving, its consequences at the scene, his lack of insurance and his failure to stop indicate that he deliberately drove off and did not report the accident, to escape the consequences.

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[1] *Cameron v Liverpool Victoria* [2019] UKSC 6; [2019] 1 W.L.R. 1471.

Ms Cameron sued the registered keeper of the Nissan as being the driver, and sought a declaration against the Liverpool Victoria that it was obliged to satisfy any unsatisfied judgment against him under s.151 in Pt VI of the Road Traffic Act 1988 (RTA). Liverpool Victoria obtained summary judgment because Ms Cameron could not prove that he was the driver. His liability for breach of statutory duty,[2] by allowing someone to drive when uninsured, did not arise from his "use" of the vehicle within s.145, does not have to be covered by compulsory insurance, and so insurers would not be obliged to satisfy a judgment against him.[3] Ms Cameron sought permission to add the driver as a defendant, describing him as the person who was driving the Nissan at the time of the collision. This application failed before the district judge and the county court judge on the grounds that she should be confined to her remedy against the MIB, which was said to be adequate, whereas a claim against the unnamed driver would operate unfairly against the insurers, who could not claim an indemnity from him and would not have the benefit of his evidence.

In the Court of Appeal the insurers conceded that the claim form could be served on the unnamed driver through service by an alternative means, on them. Before the Court of Appeal it was common ground that under the CPR it was a matter of discretion whether a claim could be made against an unnamed defendant. The majority (Gloster and Lloyd Jones LJJ) allowed the appeal, deciding that the claimant should be able to sue in court, whereas Sir Ross Cranston considered that this was contrary to the "grain" of the statutory provisions in the CPR and Pt VI, and should not be permitted as a matter of discretion.

The new points taken in the Supreme Court

The Supreme Court granted permission to appeal, and permitted the MIB to intervene. It challenged the concession made by the insurers before the Court of Appeal on service; the insurers withdrew it, and argued as a new point that since service could not be effected on the unnamed driver, who would not have notice of the proceedings against him, proceedings against him should not be permitted. The MIB argued that where the driver could not be traced, there was a heightened risk of fraudulent claims which was best guarded against through its scheme rather than in court proceedings.

Some two weeks before the appeal was due to be heard, the claimant served a supplementary case taking a new point, that the Sixth EC Motor Directive[4] of the European Parliament in art.18, which requires a direct cause of action for a victim against insurers, did so regardless of whether the perpetrator was insured under the insurance contract. They contended that because of the Directive, the CPR and Pt VI should be interpreted and applied so as to achieve this through the court allowing proceedings to be brought against an unknown defendant, permitting service by alternative means on the insurers, granting judgment against the unnamed driver for the damages, and requiring the insurers to satisfy that judgment under s.151.

[2] *Monk v Warbey* [1935] 1 K.B. 75 CA.
[3] *Sahin v Havard* [2017] 1 W.L.R. 1853 CA (Civ Div).
[4] 2009/103/EC.

Articles 13 and 18 of the Directive

The Sixth Directive consolidated earlier directives. For claims by victims, any statutory provision or contractual clause excluding from insurance the use or driving of vehicles by persons who had no express or implied authorisation to use or drive the vehicle, "shall be deemed to be void". In *Fidelidade-Companhia de Seguros SA v Caisse Suisse de Compensation*,[5] the CJEU held that national legislation rendering the contract a nullity because of fraud on whether the policy-holder was the owner and the usual driver was inconsistent with the Directive. The Directive in art.13 voids provisions excluding cover to the victim when the driver is (1) someone who is not a named insured; or (2) someone not authorised to drive the vehicle under the policy; or (3) someone not given permission to drive by the insurers or by the insured; or (4) a thief. There is only one exception,[6] a passenger who is proved by the insurers to have entered the vehicle knowing it was stolen. Once a certificate is issued, even if the contract would otherwise be void or voidable under national law because of fraud about the person who would be driving, the Directive requires the insurers to pay the victim.

The liability of insurers to victims under the Directive is supported by strong reasons of social policy. The Directive encourages insurers to reduce claims, by carrying out checks on proposers and drivers, before they issue a certificate allowing a car on the roads. Good underwriting practices can and regularly do include calling for driving licences, records maintained by the DVLA, utility bills, and checking the electoral roll. These reduce cases where vehicles are on the roads covered by a certificate of insurance obtained through identity fraud, which reinforces measures which can be taken by Member States[7] to reduce uninsured driving. The police computer in a roadside check shows whether there is an insurance certificate covering the vehicle, but the police cannot so readily check whether there is an insurance contract invalid under national law. The Directive provides for Member States to provide a cause of action under national law for victims to sue insurers direct, the insurers having issued an insurance certificate. Insurers must bear this cost as part of the price for writing motor insurance in the EC. A public register provides for a small charge for details of the insurer covering the vehicle.

Member States must provide a safety net for when there is no insurance on a vehicle, or the perpetrating vehicle and its driver are untraceable, cases in which the victim would otherwise be left with no compensation, "a measure of last resort".[8] In the United Kingdom, the MIB, which is financed and run by authorised motor insurers through a series of agreements with the Secretary of State, provides this and also allows claims against it when there is identifiable insurance on the vehicle but the driver cannot be traced. Victims can claim in arbitration against the MIB under a scheme which in certain respects gives victims less than what can be

[5] *Fidelidade-Companhia de Seguros SA v Caisse Suisse de Compensation* EU:C:2017:575; [2017] R.T.R. 26.

[6] *Fidelidade-Companhia de Seguros v Caisse Suisse de Compensation* EU:C:2017:575; [2017] R.T.R. 26 at [24]–[27]; *Churchill Insurance v Wilkinson* [2012] EWCA Civ 1166; [2013] 1 W.L.R. 1776 at [35] and [38]; *Candolin v Vahinkovakuutusosakeyhtiö Pohjola* (C-537/03) EU:C:2005:417; [2006] R.T.R. 1 at [23].

[7] Fact Sheet issued by the European Commission dated 24 May 2018: "At national level, Member States are required to take effective action to reduce risks of uninsured driving. They can do so by conducting domestic systematic verification of motor third party liability insurance of registered policies, carrying out roadside checks and imposing effective penalties for owners of uninsured vehicle."

[8] *Csonka v Magyar Állam* (C-409/11) EU:C:2013:512; [2014] 1 C.M.L.R. 14 at [30]–[32].

available in court. For example, subrogated claims are not permitted. Replacement car schemes which promptly provide a replacement vehicle to a victim work in insurance cases through the provider being subrogated to a claim for its charges, but in practice are not available to a victim who has to rely on a claim against the MIB. The deductibles permitted by the Directive are slightly less favourable. The MIB procedure is investigatory, with the MIB requiring affidavits from claimants and deciding on the investigations to be carried out, and what evidence to collect. If a victim wishes to employ a solicitor to collect factual or expert evidence in support of his claim, the costs of reasonably doing so are not recoverable from the MIB.[9] The victim has no right to have his claim against the MIB determined in a public hearing by an independent judge.

Regulation 3 of the European Communities (Rights against Insurers) Regulations 2002, which gave effect to the Fourth Motor Insurance Directive, provides for the bringing of proceedings directly against, and the liability of, insurers where the victim of an accident has a claim in tort. The 2002 regulations require that the driver is a person insured under the terms of the policy.[10] Because of this, Ms Cameron could not sue the insurers direct. The insurers argued that art.4(d) of the Fifth Directive and its successor art.18 of the Sixth Directive, were also confined to where the driver was insured under the policy. This argument is not supported by its wording, and is inconsistent with the voiding provisions. Whether a driver is covered under the policy terms is a contractual issue, between insurer and policy-holder; for the victim's claim the voiding provisions apply: there is insurance on the vehicle, and under art.18 there must be a direct cause of action provided by the Member State against insurers.[11]

The insurers' argument on service

The insurers argued that proceedings could not be brought against an unnamed defendant for final monetary relief, albeit that proceedings could be brought against persons unknown for an injunction, whether or not combined with monetary relief, because the injunction would have to be brought to the notice of the wrongdoer to be enforceable and the wrongdoer would have an opportunity to be heard. They accepted that *Bloomsbury Publishing Group Plc v News Group Newspapers Ltd*,[12] an injunction claim against whoever sought to use the Harry Potter manuscript taken from the printers, was correctly decided, because it was an injunction case; that Laddie J had been correct when granting the original interim injunction in saying that a person could be sued by reference to a photograph or other means of identifying him; and that Sir Andrew Morritt V-C had been correct in holding that provisions in the CPR for naming the defendant and giving his address were

[9] *Carswell v Secretary of State for Transport* [2011] Lloyd's Rep I.R. 644.

[10] This was common ground between the parties, and stated by the Court of Appeal in *Nemeti v Sabre Insurance Co Ltd* [2013] EWCA Civ 1555; [2014] P.I.Q.R. P12 at [4]–[5], in which the driver was a son who had taken his father's car without permission, and was not an insured under the policy terms; see J. Birds, B. Lynch and S. Paul, *MacGillivray on Insurance Law*, 13th edn (London: Sweet & Maxwell, 2017), para.31-038 ("There is no right under the Regulations to sue in respect of a tort committed by someone not insured under the policy"); *Allen v Mohammed* [2017] Lloyd's Rep. I.R. 73 at [14]–[16] (Judge Tindal); *Colley v Shuker* [2019] EWHC 781 at [38].

[11] Steven Gee QC and Christopher Kientzler, "Suing Unnamed Defendants or Persons Unknown: Cameron v Hussain" (2019) 37 C.J.Q. 412.

[12] *Bloomsbury Publishing Group Plc v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch); [2003] 1 W.L.R. 1633.

directory about what "should" happen, and not mandatory. A defendant subject to an injunction could only be proceeded against if identified and given the opportunity to be heard, thereby satisfying the requirements of natural justice. They did not challenge the numerous cases allowing claims against persons unknown for wrongs done using the internet which concealed their identity, the use of freezing and other interim injunctions against persons unknown and the granting of final monetary relief against them when the court was satisfied that they had been served, for example through an email address.

Inquiries which might be made relevant to service

A claimant might investigate who had been the driver and what steps might be taken to inform them of the proceedings brought against them. For example, when the registered keeper is not fictitious, and had apparently allowed the perpetrator to drive when uninsured, there could be an application made against them under the *Norwich Pharmacal* jurisdiction, requiring them to provide full information, including documents, identifying the driver or enabling them to be given notice of the proceedings. They may be cross-examined. If they contumaciously disobeys a court order, there could be a committal order. Disclosure could be sought from the insurers. Someone would have arranged for insurance with a fictitious policy holder. Inquiries might have be made into how this was done, what IP address had been used, how the premium had been paid, what checks had been made and with what results. The DVLA may have records of payments made to license the vehicle, or where MOT checks had been done and paid for. Inquiries might have justified an order for service by alternative means such as at an email address or through a bank or issuer of a credit card, or supported an argument that it was to be inferred that they knew of the proceedings or their "likelihood", and was evading service. The parties agreed that all the new points were available notwithstanding they had not been argued below. The agreement that what was to be argued were points of law left the claimant arguing that service on the insurers was to be permitted, notwithstanding that it was common ground that this would not come to the attention of the unnamed driver.

The decision of the Supreme Court

There had been no case management taking into account the claimant's new European law point. Lord Carnworth in argument expressed concern on whether the court was obtaining all the assistance it might have had if there had been counsel appearing for the Secretary of State, who might have assisted on whether the Directive had been implemented. The state could be affected because of the possibility of a declaration of incompatibility and a *Francovich* claim,[13] which depends on showing a sufficiently "serious breach" by the state of the Directive's provisions, conferring a right on an individual, and which has caused them loss.

[13] In *Delaney v Secretary of State* [2015] EWCA Civ 172; [2015] 1 W.L.R. 5177, a *Francovich* claim succeeded against the UK by a passenger, for excluding liability to him on the ground that he knew or ought to have known that the driver was using the vehicle in furtherance of a crime. The evidence on why the Directive had not been implemented on that point was sparse. There was a sufficiently "serious breach" of the Directives by the UK, causing him loss.

The Supreme Court, in a judgment delivered by Lord Sumption, decided that because service on the insurers did not give "effective notice" of the proceedings for damages to the unnamed driver that the court is "about to proceed to determine the rights between him and [the claimant]"[14] could not be expected to do so, and did not enable him to defend himself, it could not be permitted. It was not sufficient that the insurers would defend the case and satisfy a judgment. Nor was it a case in which a statutory scheme allowed proceedings to go forward notwithstanding absence of service so that the claimant could obtain redress against a third party.

The EC Directive, unlike an EC Regulation, does not operate to confer rights on one individual against another[15]; it does not have horizontal effect. There is no cause of action under English law direct against the insurers; the Directive did not create one, and for the proceedings in tort against the driver, under the rules of natural justice he had to be given notice of them so that he could defend himself. The Directive did not legislate for the procedure to be adopted in the victim's action against the tortfeasor. The Supreme Court questioned whether the procedure advocated by the claimant complied with art.6 of the ECHR. That question would be examined at the end of the relevant proceedings; someone can be prosecuted in their absence, and convicted, but the proceedings will still be compliant with art.6 if subsequently the person appears and is permitted to defend the charge on its merits.[16]

There was, according to Lord Sumption, adopting his own suggestion in argument, a "conceptual difficulty", because it was not possible to locate or communicate with the defendant or to know whether any particular person was the same as the person described in the claim form. The case was different from that where the defendant is identified by a description which enables the court readily to identify who he is.

Prior to the Common Law Procedure Act 1852, it was necessary that the defendant appeared before the court. The most usual method of securing appearance was through arrest. The old writs were replaced in 1832 with a single statutory form which required the defendant to be named, and the Court of Appeal decided in 1926 that under the Judicature Act and the Rules of the Supreme Court 1883 it was necessary in "an action that the defendant be named".[17] Actions were confined to adversarial proceedings between identified persons, on pleaded issues. The procedure required identification of the defendant by name, at the commencement of the proceedings.

The CPR replaced these Rules, and *Bloomsbury* decided that they enabled proceedings against a defendant without naming him. The potential for anonymous wrongdoing in modern times using the internet, or by demonstrators, squatters and paparazzi, or hit and run drivers, requires any civilised system of law to allow actions without naming the defendant. Like Mareva injunctions, the previous practice developed in the Victorian era has been overtaken by social change. The Supreme Court held that under the CPR proceedings could be brought against unnamed defendants, and that the practice direction which required a defendant to be named did not require the contrary because it did not have statutory force.

[14] *Cameron v Liverpool Victoria* [2019] UKSC 6; [2019] 1 W.L.R. 1471 at [17]–[18].
[15] See also *Colinvaux & Merkin's Insurance Contract Law* (London: Sweet & Maxwell, 1995), D-0374.
[16] *Colozza v Italy* (1985) 7 E.H.R.R. 516 ECtHR at [28]–[29]; *Rubinat v France* (1985) 7 E.H.R.R. 512 ECtHR.
[17] *Friern Barnet Urban DC v Adams* [1927] 2 Ch. 25 CA; *Re Wykeham Terrace, Brighton* [1971] Ch. 204 Ch D.

Insurers could intervene and be heard[18] in the proceedings against the unnamed driver. Any judgment against a person unknown would not be enforceable against a driver's assets without further court proceedings proving that he was the perpetrator. This would give him the opportunity to apply to the court to be permitted to defend the case on the merits. A money judgment might be set aside before any enforcement of it was permitted against the driver. Its consequences in the absence of such proceedings would be limited to enabling the victim to bring proceedings against the insurers based on a separate cause of action which would vest in the victim under s.151, allowing insurers to seek an indemnity from their policy-holder and commencing proceedings against the unidentified driver for an indemnity.

The 1852 Act allowed substituted service if a defendant was wilfully evading personal service. Although the judges had wide powers to permit proceedings in the absence of personal service, including when from any cause prompt service could not be had, they required evidence showing reason to believe that the proceedings would come to the notice of the defendant. This might be done through advertisements, service at a club, or on a wife or a close relative. Sir George Jessel MR said[19] that there had been no case when there was not "a chance of knowledge of service … ever reaching the defendant". The object of all the permitted modes of service under the CPR is to enable the court to be

> "satisfied that the method used either had put the recipient in a position to ascertain its contents or was reasonably likely to enable him to do so within any relevant time period".

The Supreme Court has said that "the whole purpose of service is to inform the defendant of the contents of the claim form and the nature of the claimant's case …".[20] Whether this is likely to be achieved is a question of fact. It depends on the evidence. The absence of evidence and factual findings on this before the Supreme Court, where the objection had been taken for the first time at such a late stage by the insurers, precluded allowing the proceedings to go forward against the unnamed driver: "there was no reason to believe that the [driver] was aware that proceedings had been or were likely to be brought". There were no fact findings enabling the court to infer that the unnamed driver knew of the proceedings or the likelihood of proceedings being brought against him, and it was not argued that it was a case of deliberate evasion of service.

The Supreme Court decided that the rules of natural justice required that there could not be proceedings leading to entry of a final money judgment against a defendant, unless there had first been effective notice to him enabling him to defend himself.

In *Cameron* there was no application for an order allowing the proceedings to go forward and service to be dispensed with on terms including setting aside a judgment unconditionally, should the driver appear at any time and choose to defend, and a stay of execution on his personal assets. Under s.151 (8) the uninsured driver would become exposed by a judgment to an indemnity claim by the insurer,

[18] *Humber Work Boats Ltd v Owners of the Selby Paradigm* [2004] EWHC 1804 (Admiralty); [2004] 2 Lloyd's Rep. 714.
[19] *Wolverhampton and Staffordshire Banking Co v Bond* (1881) 43 L.T. 721.
[20] *Abela v Baadarani* [2013] UKSC 44; [2013] 1 W.L.R. 2043 at [37].

but the insurer could not in practice pursue this without knowing who was the driver and suing him, and the driver could at that stage choose to set aside the judgment and defend the victim's claim on the merits. The criminal offences of the driver had caused the difficulties concerning service on him. The Court of Appeal in *Jacobsen v Frachon*[21] was not required to consider the relevance of a remedy by "application for the judgment to be set aside".[22] Such an order would appear to be both art.6-compliant, and not offend against the principles of natural justice because (1) the driver would be able to set aside the order at any time as of right and defend the case on its merits[23]; and (2) it would not prejudice the driver or his personal assets, or deprive him of the right to be heard. The fact that a judgment against an unnamed person was capable of being set aside unconditionally would be so of a judgment in default, and would not prevent it coming within s.151. This interpretation is reinforced by art.18, which requires there to be judgment available by direct suit against the insurers, regardless of whether the driver can be identified.

Proceedings against persons unknown under the CPR

The decision leaves intact the extensive case law on bringing proceedings for injunctions for wrongs done anonymously using the internet, and for *quia timet* relief against persons unknown restraining trespass or other overt unlawful conduct by them which can be established from evidence of what they did. They can be identified and proceeded against individually only if they subsequently so act. The decision does not affect bringing proceedings, and obtaining injunctive relief, against "persons who do not exist at all and will only come into existence in the future".[24] It does not prevent money judgments where the defendant has been served using an email address. It allows the granting of an interim injunction in proceedings against persons unknown, which will be effective against notified non-parties because they must not defeat its purpose, or facilitate its breach.

The Court of Appeal has subsequently decided that under the CPR there is no rule that a defendant has to be identifiable at the commencement of proceedings.[25] An action can be brought and an injunction granted restraining future trespass or other overt act by demonstrators. An individual will become a defendant on doing the prohibited act.[26] The rule is that the procedure under the CPR must be fair. This is what is required by the overriding objective, and the principles of natural justice. This is why, in the absence of findings of fact or evidence enabling there to be effective notice of proceedings given to the perpetrator, the action claiming an unconditional final money judgment could not proceed.

[21] *Jacobsen v Frachon* (1927) 138 L.T. 386.
[22] *Adams v Cape Industries* [1990] Ch. 433 CA (Civ Div) at 564.
[23] *Yrityspankki Skop Oyj v Olli Reinikka* [2000] I.L. Pr. 122 Ontario Court of Justice; *United States of America v Ivey* (1996) 30 O.R. (3d) 370 (Ontario CA), affirming (1995) 26 O.R. (3rd) 533 (Gen. Div.).
[24] *Boyd v Ineos Upstream Ltd* [2019] EWCA Civ 515; [2019] H.R.L.R. 11 at [29].
[25] *Boyd v Ineos Upstream Ltd* [2019] EWCA Civ 515; [2019] H.R.L.R. 11 at [29].
[26] *South Cambridgeshire DC v Gammell* [2006] 1 W.L.R. 658 CA (Civ Div) at [32].

A direct cause of action against the insurers—art.18 of the Directive

The Directive's voiding provisions and art.18 provide for the victim, including victims resident in another Member State, to obtain compensation direct from the insurer, regardless of who was driving and regardless of whether he could subsequently be identified, or served with proceedings in accordance with national law. The decision in *Cameron* shows that the non-implementation of art.18 may, depending on the evidence, not be remediable through the CPR; and that the requirement in s.151 that there must be a judgment against the driver combined with the CPR on service can render "virtually impossible or excessively difficult the exercise of rights conferred by Community law [art.18] on victims", a breach of the principle of effectiveness.[27] Each Member State shall, under art.3, "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", and under art.10

> "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 or a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied".

Breach of art.3 by the state can result in an award of damages[28] for a victim, who suffers direct loss as a result.[29]Article 18 is unconditional ("Member States shall ensure that …"). They are part of a Directive which is in full operation internationally within the EC, which has superseded the green card system, and the last date for implementation is long past. The provisions do not depend on the exercise of any discretion by any Member State, and confer specific, clear and unconditional benefits on individual victims. A provision of a Directive which is unconditional and clear in its terms, and when the date for implementation has passed, may be directly enforceable by an individual against the Member State[30] and result in an award of damages against that state.[31] The Court of Appeal has decided that arts 3 and 10 are directly enforceable by a victim against the UK.[32]Article 18 enables a victim to receive his compensation under the compulsory insurance, and appears to be directly enforceable. The Supreme Court had the obligation to interpret the Civil Procedure Rules and exercise discretions so far as possible to give effect to art.18, but not to override and change clear national law.[33]

A victim has succeeded in recovering *Francovich* damages[34] against the Secretary of State in a case where the MIB refused to compensate him based on an exclusion in their scheme agreed with the Secretary of State, which was inconsistent with the Directive.

[27] *Evans v Secretary of State for the Environment* (C-63/01) EU:C:2003:650; [2005] All E.R. (EC) 763 at [45].
[28] *Dillenkofer v Federal Republic of Germany* (C-178/94) EU:C:1996:375; [1997] Q.B. 259 at [16], [19]–[29].
[29] *Motor Insurers' Bureau v Lewis* [2019] EWCA Civ 909, applying *Farrell v Whitty* (C-356/05) EU:C:2007:229; [2007] 2 C.M.L.R. 46 at [37]. The point on art.3 had been conceded by the Secretary of State in *R. (RoadPeace Ltd) v Secretary of State for Transport* [2017] EWHC 2725 (Admin); [2018] 1 W.L.R. 1293 QBD at [94].
[30] *Becker v Finanzamt Münster-Innenstadt* (8/81) EU:C:1982:7; [1982] 1 C.M.L.R. 499 at [23]–[25].
[31] *R. v Secretary of State for Transport Ex p. Factortame (No.4)* EU:C:1996:79; [1996] Q.B. 404 at 499.
[32] *Motor Insurers' Bureau v Lewis* [2019] EWCA Civ 909 at [66].
[33] *Impact v Minister for Agriculture and Food* [2008] 2 C.M.L.R. 47 at [100]–[101].
[34] *Delaney v Secretary of State* [2015] 1 W.L.R. 5177 CA (Civ Div).

A *Francovich* claim by a victim could seek from the Secretary of State the costs incurred in pursuing proceedings rendered fruitless as a result of failure to implement art.18, and other losses resulting from not having the direct claim against the insurers.

Incompatibility of s.152(2) with the voiding provisions

Section 152(2) RTA is incompatible with the Directive, because it permits insurers to avoid a policy for non-disclosure, thereby defeating a victim's claim in cases within the Directive's voiding provisions in art.13.[35] In *Colley v Shuker*,[36] a teenager was a passenger in a car driven by the son of the policy-holder. The teenager was aware that the son did not have a valid driving licence and was not insured to drive the vehicle. The son lost control and the vehicle overturned on an embankment. The teenager suffered a spinal-cord injury at level C4, rendering him tetraplegic. The son was convicted of causing serious injury by dangerous driving. The insurers avoided the policy for misrepresentation by the policy-holder on who would be driving the vehicle. Section 152 RTA 1988 permits avoidance of motor insurance. The court was not able to give effect to the Directive through reading down the section and therefore did not have to consider and apply what the Directive required. The judge struck out the claim based on s.152(2), holding that the only remedy for incompatibility would be a *Francovich* damages claim. There was no claim under the 2002 Regulations because the son was not insured under the terms of the policy. This is a situation covered by the voiding provisions, which the UK has promised to enact. It is a matter of deep concern that non-implementation of the voiding provisions in art.13 left the victim with no claim against the insurers, and the prospect of litigation with the Secretary of State on a claim for damages.

Incompatibility of s.145 with the Directive

Under the Sixth Directive, compulsory cover in the EU includes cover for accidents irrespective of where the accident occurs, including on private property, for example a farm worker injured by a tractor,[37] or a worker on private land crushed by a landslide as a result of the spraying of herbicide from a vehicle, or injured by a vehicle which the owner does not intend to use and is parked on private property.[38] In *R & S Pilling v UK Insurance Ltd*,[39] a motorist had tried to repair his car, and a fire that started inside the vehicle spread to the garage and adjoining premises and resulted in claims against him. The Supreme Court held that compulsory motor insurance in the UK under s.145 (3)(a) of the RTA 1988 does not extend outside the roads or other public places. The insurance policy did not provide the motorist with an indemnity for the claims against him because the accident was on private

[35] *RoadPeace v Secretary of State for Transport* [2018] 1 W.L.R. 1293 at [70] (point conceded by the Secretary of State). Part II of the Road Traffic Act 1934, a statutory predecessor, had allowed insurers to avoid for misrepresentation or non-disclosure against third parties: *Zurich General Accident and Liability Insurance Co Ltd v Morrison* [1942] 2 K.B. 53 CA at 61, per Goddard LJ.

[36] *Colley v Shuker* [2019] EWHC 781.

[37] *Vnuk v Zavarovalnica Triglav dd* (C-162/13) [2016] R.T.R. 10.

[38] *Fundo de Garantia Automóvel v Juliana* [2018] 1 W.L.R. 5798 at [52].

[39] *R & S Pilling v UK Insurance Ltd* [2019] UKSC 16; [2019] 2 W.L.R. 1015.

property.[40] To protect victims, compulsory insurance should not be so confined.[41] In that case there could not be a remedy based on purposive interpretation of insurance policy. The Supreme Court considered that Parliament should "reconsider the wording" of the section so as to provide compulsory insurance complying with the Directive.[42] There can be a damages claim against the UK, and there could be a claim against the MIB under its scheme, on the basis that the MIB is an "emanation" of the state for the purpose of discharging the state's obligations under the Directive, and precluded from contesting that the accident should have been covered by compulsory insurance[43].

Compulsory motor insurance

Compulsory motor insurance should cover all accidents involving vehicles, and provide prompt compensation. Victims' costs should be recoverable.[44] Insurers should know what they are covering in order to rate the risks. English law should be updated so that victims and insurers are not litigating through the courts on issues which have nothing to do with responsibility for the underlying accident and quantifying compensation. The case of the tetraplegic speaks for itself.

[40] In *Motor Insurers' Bureau v Lewis* [2019] EWCA Civ 909, affirming [2019] 1 W.L.R. 1785, there was no insurance cover because the accident was on private land.

[41] The Minister has described insurance of land based toys and lawn mowers as "absurd".

[42] *R & S Pilling v UK Insurance Ltd* [2019] UKSC 16; [2019] 2 W.L.R. 1015 at [37].

[43] *Motor Insurers' Bureau v Lewis* [2019] EWCA Civ 909; *Farrell v Whitty (No.2)* (C-356/05) EU:C:2007:229, [2018] Q.B. 1179, holding that the MIB (Ireland) was an "emanation of the State" and bound to compensate the victim; see *Colinvaux & Merkin's Insurance Contract Law* (1995), D-0374.

[44] In the case of a hit and run driver in a case allocated to the small claims track, the extra costs caused by the accident and the perpetrator not stopping in breach of s.170 RTA 1988 may be recoverable from the perpetrator as costs caused by his "unreasonable" conduct, or may be recoverable from him as damages in tort.