

EU Law and RTA claims

Gabriel Farmer
Guildhall Chambers

June 2015

Where do we start? 1930...

Road Traffic Act 1930 – s.36(1)(b)

The policy must insure such persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by, or arising out of, the use of the vehicle on a road .

Where do we start? 1930 (1980)

Road Traffic Act 1980

s.192

" road " means any highway and any other road to which the public has access, and includes bridges over which a road passes;

s.185

" motor vehicle " means a mechanically propelled vehicle intended or adapted for use on roads

1972 – the First Motor Directive

(72/166/EEC of 24 April 1972)

- No more compulsory green card checks
- MIB's to settle foreign claims
- 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
- "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

So, we towed the line...sort of...

Road Traffic Act 1988 – s.145 (as enacted)

the policy must insure such person... as may be specified in the policy in respect of any liability which may be incurred by him... in respect of the death of or bodily injury to any person or damage to property caused by, or arising out of, the use of the vehicle on a road in Great Britain

Clark v Kato; Cutter v Eagle Star

Accidents “off the road”

Clark v Kato – Boy racer hits girl

Cutter v Eagle Star – Aerosol fire

[1998] 1 WLR 1647 HL

Clark v Kato; Cutter v Eagle Star

The European arguments:

Marleasing SA v. La Comercial Internacional de Alimentacion SA (Case C-106/89) [1990] E.C.R. 1-4135

"It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty."

Clark v Kato; Cutter v Eagle Star

- I am not persuaded that in respect of the particular question which has arisen in the present cases the Directives require that the word "road" in section 145 should be construed as including a car park, or indeed as including any place whatsoever where a vehicle might be used. Indeed it might be that while the language of the directives is of "the use of vehicles" it is with travel and movement between states that they are dealing and that they should be taken to be concerned simply with the use of vehicles on a road, which is the usual place for a vehicle to be used.

Motor Vehicles (Compulsory Insurance) Regulations 2000/726

Explanatory note:

In the case of *Cutter v. Eagle Star Insurance Company Ltd*, [1998] 4 All ER 417, it was held by the House of Lords that the expression did not include a car park or similar public place. For the purpose of complying with the directives these Regulations amend the 1988 Act ... by extending the insurance requirement to the use of vehicles in public places other than roads ...

“public place”?

Evans v Clarke (t/a FBI Volkswagen Services) and NIG Insurance plc

John Clarke v Phoebe Clarke and Motor Insurers' Bureau (2012) QBD (Judge McKenna) (30 March 2012, unreported)

EU directive clarified

Vnuk v Zavarovalnica Triglav d.d, Case C-162/13

- Slovenian farm worker up ladder
- Struck by reversing tractor and trailer
- Driving in a private courtyard
- Ends up in the supreme court

EU directive clarified

Vnuk v Zavarovalnica Triglav d.d, Case C-162/13

- Reference to CJEU: Did Art 3(1) “use of vehicles” cover the accident circumstances
- Many states (inc UK) intervened
- CJEU: holds ...

EU directive clarified

- (1) that the objective of protecting accident victims was of equal importance to the aim of freeing the movement of persons and goods
- (2) “use of vehicles” in that article [viz article 3] covers any use of a vehicle that is consistent with the normal function of that vehicle. That concept may therefore cover the manoeuvre of a tractor in the courtyard of a farm in order to bring the trailer attached to that tractor into a barn, as in the case in the main proceedings, which is a matter for the referring court to determine.

Ok – but so what?

Conflicts:

(1) Geographical location

“use of vehicles” v “road or other public place”

(2) Type of vehicle

“any motor vehicle intended for travel on land and propelled by mechanical power” v “a mechanically propelled vehicle intended or adapted for use on roads”

Ok – but so what?

Conflicts:

(3) Use

“any use of a vehicle that is consistent with the normal function of that vehicle” v road traffic context (eg tractor being used to power fixed apparatus)

Claims falling short:

- Accidents not on a road or other public place
 - The classic private land RTA
- Accidents involving odd machines
 - The nightmare of the lawnmower...
- Accidents involving multi-use machines...
 - Plant machinery

Claims falling short: other examples

- Untraced drivers agreement – incompatible limitation exclusion: Byrne v SoS Transport and MIB [2008] EWCA Civ 574
- (Resulted in amended Untraced Agreement 30.12.08)
- Principle: MIB/scheme protection had to be equivalent to and as effective as protection to insured victims

Claims falling short: other examples

- MIB exclusion clauses v Permissible exceptions under the Directives:
- Delaney v MIB [2014] EWHC 1785 (QB)
- Uninsured driver's agreement 1999
cl.6(1)(e)(iii): "the vehicle was being used in the course of or furtherance of a crime"

Claims falling short: other examples

- Directive - permissible exception:
- “[claims] 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.” (Art 4, 2nd motor directive)
- Amendment of MIB Agreements awaited...?
- (tip: rely on knowledge of lack of insurance?)

Claims falling short: remedies

- Long term:
- the RTA will require amendment !?
- See letter from Dept for Transport 22.12.14
- But: (an election has and) politics may get in the way?
- Any information from the floor re consultation/amendment?

Claims falling short: remedies

- Short term: claimants may:
 - (1) Seek EU compliant interpretation of RTA (Clark v Kato revisited?) (“Indirect effect”)
 - (2) Pursue Francovich v Italy [1991] ECR I-5357
 - (3) Pursue “Direct effect” claims v MIB

(1) Seek EU compliant interpretation?

- Difficult: “other public place” ≠ “private place”
- Lord Clyde in Clark v Kato
- “But even in this context the exercise must still be one of construction and it should not exceed the limits of what is reasonable”
- Hence – anticipated that amendment will be required
- Don’t waste time: tell C’s to pursue Dft via a Francovich claim

(2) The Francovich claim:

Francovich criteria: (*Brasserie du Pêcheur SA v Germany*, *R v SoS Transport, ex P Factortame* [1996] QB 404) (and [2000] 1 AC 524)

- The rule of law infringed must be intended to confer rights on the individual
 - Not usually in issue

(2) The Francovich claim:

- The breach must be sufficiently serious
 - NB:Vnuck: “the objective of protecting accident victims was of equal importance to the aim of freeing the movement of persons and goods”
- There must be a direct causal link between breach of the obligation and damage
 - Not usually an issue

But also

- “deliberate intention to infringe” v

(2) The Francovich claim:

But also

- “deliberate intention to infringe” v “inadvertence” : was the error of law excusable or inexcusable? (R v SoS Transport, ex parte Factortame [2000] 1 AC 524)
- Requires analysis of government rationale – interesting...?

(2) The Francovich claim:

- Robert Jay J. In Delaney: “conspicuous paucity of evidence” re decision to introduce the crime exception

Conclusion: The Government are losing – the Francovich claims will mount – there will be amendment.

(3) MIB and “direct effect”

Is the MIB an emanation of the state?

- Uncharted territory, but NB:
- *Farrell v Whitty* [2208] IEHC 124 (31.01.08)
- **yes**
- *Byrne v MIB* [EWCA Civ 574 (22.05.08) - **no**
- *McCall v Poulton & MIB* [2008] EWCA Civ 1263 (21.11.08) – **no answer!**
- Commentators: **yes**

Conclusions

- (1) Vnuk will necessitate amendment of the RTA 1988
- (2) Delaney will necessitate amendment of the MIB Agreement(s)
- (3) Politics/austerity are getting in the way?
- (4) Francovich claims – not a problem BUT
- (5) MIB (Art 75...) direct effect claims could increase?