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FOIL UPDATE 23rd March 2022

The impact of a S152 RTA declaration prior to 1 November 2019

Colley v Motor Insurers' Bureau (2022) EWCA Civ 360

The issue in this case was whether the obligation of the Motor Insurers' Bureau ("the MIB") that arose under Articles 3, 10 and 12 of Directive 2009/103/EC ("the Codified Directive") was an obligation limited to providing compensation where there was an unidentified vehicle or a vehicle in respect of which there was no policy of insurance in being at the time of the incident giving rise to liability? Or did the obligation also extend to a case where there was a policy of insurance in being at the time of the incident giving rise to liability, but that policy was subsequently avoided ab initio?

On 27th March 2015, the claimant was a passenger in a car (the vehicle) being driven by a Mr Shuker (the driver) when, by reason of the driver's negligence, an accident occurred which caused the claimant to suffer catastrophic injuries. The driver was the registered keeper of the vehicle but his father had taken out a policy of insurance with the insurer. The policy did not provide cover for the driver to drive the vehicle as he was not a named driver. He was therefore uninsured at the time of the accident.

After the accident but before these proceedings were issued the insurer sought and obtained a declaration that it was entitled to avoid the policy on grounds of material misrepresentation. The

IN BRIEF

The Court of Appeal upheld the decision of the High Court that where a policy of insurance had been in existence at the time of an accident but had subsequently been avoided *ab initio*, the MIB was required to deal with the injured claimant's claim for damages.

misrepresentation upon which the insurer relied was that the driver's father had stated wrongly that he was the registered keeper of the vehicle and that the only drivers of the vehicle would be himself and his partner.

Pursuant to the provisions of Ss151 and 152 of the Road Traffic Act 1988, as they then stood, this declaration released the insurer as a matter of English law from any obligation arising under S151 of the Act to make payment to the claimant in respect of any award of damages he might subsequently obtain against the driver.

It was common ground that this provision was not compliant with the terms of the Codified Directive and that, to that extent, the Secretary of State was in breach of Articles 3(1) and 13(1) of the Codified Directive. The problem that gave rise to the breach was remedied by the amendment of S152(2) on and from 1 November 2019 so that an insurer was now only able to avoid its liability under S151 if it obtained the S152 declaration "before the happening of the event which was the cause of the death or bodily injury or damage to property giving rise to the liability … ." This amendment was prospective only. It did not apply to or assist the claimant in his claim against the insurer.

The answer to the questions put before the court and the determination of this appeal depended upon the meaning to be attributed to the words "covered by insurance" in Article 3(1) of the Codified Directive. In the court below, a High Court Judge concluded that the MIB's obligation under the Codified Directive covered a case where there was a policy of insurance in being at the time of the incident giving rise to liability but that policy was subsequently avoided ab initio; and that it gave rise to a direct right of action by a victim against the MIB, which he held to be an emanation of the state for these purposes.

Dismissing the MIB's appeal, the Court of Appeal held that the MIB's concentration on the word "uninsured" was misplaced. Whether a vehicle was "uninsured" was not the test for the scope of the Article 3 insurance obligation. Where the word "uninsured" was used, both in the CJEU and in the Recitals to the Codified Directive, it reflected the EU law assumption that, if a policy was in existence, it would respond. If it did not do so in a particular Member State, for whatever reasons, there was a failure by that State to comply with its Article 3 insurance obligation. That was what had happened here. There could be no doubt that, if judged by EU law standards and EU law's understanding of the scope of the Article 3 insurance obligation, the insurer's avoidance could and would not have been effective as against the claimant. On the facts of this case, the national law of the United Kingdom had deviated from the system and scope of the obligation which should, as a matter of EU law, have been in place with the result that the defendant driver's civil liability was not covered. The directly enforceable obligation upon the MIB was to compensate him "at least up to the limits of the obligation" provided for in Article 3. There could be and is no gap into which the claimant might fall.

The full report may be found at: Colley v Motor Insurers' Bureau [2022] EWCA Civ 360 (22 March 2022) (bailii.org)