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Dead in a Ditch: UK harmonization of EU motor insurance law

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Boris to the rescue?

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The framework

- Compulsory motor insurance has been a statutory requirement in the UK since the Road Traffic Act 1930.

- The current statutory regime in the Road Traffic Act 1988 was enacted to ensure compliance with the European Directives although there is good reason to believe that it does not fully achieve that goal.

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The framework

- The problem is that the modern statutory framework and its relationship to the MIB does not follow a logical or easily comprehensible system.

- Nor is it easy to understand in the context of the Directives

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The framework

- Motor insurance in the UK generally insures specific individuals to drive specific cars for specific purposes and there may be many instances when the insurer is not contractually liable to indemnify and the question becomes whether it has a statutory obligation to meet the claim or whether the obligation rests on the MIB.
- In contrast, in most EU countries vehicles are insured for any driver in any circumstances with the result that a vehicle is insured (in which case the insurer meets the claim under contract) or is not insured (in which case the claim is met by the equivalent body to the MIB).

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The framework

- The ‘European model’ obviates the arguments about the status of the insurer which is so much part of the law in the UK.
- The Directives were drafted principally by reference to the European model – that is why it is so difficult to apply the terms of the Directives to particular problems under UK law.

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The framework

- The first motor insurance directive was in 1972.
- The Sixth Directive (2009/103/EC) is a consolidating directive.

(1) Requires MS to make motor insurance compulsory.

(2) Requires MS to establish a body to provide compensation to the victims of uninsured or unidentified drivers.

(3) Permits MS to exclude payment of compensation by that body to an injured person who entered the vehicle knowing that the vehicle was uninsured or stolen.

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The primary concept

- The primary concept which underpins motor insurance is that no innocent person who is injured in a RTA will go uncompensated, irrespective of the presence or absence of effective insurance.

- This result is achieved by a mixture of contractual obligations, the RTA 1988 and the MIB.

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The primary concept

The basic premise is:

- Where there is an insurer who has taken or would be entitled to take a premium in respect of the vehicle then that insurer has to pay any judgment obtained against the driver of that vehicle irrespective of who was driving and how the vehicle came to be involved.

- Where there is no insurer at all then the judgment is met by the MIB Central Fund.

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Basics: cascading liability

The primary concept gives rise to the liability tree:

(1) Contractual insurer

(2) Section 148 insurer, whose contractual obligations are modified by statute

(3) Section 151 insurer

(4) Article 75 insurer

(5) MIB Central Fund

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The insurance obligation

- Art 3(1) of the Sixth Directive:

"Each Member State shall … 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"

- Enacted in sections 143, 144 and 145 of the RTA 1988.

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The insurance obligation

Section 145(3) sets out the insurance requirement:

- The policy "must insure such person, persons or classes of person 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 or bodily injury to any person or damage to property caused by, or arising out of the **use of, the vehicle on a road or other public place** …"

i.e. third party cover in respect of injury and damage.

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Juliana (C-80/17)

- The owner of an uninsured vehicle in Portugal had stopped using it for health reasons.
- She parked it in her own private yard but took no further steps to remove it from use.
- Without her permission, her son drove the vehicle and lost control on a public road, resulting in his death and the death of 2 passengers.

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Juliana: Question 1

Did the vehicle need to be insured when it was parked on private land and the owner had no intention to drive it?

- "Vehicle" is defined under Art 1(1) of the First Directive as "any motor vehicle intended for travel on land".
- "Vehicle" therefore has an objective meaning, independent of the intention of the owner to use it.
- A vehicle which was registered (and which had not been unregistered or withdrawn from use) was a "vehicle" within Art 1(1) and as such, was required to be insured under Art 3(1), regardless of whether it was immobile on private land.

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Juliana: Question 2

Where a national compensation fund has paid out, is it lawful under Art 1(4) of the Second Directive (84/5/EEC) for it to seek recovery from the person subject to the insurance obligation, even if they had no civil liability for the accident?

- The Directive does not expressly allow or prohibit claims to be settled between the body and the person with the insurance obligation.
- It is therefore a matter of national law.

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Use of a motor vehicle

- Directive: “use” not further defined by type of use or geographical limitation.

- s. 143(1)(a): A person must not **use a motor vehicle on a road or other public place** unless insurance complying with the 1988 Act is in place.

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Use: the European cases

The CJEU takes a broad view of "use"

- In the seminal case of *Vnuk* (C-162/13), a tractor knocked a man off a ladder on a farm. The CJEU held that the Directives have no geographical limitation on the extent of the obligation to insure. That obligation included private land. The court also decided that the concept of 'use' included any use of the vehicle that is **consistent with the normal function of that vehicle**.

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Use: the European cases

- Similarly, in *Torreiro* (C-334/16), the insurers of an all-terrain military vehicle used in 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**.

- In *Baltijas* (C-648/17), the CJEU held that an injury caused by a passenger opening the door of a parked car was "**use of a vehicle consistent with its normal function**".

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Use: the European cases

- In *Andrade* (C-514/16), an employee was killed when a stationary tractor fell down a terrace. The tractor was being used to power a spraying device at the time. The CJEU held that use was **not a use consistent with its normal function as a means of transport**, and therefore did not require insurance.

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Use: the European cases

- The Directives make no reference to the compulsory insurance obligation being confined to the use of vehicles for transport

- Variation in terminology: In *Torrreiro,* the CJEU did not refer to the 'consistent with normal function' definition of use but rather considered use 'as a means of transport'

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Use: the UK cases

- *Dunthorne v. Bentley* – running across the road after a breakdown is 'use' to which the motor insurance policy must respond.

- *Elliot v. Gray* – putting a vehicle on a jack, removing the battery and keeping it parked on the street outside a house without insurance is 'use' in terms of an offence under s. 143.

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Use: *R&S Pilling v. UKI*

- Mr Holden (H) was a mechanical fitter employed by C. At his workplace and with his employer's permission he was welding plates to the underside of his private car.
- Sparks from the welding ignited seat covers, causing a huge fire which damaged his employer's premises and the neighbouring building.
- C's insurer, AXA, paid £2M and sought indemnity from H.
- H's motor insurer, D, sought an declarator that they were not liable to indemnify H.

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Use: *R&S Pilling v. UKI*

The issue was whether the accident arose out of H's 'use' of the car.

- At trial in the QBD, HHJ Waksman QC found:

"the repair being undertaken to [H's] car was clearly not using it. It was not being operated in any way at all but was immobile and indeed partly off the ground so that it could be worked on."

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Use: *R&S Pilling v. UKI*

Court of Appeal:

- "[61] I consider that it follows that the repair of a car, which the owner was driving but due to disrepair cannot be lawfully and safely driven, and which the owner wishes to effect as soon as possible in order to be able to drive the car lawfully and safely, is "use" of the car within section 145(3)(a) of the RTA, being an activity consistent with its normal function for the purpose of that statutory provision."

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Use: *R&S Pilling v. UKI*

Supreme Court:

- Applying the 'purposive interpretation' to section 145(3)(a) would "go against the grain and thrust of the legislation, because it raised policy ramifications which were not with the institutional competence of the courts, and because it would necessarily impose retrospective criminal liability under section 143." [40]

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Use: *R&S Pilling v. UKI*

Supreme Court:

- The Court needed to consider not only "use of the vehicle" but the words "caused by or arising out of" the use of the vehicle on a road or other public place. Those words must mean there has to be a causal link between the use of the vehicle on a road and the damage resulting from that use which occurs elsewhere. [42]

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Use: *R&S Pilling v. UKI*

Supreme Court:

- It is artificial to say that the property damage which C suffered was caused by, or arose out of, the use of the vehicle. The cause of damage was H's negligence in carrying out the repairs, and not the prior use of the vehicle as a means of transport. [55]

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Use: *R&S Pilling v. UKI*

- "Recent case law of the CJEU has demonstrated a need for Parliament to reconsider the wording of section 145(3)(a) of the RTA to comply with the Directive." [37]
- "It is important to note that EU law does not require a national court, hearing a dispute between private persons, to disapply the provisions of national law and the terms of an insurance policy, which follows national law, when it is unable to interpret national law in a manner that is compatible with a provision of a Directive which is capable of producing direct effect." [41]

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Was the Supreme Court correct?

Linea Directa (C-517/19)

A parked and unattended car in a garage caught fire due to an electrical fault. In Spain, the compulsory insurance obligation did not cover cases where a vehicle caught fie when stationary and protected by frost covers. In those circumstances, where there was no risk to road users, did EU law require insurance?

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Reconciling *Pilling* with *Linea*

- CJEU held, following *Torriero* and *Baltijas* that parking and immobilization of a vehicle were natural steps forming part of the use of the vehicle as a means of transport.
- Can they be reconciled? Perhaps.
- In *Linea Directa* the fire was the spontaneous result of a defect in the vehicle, whereas in *Pilling* the fire was caused by a negligent act.

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Amending the MID?

- Commission proposed an amendment of the MID to EU Parliament:

"'Use of a vehicle' means any use of such vehicle, intended normally to serve as a means of transport, that is consistent with the normal function of the vehicle, irrespective of the vehicle's characteristic and irrespective of the terrain on which the motor vehicle is used and of whether it is stationary or in motion."

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Amending the MID?

- EU Parliament's amendment:

"'Use' of a vehicle means any use of ***a*** vehicle ***in traffic*** that is consistent with the ***vehicle's*** function ***as a means of transport at the time of the accident*** irrespective of the vehicle's characteristics and irrespective of the terrain on which the motor vehicle is used and of whether it is stationary or in motion"

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Fidelidade

- Statutory or contractual provisions designed to limit insurers' liability to third parties are not permitted by EU law.
- The only permitted derogations are those where the victim knowingly permits themselves to be carried in a stolen or uninsured vehicle.
- Any material omissions or false statements by the policyholder do not enable the insurer to rely on the nullity of contract against a third-party victim.

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Fidelidade

The Directives

"…. must be interpreted as precluding national legislation which would have the effect of making it possible to invoke against third-party victims … the nullity of contract for motor insurance … as a result of the policyholder initially making false statements concerning the identity of the owner and the usual driver of the vehicle concerned or from the fact that the person for whom or on whose behalf that insurance contract was concluded had no economic interest in the conclusion of that contract."

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Roadpeace v. SS for Transport & MIB

A charity sought JR of various road traffic law provisions:

- Sections 143, 145 and 151 were not compatible with the Directive because they did not prohibit insurance policies from including limitations and exclusions.
- The legislation permitted the insurer to rely on breaches by the policyholder to refuse to indemnify, to the detriment of the innocent third party victim.
- The restriction on compulsory insurance to "road or other public place" was incompatible with the Directive.

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Roadpeace v. SS for Transport & MIB

Ousley J held:

- That restrictions in policies permitted by the RTA 1988 (e.g. for SDP use) did not render the Act incompatible with the Directive, because the Directive did not require insurance for any and all uses, but rather the MIB protected the interests of victims.
- Art 3 of the Directive gave the innocent victim no greater right against the insurer than the policyholder, so the legislative scheme was not incompatible.
- However, the obligation of compulsory insurance was wider than had been understood by the government and amendments to the UtDA and UiDA were required.

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Roadpeace v. SS for Transport & MIB

"[70] [The government] accepted … that the true effect of the *Fidelidade case* was that section 152(2) of the RTA was no longer compatible with EU law. The general rule is that the insurer is directly responsible for satisfying judgments obtained by third parties against the insured even if the insurance company will otherwise be entitled to avoid the policy. There was an exception to that general rule in section 152(2), where a declaration had been made that the policy had been obtained through non-disclosure of a material fact or a materially false representation of fact. Amendment would therefore be required. But that was not part of the challenge in these proceedings, nor did it relate to this ground.

"[71] I agree."

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Colley v. Shuker

- C, a passenger, seriously injured by negligent driving of driver. As C knew, the driver was uninsured.
- Insurer obtained declarator under s. 152.
- C sought to set the declarator aside and brought an action against the driver, the insurer and the MIB.
- The insurer applied to have that action struck out.

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Colley v. Shuker

- C argued that s. 152 was incompatible with the Sixth Directive, and that a purposive interpretation of s. 152 required that there be implied a residual discretion to require an insurer to satisfy the s. 151 obligation notwithstanding that a declarator had been obtained.

- O'Farrell J found that the wording of s. 152 was clear and that the C's approach would go against the grain of the legislation and cross the boundary between interpretation and amendment.

- Any incompatibility between s. 152 and EU law cannot be remedied by effecting a purposive interpretation.

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Declarators

- From 1 November 2019, a declarator that a policy is avoided and which is obtained after the harmful event no longer relieves the insurer of the obligation to meet the liability under s. 151.

- The consequence of a declarator that the policy is avoided (and which is obtained before the harmful act) is that the insurer is:

(1) no longer the contractual insurer;

(2) not required by section 151 to satisfy a judgment;

(3) and is now an Article 75 insurer.

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Declarators: A trap for the unwary

- Insurers will have to look more closely at the basis for canceling a policy.

- The terms of policy concerning cancellation must be clear and any cancellation made strictly in accordance with those terms.

- Amendments to s. 152 do not prevent insurers from cancelling policies. A knee-jerk reaction of avoiding a policy may mean there is no policy to cancel, so as to have the benefit of s. 152(1).

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Cameron v. Hussain

- Minor RTA. C suffered modest personal injury and credit hire charges.

- Driver of other vehicle did not stop. Registration number of vehicle obtained, but the driver was never identified.

- D1 was the registered keeper (who had been convicted of failing to identify the driver) and D2 was the insurer (who had issued a policy to another person).

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Cameron v. Hussain

- C claimed against D1, believing he was the driver. It became clear that D1 was not the driver, and C sought leave to amend the claim:

  "The person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZIZ on 26 May 2013"

- Application failed at first instance. Claim was dismissed on D2's application. CA overturned the decision.

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Cameron v. Hussain

- Effect?

A large number of cases which previously would have fallen within the MIB Untraced Drivers Agreement (and met out of MIB's central fund) would now have to be satisfied by an insurer.

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Cameron v. Hussain

- "It is a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard."

- Unless a C has a driver's name or identity, proceedings cannot be raised against them (so no s. 151 liability).

- In those circumstances, the only course of action is to MIB Untraced Drivers' Agreement.

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Lewis v. Tindale

- C was seriously injured on private land when D1 ran him down.
- D1 was uninsured.
- MIB did not dispute D1's liability, but contended that it had no contingent liability to C under the Uninsured Drivers' Agreement because the accident and injuries were not "caused by or arising out of the use of the vehicle on a road or other public place".

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Lewis v. Tindale

Court of Appeal

- Following *Vnuk*, there was no doubt the Directive required insurance cover for use of vehicles on private land
- Where there was no insurance policy, Art 10 of the Directive required each MS' body to meet the claim
- Arts 3 & 10 of the Directive created directly effective rights against the MIB

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Lewis v. Tindale

Court of Appeal:

"[74] … the MIB, albeit a private law body, has had conferred on it by the UK government the task under Article 10, which as [para 39] of *Farrell v Whitty (No 2)* makes clear, includes remedying the failure of the government to institute in full a compulsory insurance regime, in the present case in respect of the use of vehicles on private land."

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Lewis v. Tindale

"[68] The fact that the UK government has failed to legislate for compulsory insurance in respect of the use of motor vehicles on private land and then specifically to delegate to the MIB the residual liability where the relevant vehicle is uninsured can legitimately be described as a breakdown in the system put in place by the government … The MIB may well have rights of contribution over against the Department of Transport."

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Lewis v. Tindale

- MIB have sought permission to appeal to the Supreme Court. A decision is awaited.

- MIB is also seeking indemnity from the UK government, arguing that it was the government's failure to correctly implement the Directives which has given rise to the extended liability of the MIB.

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The insurer's right of indemnity

- Where the policyholder has permitted an uninsured person to drive and is then injured by the driver's negligence, s. 151(8) would negative the insurer's liability to the policyholder claimant.
- Difficulty is that Art 12(1) of the Directive requires the same protection for passengers as for any third party.
- In *Churchill Insurance v. Wilkinson*, the CA held that s. 151(8) was not to be construed as creating an exception to s. 151(5) because the 2 provisions were entirely distinct.
- CA referred the question of compatibility to the CJEU.

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Churchill Insurance v. Wilkinson

CJEU

- Section 151(8) was not simply a provision which gave a right of recourse.
- Rather, s. 151(8) operated as an exclusion from coverage where the insured was himself a passenger.
- The scheme of the Directive was to confer protection on passengers as a particularly vulnerable class.
- The only permitted derogation was in respect of passengers knowingly entering a stolen vehicle.

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Churchill Insurance v. Wilkinson

- Insured passenger's state of mind was irrelevant – it does not matter whether he or she has considered whether the driver was insured.
- CJEU left open the possibility of a deduction for contributory negligence, but that would be tested by proportionality.
- CA interpreted ruling as removing automatic effect of s. 151(8) in order to achieve the proportionality required.
- It is likely that the circumstances in which permission was given, the nature of the accident and the competence of the driver will all be relevant factors.

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The "B-word"

- UK will be withdrawn from the 4th Directive's Protection of Visitors Scheme which allows victims of accidents to make claims in their own country and language.

- For some EU countries, an International Driving Permit will be required in addition to a full UK driving licence.

- If there is no deal, UK drivers will require a green card for driving in EEA countries.

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EU (Withdrawal) Act 2018

- Presume will be brought into force completely.
- Will repeal incorporation of EU law into UK law.
- Savings provisions:

  (a) Direct effect

  (b) Francovich claims

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Savings: Direct effect

s. 4(2)(b) – any right, etc. arising under an EU Directive and "not of a kind recognized" by an EU or UK Court before exit day is not saved.

- A right under an EU Directive which is recognized *is* saved.
- If a direct effect claim is not recognized, it will not survive Brexit.

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Savings: Direct effect

2 possible interpretations:

- Wide: direct effect under the MID has been recognized in relation to the state and emanations thereof.

- Narrow: direct effect against an Art 10 body has been recognized.

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Savings: *Francovich*

- *Francovich* claims are not generally saved (Sch 1, 4).
- *Francovich* claims begun before exit day are saved (Sch 8, 39(3)).
- *Francovich* claims relating to events before exit day may be commenced within 2 years of exit day (Sch 8, 39(7)).

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The "B-word"

- SC will not hear the *Lewis v. Tindale* appeal before exit on 31 Jan 2020. It will apply the same law on direct effect if the 2018 Act is brought into force.
- During the 2-year transition, not much will change.
- RTA 1988 "use" may survive the attempt at harmonization.
- Francovich damages may no longer be available.

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Harmonization: Dead in a Ditch?

Incompatibility:

- Section 143 insurance obligation: *Pilling / Linea*
- Section 152 declarators: 2019 Regulations
- MIB liability for harm on private land: *Lewis*
- Section 151(8) recovery from claimant policyholder: *Churchill Insurance*
- *Cameron v. Hussain* - the consequences yet to be fully appreciated

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Authorities

- *Fundo de Garantia Automovel v. Juliana* (Case C-80/17) [2018] WLR 5798
- *Vnuk v. Zavarovalnica Triglav dd* (Case C-162/13) [2016] RTR 10
- *Torreiro v. AIG Europe Ltd* (C-334/16) [2018 Ll Rep 418
- *BTA Baltic Insurance Co AS v. Baltijas Apdrosinasanas Nams AS* (Case C-648/17) [2019] 4 WLR 48
- *Andrade v. Proenca Salvador* (Case C-514/16) [2018] 4 WLR 75
- *Dunthorne v. Bentley* [1996] RTR 428
- *R&S Pilling (t/a Phoenix Engineering) v UK Insurance Ltd* [2016] EWHC 264 (QBD); [2017] EWCA Civ 259; [2019] 2 WLR 1015

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Authorities

- *Linea Directa Aseguradora SA v. Segurcaixa Sociedad Anonima de Seguros y Reaseguros* (Case C-100/18) [2019] Ll Rep IR 431
- *Fidelidade-Compania de Seguros SA v. Caisse Suisse de Compensation* (Case C-287/16)
- *Roadpeace v. SS for Transport & MIB* [2018] 1 WLR 1293
- *Colley v. Shuker* [2019] Ll Rep IR 503
- *Cameron v. Liverpool Victoria Insurance Co Ltd (MIB intervening)* [2018] 1 WLR 657; [2019] 1 WLR 1471
- *Lewis v. Tindale* [2019] 1 WLR 1785
- *Churchill Insurance Co Ltd v. Wilkinson* (Case C-442/10) [2013] 1 WLR 1776