



Client Alert

Wilkinson v Churchill - The European Court of Justice decision

2 December 2011

The European Court of Justice (ECJ) today handed down the long awaited decision in the conjoined cases of Wilkinson v Churchill and Cockayne v Evans

Background

Section 151(8) of the Road Traffic Act

S151(8) gives an insurer a right of recovery of their outlay against their insured where their insured has permitted use of the vehicle by an uninsured motorist. In instances where the insured was a passenger in the vehicle and was himself injured, insurers have historically been able to argue that the insured's compensation is wiped out by their right of recovery under this section. The "circularity" of action effectively means that the insured recovers nothing for their own injuries.

The facts in Churchill v Wilkinson

The policy holder was Mrs Wilkinson, but Benjamin Wilkinson (BW), a "named driver", allowed Mr Fitzgerald to drive the car. It is accepted that BW knew Mr Fitzgerald was not insured under the policy. BW, who was aged 20 at the time, suffered severe injuries.

At first instance

Blair J gave judgment in favour of Benjamin Wilkinson, so that the insurers could not recover from him in his capacity as insured, the damages they would have to pay to him in his capacity as victim. The thrust of this decision was that the section breached the EU Directives on motor insurance and should be interpreted so to comply.

The facts in Evans v Equity

Tracy Evans owned a motorcycle and insured it with Equity. She was insured to drive it, but no one else. She permitted Adam Cockayne to drive it with herself as pillion passenger. The judge found that in permitting Cockayne to drive she had given no thought to the question of whether he was insured to drive her motorcycle.

At first instance

Judge Godfrey denied Tracy Evans compensation from Equity.

The Court of Appeal decision

1. The issue of whether section 151(8) RTA in its present form complies with Community Law and / or if some amendment or reinterpretation as to the degree of the insured's knowledge might lead it to comply should be referred, and that
2. It would not be appropriate to consider whether section 151(8) can be interpreted to comply with Community Law until after the reference has been decided on.

The ECJ decision

The ECJ have decided that section 151.8 of the Road Traffic Act does not comply with the European Directives on the harmonisation of motor insurance. This means that the Section cannot operate so as to preclude a claimant of his entitlement to damages as a victim, despite having permitted use of the vehicle by an uninsured driver who caused the loss. However this is not the end of the argument.

Next steps

The next step is for the case to be remitted back to the Court of Appeal to reconvene the Appeal hearing. The Court will now have to decide if they can interpret the section so as to comply with EU law. If not the claimant will have a cause of action against the UK Government for compensation in place of the insurer.

What this means for insurers

1. Insurers will no longer be able to rely on Section 151.8 to avoid payment of damages in respect of injuries sustained by their insured on the basis of a direct right of recoupment through a statutory right of recovery under the RTA.
2. The effective date for this change will either be:
 - a. the date the Court of Appeal may interpret the Act so to comply, or
 - b. the date of any repeal if the Court of Appeal cannot interpret the Act so to comply.

Where are we now on recovery of rights under the Road Traffic Act?

1. Against the insured when not in the vehicle

As long as the current section remains in force an insurer still retains a right of recovery against their insured, if they permitted use by an uninsured driver, in respect of damages paid out as a result of the actions of the driver, and provided they were not a victim. This will therefore cover damages paid out to any passengers in his vehicle or any third parties with a cause of action in negligence.

2. Against the insured when in the vehicle, "a victim"

- a. After the ECJ decision it is no longer possible to recoup sums paid in respect of his damages. This was precisely the Wilkinson scenario.
- b. We think that a right of recovery would still exist in respect of outlay for other injured passengers and third parties. If this served to wipe out the insured's own damages it might be argued that this was again to breach EU law but we do not think that that accords with the Directives.
- c. If the insured were "independently wealthy" regardless of damages the right of recovery should be against those assets rather than the damages in any event and a separate debt action could be pursued. This could not be by way of set off.

Keoghs will update you further on future developments in this case.

Andrew Underwood and Kate Scholefield of Keoghs LLP represented the defendant insurer in this matter.

For more information please contact:



Andrew Underwood
Partner

T: 01204 677162

E: aunderwood@keoghs.co.uk

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Keoghs LLP

2 The Parklands, Bolton, BL6 4SE
T: 01204 677000 F: 01204 677111

E: info@keoghs.co.uk

Compton Court, Harry Weston Road, Binley Business Park, Coventry, CV3 2SU
T: 02476 658200 F: 02476 658268 E: info@keoghs.co.uk