Hilary Term
[2019] UKSC 6
On appeal from: [2017] EWCA Civ 366

Judgment

Cameron (Respondent) *v* Liverpool Victoria Insurance Co Ltd (Appellant)

before

Lord Reed, Deputy President
Lord Sumption
Lord Carnwath
Lord Hodge
Lady Black

Judgment given on

20 February 2019

Heard on 28 November 2018

Appellant
Stephen Worthington
QC
Patrick Vincent

(Instructed by Keoghs
LLP)

Respondent
Benjamin Williams QC
Ben Smiley
Anneli Howard
(Instructed by Bond
Turner Solicitors)

Intervener
(Motor Insurers' Bureau)
Tim Horlock QC
Paul Higgins
(Instructed by
Weightmans LLP
(Liverpool))

Lord Sumption: (with whom Lord Reed, Lord Carnwath, Lord Hodge and Lady Black agree)

1. The question at issue on this appeal is: in what circumstances is it permissible to sue an unnamed defendant? It arises in a rather special context in which the problem is not uncommon. On 26 May 2013 Ms Bianca Cameron was injured when her car collided with a Nissan Micra. It is common ground that the incident was due to the negligence of the driver of the Micra. The registration number of the Micra was recorded, but the driver made off without stopping or reporting the accident to the police and has not been heard of since. The registered keeper of the Micra was Mr Naveed Hussain, who was not the driver but has declined to identify the driver and has been convicted of failing to do so. The car was insured under a policy issued by Liverpool Victoria Insurance Co Ltd to a Mr Nissar Bahadur, whom the company believes to be a fictitious person. Neither Mr Hussain nor the driver was insured under the policy to drive the car.

The statutory framework

2. The United Kingdom was the first country in the world to introduce compulsory motor insurance. It originated with the Road Traffic Act 1930, which was part of a package of measures to protect accident victims, including the Third Parties (Rights Against Insurers) Act 1930. The latter Act entitled a person to claim directly against the insurer where an insured tortfeasor was insolvent. But it was shortly superseded as regards motor accidents by the Road Traffic Act 1934, which required motor insurers to satisfy any judgment against their insured and restricted the right of insurers to rely as against third parties on certain categories of policy exception or on the right of avoidance for non-disclosure or misrepresentation. The statutory regime has become more elaborate and more comprehensive since 1934, but the basic framework has not changed.

3. The current legislation is Part VI of the Road Traffic Act 1988. As originally enacted, it sought to give effect to the first three EEC Motor Insurance Directives, 72/166/EEC, 84/5/EEC and 90/232/EEC. It was subsequently amended by statutory instruments under the European Communities Act 1972 to reflect the terms of the Fourth, Fifth and Sixth Motor Insurance Directives 2000/26/EC, 2005/14/EC and 2009/103/EC. The object of the current legislation is to enable the victims of negligently caused road accidents to recover, if not from the tortfeasor then from his insurer or, failing that, from a fund operated by the motor

insurance industry. Under section 143 of the Act of 1988 it is an offence to use or to cause or permit any other person to use a motor vehicle on a road or other public place unless there is in force a policy of insurance against third party risks "in relation to the use of the vehicle" by the particular driver (I disregard the statutory provision for the giving of security in lieu of insurance). Section 145 requires the policy to cover specified risks, including bodily injury and damage to property. Section 151(5) requires the insurer, subject to certain conditions, to satisfy any judgment falling within subsection (2). This means (omitting words irrelevant to this appeal)

> "judgments relating to a liability with respect to any matter where liability with respect to that matter is required to be covered by a policy of insurance under section 145 of this Act and either -
>
> > (a) it is a liability covered by the terms of the policy or security …, and the judgment is obtained against any person who is insured by the policy … or
> >
> > (b) it is a liability … which would be so covered if the policy insured all persons …, and the judgment is obtained against any person other than one who is insured by the policy…"

The effect of the latter subsection is that an insurer who has issued a policy in respect of the use of a vehicle is liable on a judgment, even where it was obtained against a person such as the driver of the Micra in this case who was not insured to drive it. The statutory liability of the insurer to satisfy judgments is subject to an exception under section 152 where it is entitled to avoid the policy for non-disclosure or misrepresentation and has obtained a declaration to that effect in proceedings begun within a prescribed time period. But the operation of section 152 is currently under review in the light of recent decisions of the Court of Justice of the European Union.

4. Under section 145(2), the policy must have been issued by an "authorised insurer". This means a member of the Motor Insurers' Bureau: see sections 95(2) and 145(5). The Bureau has an important place in the statutory scheme for protecting the victims of road accidents in the United Kingdom. Following a recommendation of the Cassell Committee, which reported in 1937 (Cmnd 5528/1937), the Bureau was created in 1946 to manage a fund for compensating

victims of uninsured motorists. It is a private company owned and funded by all insurers authorised to write motor business in the United Kingdom. It has entered into agreements with the Secretary of State to compensate third party victims of road accidents who fall through the compulsory insurance net even under the enlarged coverage provided by section 151(2)(b). This means victims suffering personal injury or property damage caused by (i) vehicles in respect of which no policy of insurance has been issued; and (ii) drivers who cannot be traced. These categories are covered by two agreements with the Secretary of State, the Uninsured Drivers Agreement and the Untraced Drivers Agreement respectively. The relevant agreement covering Ms Cameron's case was the 2003 Untraced Drivers Agreement. It applied to persons suffering death, bodily injury or property damage arising out of the use of a motor vehicle in cases where "it is not possible … to identify the person who is or appears to be liable": see clause 4(d). The measure of indemnity under this agreement is not always total. Under clause 10, there is a limit to the Bureau's liability for legal costs; and under clause 8 the indemnity for property damage is subject to a modest excess (at the relevant time £300) and a maximum limit corresponding to the minimum level of compulsory insurance (at the relevant time £1,000,000). The Bureau assumes liability under the Uninsured Drivers Agreement in cases where the insurer has a defence under the provisions governing avoided policies in section 152. But under article 75 of the Bureau's articles of association, each insurer binds itself to meet the Bureau's liability to satisfy a judgment in favour of the third party in such cases. In 2017, there were 17,700 concluded applications to the Motor Insurers' Bureau by victims of untraced drivers.

5. It is a fundamental feature of the statutory scheme of compulsory insurance in the United Kingdom that it confers on the victim of a road accident no direct right against an insurer in respect of the underlying liability of the driver. The only direct right against the insurer is the right to require it to satisfy a judgment against the driver, once the latter's liability has been established in legal proceedings. This reflects a number of features of motor insurance in the United Kingdom which originated well before the relevant European legislation bound the United Kingdom, and which differentiate it from many continental systems. In the first place, policies of motor insurance in the United Kingdom normally cover drivers rather than vehicles. Section 151(2)(b) of the Act (quoted above) produces a close but not complete approximation to the continental position. Secondly, the rule of English insurance law is that an insurer is liable to no one but its insured, even when the risks insured include liabilities owed by the insured to third parties. Subject to limited statutory exceptions, the third party has no direct right against the insurer. Thirdly, even the insured cannot claim against his liability insurer unless and until his liability has been ascertained in legal proceedings or by agreement or admission. The Untraced Drivers Agreement assumes that judgment cannot be obtained against the driver if he cannot be

identified, and therefore that no liability will attach to the insurer in that case. This is why it is accepted as a liability of the Motor Insurance Bureau. On the present appeal, Ms Cameron seeks to challenge that assumption. Such a challenge is usually unnecessary. It is cheaper and quicker to claim against the Bureau. But for reasons which remain unclear, in spite of her counsel's attempt to explain them, Ms Cameron has elected not to do that.

The proceedings

6. Ms Cameron initially sued Mr Hussain for damages. The proceedings were then amended to add a claim against Liverpool Victoria Insurance for a declaration that it would be liable to meet any judgment obtained against Mr Hussain. The insurer served a defence which denied liability on the ground that there was no right to obtain a judgment against Mr Hussain, because there was no evidence that he was the driver at the relevant time. Ms Cameron's response was to apply in the Liverpool Civil and Family Court to amend her claim form and particulars of claim so as to substitute for Mr Hussain "the person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013." District Judge Wright dismissed that application and entered summary judgment for the insurer. Judge Parker dismissed Ms Cameron's appeal. But a further appeal to the Court of Appeal was allowed by a majority (Gloster and Lloyd Jones LJJ, Sir Ross Cranston dissenting): [2018] 1 WLR 657.

7. Gloster LJ delivered the leading judgment. She held that the policy of the legislation was to ensure that the third-party victims of negligent drivers received compensation from insurers whenever a policy had been issued in respect of the vehicle, irrespective of who the driver was. In her judgment, the court had a discretion to permit an unknown person to be sued whenever justice required it. Justice required it when the driver could not be identified, because otherwise it would not be possible to obtain a judgment which the issuer of a policy in respect of the car would be bound to satisfy. The majority considered it to be irrelevant that Ms Cameron had an alternative right against the Motor Insurance Bureau. She had a right against the driver and, upon getting judgment against him, against the insurer. In principle she was entitled to choose between remedies. Sir Ross Cranston dissented. He agreed that there was a discretion, but he did not consider that justice required an action to be allowed against the unknown driver when compensation was available from the Motor Insurance Bureau. Accordingly, the Court of Appeal (i) gave Ms Cameron permission to amend the claim form so as to sue the driver under the above description; (ii) directed under CPR 6.15 that service on the insurer should constitute service on the driver and that further service on the driver should be dispensed with; and (iii) gave

judgment against the driver, as described, recording in their order that the insurer accepted that it was liable to satisfy that judgment.

Suing unnamed persons

8. Before the Common Law Procedure Act 1852 abolished the practice, it was common to constitute actions for trespass with fictional parties, generally John (or Jane) Doe or Roe, in order to avoid the restrictions imposed on possession proceedings by the forms of action. “Placeholders” such as these were also occasionally named as parties where the identity of the real party was unknown, a practice which subsists in the United States and Canada. After the disappearance of this practice in England, the extent of any right to sue unnamed persons was governed by rules of court. The basic rule before 1999 was laid down by the Court of Appeal in 1926 in *Friern Barnet Urban District Council v Adams* [1927] 2 Ch 25. The Friern Barnet District Council had a statutory right to recover the cost of making up Alexandra Road from the proprietors of the adjoining lands, but in the days before registered title reached Friern Barnet it had no way of discovering who they were. It therefore began proceedings against a named individual who was not concerned and “the owners of certain lands adjoining Alexandra Road, … whose names and addresses are not known to the plaintiffs.” The judge struck out these words and declined to order substituted service by affixing copies of the writ to posts on the relevant land. The Court of Appeal dismissed the appeal. They held that there was no power to issue a writ in this form because the prescribed form of writ required it to be directed to “C D of, etc in the County of …” (p 30).

9. When the Civil Procedure Rules were introduced in 1999, the function of prescribing the manner in which proceedings should be commenced was taken over by CPR Part 7. The general rule remains that proceedings may not be brought against unnamed parties. This is implicit in the limited exceptions contemplated by the Rules. CPR 8.2A provides that a practice direction “may set out circumstances in which a claim form may be issued under this Part without naming a defendant.” It is envisaged that permission will be required, but that the notice of application for permission “need not be served on any other person”. However, no such practice direction has been made. The only express provision made for proceedings against an unnamed defendant, other than representative actions, is CPR 55.3(4), which permits a claim for possession of property to be brought against trespassers whose names are unknown. This is the successor to RSC Order 113, which was introduced in order to provide a means of obtaining injunctions against unidentifiable squatters, following the decision of Stamp J in *In re Wykeham Terrace, Brighton, Sussex, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch 204, that they could not be

sued if they could not be named. In addition, there are specific statutory exceptions to broadly the same effect, such as the exception for proceedings for an injunction to restrain “any actual or apprehended breach of planning controls” under section 187B of the Town and Country Planning Act 1990. Section 187B(3) provides that “rules of court may provide for such an injunction to be issued against a person whose identity is unknown.” The Rules are supplemented by a practice direction which deals with the administrative steps involved. CPR 7A PD4.1 provides that a claim form must be headed with the title of the proceedings, which “should state”, among other things, the “full name of each party”.

10. English judges have allowed some exceptions. They have permitted representative actions where the representative can be named but some or all of the class cannot. They have allowed actions and orders against unnamed wrongdoers where some of the wrongdoers were known so they could be sued both personally and as representing their unidentified associates. This technique has been used, for example, in actions against copyright pirates: see *EMI Records Ltd v Kudhail* [1985] FSR 35. But the possibility of a much wider jurisdiction was first opened up by the decision of Sir Andrew Morritt V-C in *Bloomsbury Publishing Group Plc v News Group Newspapers Ltd* [2003] 1 WLR 1633. The claimant in that case was the publisher of the *Harry Potter* novels. Copies of the latest book in the series had been stolen from the printers before publication and offered to the press by unnamed persons. An injunction was granted in proceedings against “the person or persons who have offered the publishers of “The Sun”, the “Daily Mail” and the “Daily Mirror” newspapers a copy of the book *Harry Potter and the Order of the Phoenix* by J K Rowling or any part thereof and the person or persons who has or have physical possession of a copy of the said book or any part thereof without the consent of the claimants.” The real object of the injunction was to deter newspapers minded to publish parts of the text, who would expose themselves to proceedings for contempt of court by dealing with the thieves with notice of the order. The Vice-Chancellor held that the decision in *Friern Barnet Urban District Council v Adams* had no application under the Civil Procedure Rules; that the decision of Stamp J in *In re Wykeham Terrace* was wrong; and that the words “should state” in CPR 7A PD4.1 were not mandatory, but imported a discretion to depart from the practice in appropriate cases. In his view, a person could be sued by a description, provided that the description was “sufficiently certain as to identify both those who are included and those who are not” (para 21).

11. Since this decision, the jurisdiction has regularly been invoked. Judging by the reported cases, there has recently been a significant increase in its use. The main contexts for its exercise have been abuse of the internet, that powerful tool

for anonymous wrongdoing; and trespasses and other torts committed by protesters, demonstrators and paparazzi. Cases in the former context include *Brett Wilson LLP v Persons Unknown* [2016] 4 WLR 69 and *Smith v Unknown Defendant Pseudonym "Likeicare"* [2016] EWHC 1775 (QB) (defamation); *Middleton v Person Unknown* [2016] EWHC 2354 (QB) (theft of information by hackers); *PML v Persons Unknown* [2018] EWHC 703 (QB) (hacking and blackmail); *CMOC v Persons Unknown* [2017] EWHC 3599 (Comm) (hacking and theft of funds). Cases decided in the second context include *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2004] Env LR 9; *Ineos Upstream Ltd v Persons Unknown* [2017] EWHC 2945 (Ch); *UK Oil and Gas Investments Plc v Persons Unknown* [2018] EWHC 2253 (Ch). In some of these cases, proceedings against persons unknown were allowed in support of an application for a quia timet injunction, where the defendants could be identified only as those persons who might in future commit the relevant acts. The majority of the Court of Appeal followed this body of case law in deciding that an action was permissible against the unknown driver of the Micra who injured Ms Cameron. This is the first occasion on which the basis and extent of the jurisdiction has been considered by the Supreme Court or the House of Lords.

12. The Civil Procedure Rules neither expressly authorise nor expressly prohibit exceptions to the general rule that actions against unnamed parties are permissible only against trespassers. The prescribed forms include a space in which to designate the claimant and the defendant, a format which is equally consistent with their being designated by name or by description. The only requirement for a name is contained in a practice direction. But unlike the Civil Procedure Rules, which are made under statutory powers, a practice direction is no more than guidance on matters of practice issued under the authority of the heads of division. As to those matters, it is binding on judges sitting in the jurisdiction with which it is concerned: *Bovale Ltd v Secretary of State for Communities and Local Government* [2009] 1 WLR 2274. But it has no statutory force, and cannot alter the general law. Whether or not the requirement of CPR 7A PD4.1 that the claim form "should state" the defendants' full name admits of a discretion on the point, is not therefore the critical question. The critical question is what, as a matter of law, is the basis of the court's jurisdiction over parties, and in what (if any) circumstances can jurisdiction be exercised on that basis against persons who cannot be named.

13. In approaching this question, it is necessary to distinguish between two kinds of case in which the defendant cannot be named, to which different considerations apply. The first category comprises anonymous defendants who are identifiable but whose names are unknown. Squatters occupying a property are, for example, identifiable by their location, although they cannot be named.

The second category comprises defendants, such as most hit and run drivers, who are not only anonymous but cannot even be identified. The distinction is that in the first category the defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further inquiry whether he is the same as the person described in the claim form, whereas in the second category it is not.

14. This appeal is primarily concerned with the issue or amendment of the claim form. It is not directly concerned with its service, which occurs under the rules up to four months after issue, subject to extension by order of the court. There is no doubt that a claim form may be issued against a named defendant, although it is not yet known where or how or indeed whether he can in practice be served. But the legitimacy of issuing or amending a claim form so as to sue an unnamed defendant can properly be tested by asking whether it is conceptually (not just practically) possible to serve it. The court generally acts in personam. Although an action is completely constituted on the issue of the claim form, for example for the purpose of stopping the running of a limitation period, the general rule is that "service of originating process is the act by which the defendant is subjected to the court's jurisdiction": *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, para 8. The court may grant interim relief before the proceedings have been served or even issued, but that is an emergency jurisdiction which is both provisional and strictly conditional. In *Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502, the Court of Appeal held that, for the purposes of the Brussels Convention (the relevant provisions of the Brussels Regulation are different), an English court was "seised" of an action when the writ was served, not when it was issued. This was because of the legal status of an unserved writ in English law. Bingham LJ described that status, at p 523, as follows:

> "it is in my judgment artificial, far-fetched and wrong to hold that the English court is seised of proceedings, or that proceedings are decisively, conclusively, finally or definitively pending before it, upon mere issue of proceedings, when at that stage (1) the court's involvement has been confined to a ministerial act by a relatively junior administrative officer; (2) the plaintiff has an unfettered choice whether to pursue the action and serve the proceedings or not, being in breach of no rule or obligation if he chooses to let the writ expire unserved; (3) the plaintiff's claim may be framed in terms of the utmost generality; (4) the defendant is usually unaware of the issue of proceedings and, if unaware, is unable to call on the plaintiff to serve the writ or discontinue the action and

> unable to rely on the commencement of the action as a lis alibi pendens if proceedings are begun elsewhere; (5) the defendant is not obliged to respond to the plaintiff's claim in any way, and not entitled to do so save by calling on the plaintiff to serve or discontinue; (6) the court cannot exercise any powers which, on appropriate facts, it could not have exercised before issue; (7) the defendant has not become subject to the jurisdiction of the court."

The case was decided under the Rules of the Supreme Court. But Bingham LJ's statement would be equally true (mechanics and terminology apart) of an unserved claim form under the Civil Procedure Rules.

15. An identifiable but anonymous defendant can be served with the claim form or other originating process, if necessary by alternative service under CPR 6.15. This is because it is possible to locate or communicate with the defendant and to identify him as the person described in the claim form. Thus, in proceedings against anonymous trespassers under CPR 55.3(4), service must be effected in accordance with CPR 55.6 by attaching copies of the documents to the main door or placing them in some other prominent place on the land where the trespassers are to be found, and posting them if practical through the letter box. In *Brett Wilson LLP v Persons Unknown*, *supra*, alternative service was effected by email to a website which had published defamatory matter, Warby J observing (para 11) that the relevant procedural safeguards must of course be applied. In *Smith v Unknown Defendant Pseudonym "Likeicare"*, *supra*, Green J made the same observation (para 11) in another case of internet defamation where service was effected in the same way. Where an interim injunction is granted and can be specifically enforced against some property or by notice to third parties who would necessarily be involved in any contempt, the process of enforcing it will sometimes be enough to bring the proceedings to the defendant's attention. In *Bloomsbury Publishing Group*, for example, the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction. The Court of Appeal has held that where proceedings were brought against unnamed persons and interim relief was granted to restrain specified acts, a person became both a defendant and a person to whom the injunction was addressed by doing one of those acts: *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, para 32. In the case of anonymous but identifiable defendants, these procedures for service are now well established, and there is no reason to doubt their juridical basis.

16. One does not, however, identify an unknown person simply by referring to something that he has done in the past. “The person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013”, does not identify anyone. It does not enable one to know whether any particular person is the one referred to. Nor is there any specific interim relief such as an injunction which can be enforced in a way that will bring the proceedings to his attention. The impossibility of service in such a case is due not just to the fact that the defendant cannot be found but to the fact that it is not known who the defendant is. The problem is conceptual, and not just practical. It is true that the publicity attending the proceedings may sometimes make it possible to speculate that the wrongdoer knows about them. But service is an act of the court, or of the claimant acting under rules of court. It cannot be enough that the wrongdoer himself knows who he is.

17. This is, in my view, a more serious problem than the courts, in their more recent decisions, have recognised. Justice in legal proceedings must be available to both sides. 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. The principle is perhaps self-evident. The clearest statements are to be found in the case law about the enforcement of foreign judgments at common law. The English courts will not enforce or recognise a foreign judgment, even if it has been given by a court of competent jurisdiction, if the judgment debtor had no sufficient notice of the proceedings. The reason is that such a judgment will have been obtained in breach of the rules of natural justice *according to English notions*. In his celebrated judgment in *Jacobson v Frachon* (1927) 138 LT 386, 392, Atkin LJ, after referring to the “principles of natural justice” put the point in this way:

> “Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court.”

Lord Atkin’s principle is reflected in the statutory provisions for the recognition of foreign judgments in section 9(2)(c) of the Administration of Justice Act 1920 and section 8(1) and (2) of the Foreign Judgments (Reciprocal Enforcement) Act 1933, as well as in article 45(1)(b) of the Brussels I Regulation (Recast), Regulation (EU) No 1215/2012.

18. It would be ironic if the English courts were to disregard in their own proceedings a principle which they regard as fundamental to natural justice as applied to the proceedings of others. In fact, the principle is equally central to domestic litigation procedure. Service of originating process was required by the practice of the common law courts long before statutory rules of procedure were introduced following the Judicature Acts of 1873 and 1875. The first edition of the Rules of the Supreme Court, which was promulgated in 1883, required personal service unless an order was made for what was then called substituted (now alternative) service. Subsequent editions of the rules allowed for certain other modes of service without a special order of the court, notably in the case of corporations, but every mode of service had the common object of bringing the proceedings to the attention of the defendant. In *Porter v Freudenberg* [1915] 1 KB 857 a specially constituted Court of Appeal, comprising the Lord Chief Justice, the Master of the Rolls and all five Lords Justices of the time, held that substituted service served the same function as personal service and therefore had to be such as could be expected to bring the proceedings to the defendant's attention. The defendants in that case were enemy aliens resident in Germany during the First World War. Lord Reading CJ, delivering the judgment of the court, said at p 883:

> "Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a court of justice he must have the right of submitting his answer to the court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's courts in the administration of justice."

It followed, as he went on to observe at pp 887-888, that the court must

> "take into account the position of the defendant the alien enemy, who is, according to the fundamental principles of English law, entitled to effective notice of the proceedings against him. … In order that substituted service may be permitted, it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the defendant or to come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted."

The principle stated in *Porter v Freudenberg* was incorporated in the Rules of the Supreme Court in the revision of 1962 as RSC Order 67, rule 4(3). This provided:

> "Substituted service of a document, in relation to which an order is made under this rule, is effected by taking such steps as the court may direct to bring the document to the notice of the person to be served."

This provision subsequently became RSC Order 65, rule 4(3), and continued to appear in subsequent iterations of the Rules until they were superseded by the Civil Procedure Rules in 1999.

19. The treatment of the principle in the more recent authorities is, unfortunately, neither consistent nor satisfactory. The history may be summarised as follows:

(1) *Murfin v Ashbridge* [1941] 1 All ER 231 arose out of a road accident caused by the alleged negligence of a driver who was identified but could not be found. The case is authority for the proposition that while an insurer may be authorised by the policy to defend an action on behalf of his assured, he was not a party in that capacity and could not take any step in his own name. In the course of considering that point, Goddard LJ suggested at p 235 that "possibly" service on the driver might have been effected by substituted service on the insurers. *Porter v Freudenberg* was cited, but the point does not appear to have been argued.

(2) In *Gurtner v Circuit* [1968] 2 QB 587, the driver alleged to have been responsible for a road accident had emigrated and could not be traced. He was thought to have been insured, but it was impossible to identify his insurer. The plaintiff was held not to be entitled to an order for substituted service on another insurer who had no relationship with the driver. Lord Denning MR thought (pp 596-597) that the affidavit in support of the application was defective because it failed to state that the writ, if served on a non-insurer, was likely to reach the defendant. But he suggested that substituted service might have been effected on the real insurer if it had been identified. Diplock LJ thought (p 605) that it might have been effected on the Motor Insurers' Bureau. *Porter v Freudenberg* was not cited, and the point does not appear to have been argued.

(3) In *Clarke v Vedel* [1979] RTR 26, the question was fully argued by reference to all the relevant authorities in the context of the Road Traffic Acts. A person had stolen a motor cycle, collided with the plaintiffs, given a fictitious name and address and then disappeared. He was sued under the fictitious name he had given, and an application was made for substituted service on the Motor Insurance Bureau. The affidavit in support understandably failed to state that that mode of service could be expected to reach the driver. The Court of Appeal proceeded on the assumption (p 32) that there was "no more reason to suppose that [the writ] will come to his notice or knowledge by being served on the Motor Insurance Bureau than by being served on any one else in the wide world." But it declined to treat the dicta in the above cases as stating the law. Stephenson LJ considered (p 36), on the strength of the dicta in *Murfin v Ashbridge* and *Gurtner v Circuit*, that

> "there may be cases where a defendant, who cannot be traced and, therefore, is unlikely to be reached by any form of substituted service, can nevertheless be ordered to be served at the address of insurers or the Bureau in a road accident case. The existence of insurers and of the Bureau and of these various agreements does create a special position which enables a plaintiff to avoid the strictness of the general rule and obtain such an order for substituted service in some cases."

But he held (p 37) that

> "This is a case in which, on the face of it, substituted service under the rule is not permissible and the affidavit supporting the application for it is insufficient. This fictitious, or, at any rate, partly fictitious defendant cannot be served, so Mr Crowther is right in saying that he cannot be sued … I do not think that Lord Denning MR or Diplock LJ or Salmon LJ or Goddard LJ had anything like the facts of this case in mind; and whatever the cases in which the exception to the general rule should be applied, in my judgment this is not one of them."

In his concurring judgment, Roskill LJ (pp 38-39) approved the statement in the then current edition of the *Supreme Court Practice* that "[t]he steps which the court may direct in making an order for substituted service must

be taken to bring the document to the notice of the person to be served," citing *Porter v Freudenberg* in support of it.

(4) 20 years later, another division of the Court of Appeal reached the opposite conclusion in *Abbey National Plc v Frost (Solicitors' Indemnity Fund Ltd intervening)* [1999] 1 WLR 1080. The issue was the same, except that the defendant was a solicitor insured by the Solicitors Indemnity Fund pursuant to a scheme managed by the Law Society under the compulsory insurance provisions of the Solicitors Act 1974. The claimant sued his solicitor, who had absconded and could not be found. The Court of Appeal made an order for substituted service on the Fund. Nourse LJ (with whom Henry LJ and Robert Walker LJ agreed) distinguished *Porter v Freudenberg* on the ground that it was based on the practice of the masters of the Supreme Court recorded in the *White Book* at the time; and *Clarke v Vedel* on the ground that the policy of the statutory solicitors' indemnity rules required a right of substituted service on an absconding solicitor. RSC Order 65, rule 4(3) was held to be purely directory and not to limit the discretion of the court as to whether or in what circumstances to order substituted service. Nourse LJ held that RSC Order 65 did not require that the order should be likely to result in the proceedings coming to the defendants' attention.

20. The current position is set out in Part 6 of the Civil Procedure Rules. CPR 6.3 provides for service by the court unless the claimant elects to effect service himself. It considerably broadens the permissible modes of service along lines recommended by Lord Woolf's reports on civil justice. But the object of all the permitted modes of service, as his final report made clear, was the same, namely 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": see *Access to Justice, Final Report* (1996), Ch 12, para 25. CPR 6.15, which makes provision for alternative service, provides, so far as relevant:

> "6.15(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.
>
> (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the

attention of the defendant by an alternative method or at an alternative place is good service."

CPR 6.15 does not include the provision formerly at RSC Order 65, rule 4(3). But it treats alternative service as a mode of "service", which is defined in the indicative glossary appended to the Civil Procedure Rules as "steps required by rules of court to bring documents used in court proceedings to a person's attention." Moreover, sub-paragraph (2) of the rule, which is in effect a form of retrospective alternative service, envisages in terms that the mode of service adopted will have had that effect. Applying CPR 6.15 in *Abela v Baadarani* [2013] 1 WLR 2043 Lord Clarke of Stone-cum-Ebony (with whom the rest of this court agreed) held (para 37) 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." The Court of Appeal appears to have had no regard to these principles in ordering alternative service of the insurer in the present case.

21. In my opinion, subject to any statutory provision to the contrary, it is an essential requirement for any form of alternative service that the mode of service should be such as can reasonably be expected to bring the proceedings to the attention of the defendant. *Porter v Freudenberg* was not based on the niceties of practice in the masters' corridor. It gave effect to a basic principle of natural justice which had been the foundation of English litigation procedure for centuries, and still is. So far as the Court of Appeal intended to state the law generally when it observed in *Abbey National Plc v Frost* that service need not be such as to bring the proceedings to the defendant's attention, I consider that they were wrong. An alternative view of that case is that that observation was intended to apply only to claims under schemes such as the solicitors' compulsory insurance scheme, where it was possible to discern a statutory policy that the public should be protected against defaulting solicitors. If so, the reasoning would apply equally to the compulsory insurance of motorists under the Road Traffic Acts, as indeed the Court of Appeal held in the present case. That would involve a narrower exception to the principle of natural justice to which I have referred, and I do not rule out the possibility that such an exception might be required by other statutory schemes. But I do not think that it can be justified in the case of the scheme presently before us.

22. In the first place, the Road Traffic Act scheme is expressly based on the principle that as a general rule there is no direct liability on the insurer, except for its liability to meet a judgment against the motorist once it has been obtained. To that extent, Parliament's intention that the victims of negligent motorists should be compensated *by the insurer* is qualified. No doubt Parliament assumed, when

qualifying it in this way, that other arrangements would be made which would fill the compensation gap, as indeed they have been. But those arrangements involve the provision of compensation not by the insurer but by the Motor Insurers' Bureau. The availability of compensation from the Bureau makes it unnecessary to suppose that some way must be found of making the insurer liable for the underlying wrong when his liability is limited by statute to satisfying judgments.

23. Secondly, ordinary service on the insurer would not constitute service on the driver, unless the insurer had contractual authority to accept service on the driver's behalf or to appoint solicitors to do so. Such provisions are common in liability policies. I am prepared to assume that the policy in this case conferred such authority on the insurer, although we have not been shown it. But it could only have conferred authority on behalf of the policy-holder (if he existed), and it is agreed that the driver of the Micra was not the policy holder. Given its contingent liability under section 151 of the Road Traffic Act 1988, the insurer no doubt has a sufficient interest to have itself joined to the proceedings in its own right, if it wishes to be. That would authorise the insurer to make submissions in its own interest, including submissions to the effect that the driver was not liable. But it would not authorise it to conduct the defence on the driver's behalf. The driver, if sued in these proceedings, is entitled to be heard in his own right.

24. Thirdly, it is plain that alternative service on the insurer could not be expected to reach the driver of the Micra. It would be tantamount to no service at all, and should not therefore have been ordered unless the circumstances were such that it would be appropriate to dispense with service altogether.

25. There is a power under CPR 6.16 "to dispense with service of a claim form in exceptional circumstances." It has been exercised on a number of occasions and considered on many more. In general, these have been cases in which the claimant has sought to invoke CPR 6.16 in order to escape the consequences of some procedural mishap in the course of attempting to serve the claim form by one of the specified methods, or to confer priority on the English court over another forum for the purpose of the Brussels Regulation, or to affect the operation of a relevant limitation period. In all of them, the defendant or his agents was in fact aware of the proceedings, generally because of a previous attempt by the claimant to serve them in a manner not authorised by the Rules. As Mummery LJ observed, delivering the judgment of the Court of Appeal in *Anderton v Clwyd County Council (No 2)* [2002] 1 WLR 3174, para 58, service was dispensed with because there was "no point in requiring him to go through the motions of a second attempt to complete in law what he has already achieved

in fact." In addition, I would accept that it may be appropriate to dispense with service, even where no attempt has been made to effect it in whatever manner, if the defendant has deliberately evaded service and cannot be reached by way of alternative service under CPR 6.15. This would include cases where the defendant is unidentifiable but has concealed his identity in order to evade service. However, a person cannot be said to evade service unless, at a minimum, he actually knows that proceedings have been or are likely to be brought against him. A court would have to be satisfied of that before it could dispense with service on that basis. An inference to that effect may be easier to draw in the case of hit and run drivers, because by statute drivers involved in road accidents causing personal injury or damage to another vehicle must either "stop and, if required to do so by any person having reasonable grounds for so requiring, give his name and address and also the name and address of the owner and the identification marks of the vehicle", or else report the incident later. But the mere fact of breach of this duty will not necessarily be enough, for the driver may be unaware of his duty or of the personal injury or damage or of his potential liability. No submission was made to us that we should treat this as a case of evasion of service, and there are no findings which would enable us to do so. I would not wish arbitrarily to limit the discretion which CPR 6.16 confers on the court, but I find it hard to envisage any circumstances in which it could be right to dispense with service of the claim form in circumstances where there was no reason to believe that the defendant was aware that proceedings had been or were likely to be brought. That would expose him to a default judgment without having had the opportunity to be heard or otherwise to defend his interests. It is no answer to this difficulty to say that the defendant has no reason to care because the insurer is bound to satisfy a judgment against him. If, like the driver of the Micra, the motorist was not insured under the policy, he will be liable to indemnify the insurer under section 151(8) of the Road Traffic Act. It must be inherently improbable that he will ever be found or, if found, will be worth pursuing. But the court cannot deny him an opportunity to be heard simply because it thinks it inherently improbable that he would take advantage of it.

26. I conclude that a person, such as the driver of the Micra in the present case, who is not just anonymous but cannot be identified with any particular person, cannot be sued under a pseudonym or description, unless the circumstances are such that the service of the claim form can be effected or properly dispensed with.

The European law issue

27. Mr Williams QC, who appeared for Ms Cameron, submitted that this result was inconsistent with the Sixth Motor Insurance Directive 2009/103/EC, and that the Road Traffic Act 1988 should be read down so as to conform with it. The submission was pressed with much elaboration, but it really boils down to two points. First, Mr Williams submits that the Directive requires a direct right against the insurer on the driver's underlying liability, and not simply a requirement to have the insurer satisfy a judgment against the driver. Secondly, he submits that recourse to the Motor Insurers' Bureau is not treated by the Directive as an adequate substitute. Neither point appears to have been raised before the Court of Appeal, for there is no trace of them in the judgments. Before us, they emerged as Mr Williams' main arguments. I propose, however, to deal with them quite shortly, because I think it clear that no point on the Directive arises.

28. Article 3 of the Directive requires member states to ensure that civil liability in respect of the use of vehicles is covered by insurance, and article 9 lays down minimum amounts to be insured. Recital 30 states:

> "The right to invoke the insurance contract and to claim against the insurance undertaking directly is of great importance for the protection of victims of motor vehicle accidents … In order to facilitate an efficient and speedy settlement of claims and to avoid as far as possible costly legal proceedings, a right of direct action against the insurance undertaking covering the person responsible against civil liability should be extended to victims of any motor vehicle accident."

Effect is given to this objective by article 18, which provides:

> "Article 18
>
> ### Direct Right of Action
>
> Member states shall ensure that any party injured as a result of an accident caused by a vehicle covered by insurance as referred to in article 3 enjoys a direct right of action against

> the insurance undertaking covering the person responsible against civil liability."

29. I assume (without deciding) that article 18 requires a direct right of action against the insurer in respect of the underlying wrong of the "person responsible" and not just a liability to satisfy judgments entered against that person. It is a plausible construction in the light of the recital and the reference to Directive 2000/26/EC. However, Ms Cameron is not trying in these proceedings to assert a direct right against the insurer for the underlying wrong. Her claim against the insurer is for a declaration that it is liable to meet any judgment against the driver of the Micra. Her claim against the driver is for damages. But the right that she asserts against him on this appeal is a right to sue him without identifying him or observing rules of court designed to ensure that he is aware of the proceedings. Nothing in the Directive requires the United Kingdom to recognise a right of that kind. Indeed, it is questionable whether it would be consistent with article 47 of the Charter of Fundamental Rights regarding the fairness of legal proceedings.

30. Mr Williams' second point is in reality a reiteration of the first. It is based on article 10 of the Directive, which requires member states to ensure that there is a "national bureau" charged to pay compensation 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." The submission is that the Directive requires that recourse to the Bureau, as the relevant body in the United Kingdom, should be unnecessary in a case like this, because the Micra was identified. It was only the driver who was unidentified. This is in effect a complaint that the indemnity available from the Motor Insurers' Bureau under the Untraced Drivers Agreement, which extends to untraced drivers whether or not the vehicle is identified, is wider than the Directive requires. In reality, the complaint is not about the extent of the Bureau's coverage, which unquestionably extends to this case. The complaint is that it is the Bureau which is involved and not the insurer. But that is because the insurer is liable only to satisfy judgments, which is Mr Williams' first point. It is true that the measure of the Bureau's indemnity is slightly smaller than that of the insurer (because of the excess for property damage and the limited provision for costs). But in that respect it is consistent with the Directive.

Disposal

31. I would allow the appeal, set aside the order of the Court of Appeal, and reinstate that of District Judge Wright.