OUTER HOUSE, COURT OF SESSION

[2025] CSOH 47

PD155/20

OPINION OF LADY HALDANE

In the cause

IAN WHYTE

Pursuer

against

DAVID ARTHUR

Defender

Second Defender: Smith K.C. Keoghs Scotland; Solicitors
Second Third Party: McNaughtan K.C. and Swanney; Balfour and Manson; Solicitors

10 June 2025

Introduction

[1] This action for damages for personal injury called before me for a debate, that is to say a legal argument, in relation to the relevancy of parts of the pleadings. The action arises out of a road traffic accident which took place in June 2017. There are or were a number of parties involved in these proceedings beyond the pursuer and the defender who were, respectively, a passenger and the driver of the motor vehicle in question. The second defender is an insurance company who at one point issued a certificate of insurance related to the vehicle, the first third party was another passenger in the vehicle, and the second third

party was also a passenger in the vehicle, in whose name the policy of insurance that features in this case was issued.

[2] By the time that the case came before me, the second defenders, UK Insurance Limited, ('UK Insurance') had settled the claim of the pursuer in their role as a Motor Insurer's Bureau (hereinafter 'MIB') 'Article 75' insurer. They aver in the pleadings that they are entitled to recoup the sums paid by them to the pursuer from the second third party, Lauren Ruth Methven, in reliance upon the provisions of section 151(8) of the Road Traffic Act 1988. The debate took place only between UK Insurance and Lauren Ruth Methven. To avoid confusion arising from the plethora of parties at one time involved in this litigation I shall refer to the parties who took part in the Debate as UK Insurance, and Ms Methven.

[3] The point in issue between the parties is whether UK Insurance are, as they contend in their pleadings, entitled to rely on the provisions of section 151(8) for the purpose of recoupment of the damages paid by them. Ms Methven submitted that, as a matter of law, they were not so entitled and that the court should dismiss the action so far as directed against her.

Background

[4] In order to give context to the submissions made by the parties, it is helpful to understand the factual background to the legal arguments made. At the time of the accident in question, the pursuer was being driven in a car by the defender, who was not insured to drive the car. The car was owned by the first third party (no longer involved in these proceedings). Ms Methven, the second third party, had obtained a certificate of insurance issued by UK Insurance on the basis of false representations by her in relation to a number

of matters, not least that she owned the car, when she did not. Ms Methven also suffered injury in the accident, and she has raised separate proceedings seeking to recover her losses.

[5] After the accident, but prior to the present proceedings being raised, UK Insurance raised proceedings in the Court of Session seeking to avoid the policy issued in the name of Ms Methven. Those proceedings were not defended, and on 6 September 2019 the following interlocutor was pronounced (in the context of the following interlocutor, the pursuer is UK Insurance limited, and the defender Lauren Ruth Methven):

> "The Lord Ordinary, on the motion of the pursuer, in absence, decerns against the defender in terms of the conclusions of the summons; and finds and declares:
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> 1. that on 16 June 2017, the defender did not have an insurable interest in the Peugeot 206 2.0L GTI car, registration V243 FHS; and
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> 2. in terms of section 152(2) of the Road Traffic Act 1988 that the pursuers were and are entitled to avoid the whole policy of motor insurance, policy number 45872506 in respect of a Peugeot 206 2.0L GTI car, registration V243 FHS, issued by the pursuers in the name of the defender and commencing on or around 5 May 2017, such avoidance of the policy being on the ground that it was obtained from the pursuers by a fraudulent misrepresentation of fact, and that the policy is and has at all times been void and of no effect;
>
> 3. finds the defender liable to the pursuer in the expense of process; remits the account of expenses, when lodged, to the Auditor of Court to tax."

UK Insurance plead in the Record at Answer 4, page 15, that notwithstanding the terms of the foregoing interlocutor they are entitled to rely upon the terms of section 151(8) of the 1988 Act to seek to recoup the sums paid by them to the pursuer to settle his claim.

Ms Methven's position , read short, is that having sought and obtained the declarator set out above, and having thus avoided the policy of insurance issued to Ms Methven, UK Insurance no longer falls within the provisions of section 151 and cannot seek to recoup from Ms Methven in terms of section 151(8). UK Insurance also plead, on an 'and/or' basis, that they are entitled at common law to recoup the damages paid by them. That argument

was not maintained at Debate, and indeed Mr Smith KC, on behalf of UK Insurance, sought and was permitted to amend his pleadings to remove any reference to common law recoupment from the pleadings.

The relevant legislation

[6] Section 151 of the 1988 Act has, in common with many of its' other provisions, undergone various iterations over the years. The version in force at the time that UK Insurance obtained the declarator set out above provided, *inter alia*, as follows:

> "**151.— Duty of insurers or persons giving security to satisfy judgment against persons insured or secured against third party risks.**
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> (1) This section applies where, after [a policy or security is issued or given for the purposes of this Part of this Act,] a judgment to which this subsection applies is obtained.
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> (2) Subsection (1) above applies to 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 whose liability is covered by the security, as the case may be, or
> (b) it is a liability, other than an excluded liability, which would be so covered if the policy insured all persons or, as the case may be, the security covered the liability of all persons, and the judgment is obtained against any person other than one who is insured by the policy or, as the case may be, whose liability is covered by the security.
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> (3) In deciding for the purposes of subsection (2) above whether a liability is or would be covered by the terms of a policy or security, so much of the policy or security as purports to restrict, as the case may be, the insurance of the persons insured by the policy or the operation of the security by reference to the holding by the driver of the vehicle of a licence authorising him to drive it shall be treated as of no effect.
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> (4) In subsection (2)(b) above 'excluded liability' means a liability in respect of the death of, or bodily injury to, or damage to the property of any person who, at the time of the use which gave rise to the liability, was allowing himself to be carried in or upon the vehicle and knew or had reason to believe that the vehicle had been stolen or unlawfully taken, not being a person who—

(a) did not know and had no reason to believe that the vehicle had been stolen or unlawfully taken until after the commencement of his journey, and
(b) could not reasonably have been expected to have alighted from the vehicle.

In this subsection the reference to a person being carried in or upon a vehicle includes a reference to a person entering or getting on to, or alighting from, the vehicle.

(5) Notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy or security, he must, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment—
(a) as regards liability in respect of death or bodily injury, any sum payable under the judgment in respect of the liability, together with any sum which, by virtue of any enactment relating to interest on judgments, is payable in respect of interest on that sum,
(b) as regards liability in respect of damage to property, any sum required to be paid under subsection (6) below, and
(c) any amount payable in respect of costs.

……

(7) Where an insurer becomes liable under this section to pay an amount in respect of a liability of a person who is insured by a policy or whose liability is covered by a security, he is entitled to recover from that person—
(a) that amount, in a case where he became liable to pay it by virtue only of subsection (3) above, or
(b) in a case where that amount exceeds the amount for which he would, apart from the provisions of this section, be liable under the policy or security in respect of that liability, the excess.

(8) Where an insurer becomes liable under this section to pay an amount in respect of a liability of a person who is not insured by a policy or whose liability is not covered by a security, he is entitled to recover the amount from that person or from any person who—
(a) is insured by the policy, or whose liability is covered by the security, by the terms of which the liability would be covered if the policy insured all persons or, as the case may be, the security covered the liability of all persons, and
(b) caused or permitted the use of the vehicle which gave rise to the liability.

(9) In this section—
(a) 'insurer' includes a person giving a security
(c) 'liability covered by the terms of the policy or security' means a liability which is covered by the policy or security or which would be so covered

but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy or security"

Section 152 of the 1988 Act, so far as relevant, provides:

"**152.— Exceptions to section 151.**

(1) No sum is payable by an insurer under section 151 of this Act—
  (a) in respect of any judgment unless, before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings, or
  (b) in respect of any judgment so long as execution on the judgment is stayed pending an appeal, or
  (c) in connection with any liability if, 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, the policy or security was cancelled by mutual consent or by virtue of any provision contained in it

(2) Subject to subsection (3) below, no sum is payable by an insurer under section 151 of this Act if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration—
  (a) that, apart from any provision contained in the policy or security, he is entitled to avoid [the policy under either of the relevant insurance enactments, or the security] on the ground that it was obtained—
    (i) by the non-disclosure of a material fact, or
    (ii) by a representation of fact which was false in some material particular, or
  (b) if he has avoided the policy [under either of the relevant insurance enactments, or the security] on that ground, that he was entitled so to do apart from any provision contained in [the policy or security] . [and, for the purposes of this section, 'material' means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions.]

(3) An insurer who has obtained such a declaration as is mentioned in subsection (2) above in an action does not by reason of that become entitled to the benefit of that subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless before, or within seven days after, the commencement of that action he has given notice of it to the person who is the plaintiff (or in Scotland pursuer) in those proceedings specifying [the relevant insurance enactment or, in the case of a security,] the non-disclosure or false representation on which he proposes to rely."

[7] The declarator in the present case was obtained in reliance upon section 152(2). In its current iteration, as amended in 2019, the relevant declarator must now be obtained before the event giving rise to liability under the policy, that is to say, before any accident occurs.

Submissions for the second third party, Lauren Ruth Methven

[8] Mr McNaughtan adopted his note of argument and amplified that note with oral argument. In summary, he contended that UK Insurance had incurred no liability in terms of section 151 which would permit them to rely upon the recoupment provisions set out in section 151(8). The settlement in question had not been effected as a consequence of a duty to satisfy a Judgment against persons insured. There was no valid policy of insurance giving rise to such an obligation. The only policy relevant to this matter had been declared void *ab initio* by the Court in 2019. Therefore it could not be said, under reference to subsection 8, that UK Insurance had become liable under this section (emphasis added) to pay the sums in question. Rather, the mechanism by which UK Insurance had an obligation to make payment arose because the pursuer pursued his claim against the defender as an uninsured driver, and against UK Insurance as second defenders in their capacity as Article 75 insurers on behalf of the Motor Insurer's Bureau.

[9] In order to understand better the relationship between sections 151, 152 and Insurers under Article 75 of the MIB Articles of Association, Mr McNaughtan referred to the textbook '*Guide to MIB claims: Uninsured and Untraced Drivers* ed, Andrew Ritchie QC 4th edition (2016), in particular paragraphs 6.14 and 7.3. In paragraph 8.14, the author discusses the mechanism provided by section 152(2) to avoid a policy of insurance and observes:

> "Ordinarily this sort of declaration would not help an insurer when article 75 of the MIB's article will make the 'insurer concerned' the one to carry the liability under the MIB's Agreements in any event. However if there is potentially more than one Article 75 insurer who would be liable and/or the insurer wishes to resist a claimant's private medical costs, arguably a subrogated claim on behalf of a third party, then the insurer are likely to seek such a declaration"

Paragraph 7.3 continues

> "In practice, when notified of a claim, the MIB often delegates its liabilities to an insurer to investigate and settle the claim on its behalf as an agent under Article 75 of its Articles of Association…..When an insurance policy is in existence but the claim falls outside the policy and outside s 151 then the MIB's practice is to nominate that insurance company to deal with the claim on its behalf.
> ……..
> An Article 75 insurer is not liable to the claimant directly. It is only the agent of the MIB who is and remains liable under the Uninsured Drivers agreement. So the insurer should not be named in the pleading, the MIB should be named as the defendant albeit come insurers prefer to be an additional named defendant even though no direct cause of action can be pleaded against them."

[10] Mr McNaughtan submitted that this was the situation in the present case – UK Insurance Limited had settled the pursuer's claim as agent for the MIB, which remained at all times liable as principal. The claim was properly understood as one against an uninsured driver in which the MIB was the insurer of last resort. The reason for Ms Methven being uninsured was because UK Insurance had elected to have the policy in her name declared void and of no effect.

[11] The validity of the analysis set out by the author in the *MIB claims* textbook was in any event supported by the relevant authorities. The first case relied upon by Mr McNaughtan was *Delaney* v *(1) Pickett and (2) Tradewise Insurance Services Ltd*. [2011] EWCA Civ.1532; [2012] 1 WLR 2149, from the decision of the Court of Appeal. There were a number of live questions in Delaney, not least the applicability of the doctrine *ex turpi causa non oritur action* (that being a public policy doctrine precluding the recovery of compensation for loss or damage arising as a result of your own criminal conduct). In

Delaney, drugs had been found in the car in question as well as on the claimant's person after a collision. More pertinently for the purposes of this case, the insurers were joined as second defendant after they had avoided the policy of insurance issued in the respondent's name. Ward LJ said this at paragraphs 38 and 39 in relation to the role of the MIB:

> "38 Tradewise Insurance Services Ltd ('the insurers') were joined as second defendant because, having fortuitously discovered the first defendant's confession of habitual drug use, they successfully took proceedings against him to avoid his policy of motor insurance taken out with them. The Motor Insurers' Bureau may have been the more appropriate defendant but nothing turns on that. The insurers accept their liability to meet the claimant's claim for damages but plead the exceptions to their liability contained in the MIB agreement.
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> 39 This agreement was made on 13 August 1999 between the MIB, a company incorporated under the Companies Act, and the Secretary of State for the Environment, Transport and the Regions. Among the principal terms is:
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> '5. (1) Subject to clauses 6 to 17, if a claimant has obtained against any person in a court in Great Britain a judgment which is an unsatisfied judgment then MIB will pay the relevant sum to, or to the satisfaction of, the claimant or will cause the same to be so paid. (2) Paragraph (1) applies whether or not the person liable to satisfy the judgment is in fact covered by a contract of insurance and whatever may be the cause of his failure to satisfy the judgment.'"

[12] Richards LJ continued the foregoing theme at paragraph 65 when he said:

> "On that basis the claimant is entitled to judgment from the first defendant. There is, however, no real prospect of the first defendant personally being able to satisfy the judgment. He did have an insurance policy but this was avoided by the insurers for material non-disclosure. That is why the claimant needs to fall back on the MIB agreement. The effect of clause 5 of the MIB agreement is that the MIB is liable to meet the judgment unless, so far as relevant, the situation falls within the exclusion in clause 6(1)(e). In fact, by virtue of article 75 of the MIB's articles of association, responsibility for payment of any sum due to the claimant under the agreement lies in the circumstances with the insurers, not with the MIB itself. That explains the participation of the insurers, rather than the MIB, in the proceedings."

Continuing in the same vein, Tomlinson LJ also noted at paragraph 74:

> "74 Different considerations however apply where the question is whether the judgment, if unsatisfied by the first defendant, should be met out of public funds, as is effectively and usually the case where the liability of the MIB is engaged. Having avoided liability for non-disclosure the first defendant's insurers must have tendered, or at any rate are obliged to tender, a return of his premium. Whether a

> liability is met by the MIB or, as it would be here, by the designated insurer, ultimately such recoveries are funded by an increment on the premiums paid by all insured motorists."

[13] The Court of Appeal, whilst upholding the appeal, by a majority, to the effect that the first instance Judge had been wrong to hold that the claim could not succeed against the driver, also dismissed the appeal so far as directed against the MIB on the basis that it was entitled to rely on an exclusion in its agreement: here the vehicle was being used in furtherance of or in the course of a crime. Mr Delaney raised separate proceedings against the Secretary of State, arguing that the MIB's exclusion clause was incompatible with EU law. The Judge at first instance (Jay J) agreed, finding in favour of Mr Delaney. He also stated, at paragraph 2 of his opinion (from which the Court of Appeal later did not demur) that:

> "2. The driver held a policy of insurance with Tradewise Insurance Services Ltd ('Tradewise') in respect of his liability under section 143 of the Road Traffic Act 1988. On 4 March 2009 Tradewise obtained an order to the effect that it was at all material times entitled to avoid this policy of insurance pursuant to section 152(2) of the 1988 Act on the grounds that the policy was obtained by the non-disclosure of material facts and by the representation of facts which were materially false. The matters which were misrepresented and/or not disclosed by the driver comprised that: (i) he suffered from diabetes; (ii) he suffered from depression; and (iii) he was a habitual cannabis user.
>
> 3 This state of affairs brought within potential scope the Motor Insurers Bureau ('MIB') as insurer of last resort under the Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement 1999 made between it and the Secretary of State in 1999 ('the Uninsured Drivers' Agreement 1999'). The precise nature of these arrangements will need to be examined subsequently, but at this stage it is sufficient to mention that Tradewise' standing in the shoes of the MIB became the 'article 75 insurer' liable to meet the Road Traffic Act liability brought about by Mr Pickett's driving on this occasion, subject to it being proven that one of the exceptions set out in the Uninsured Drivers' Agreement 1999 was applicable."

[14] The Court of Appeal dismissed an appeal by the Secretary of State, agreeing that the MIB was bound to pay compensation in circumstances where, for whatever reasons, the insurer owed no liability to the insured, albeit, as Richards LJ stated at paragraph 2 of the

decision in the Court of Appeal "For reasons it is unnecessary to go into, Tradewise stood in the shoes of the MIB in defending the claim brought by the claimant."(emphasis added)

[15] Mr McNaughtan then turned to consider the case of *Colley* v *Shuker & Others* [2021] 1 WLR 1889, which looked at the interrelationship between section 151, 152(2) and the MIB. The background to *Colley*, read short, was that a policy of insurance was in place in respect of the vehicle in question at the time of the accident, but the driver, the son of the insured, was not covered by that policy. The insurer avoided the policy in terms of section 152(2) and the question for the court, considering the matter as a preliminary issue, was whether, in those circumstances, the MIB were obliged to compensate the passenger who had been injured. The court held that where the policy had been avoided, the MIB was obliged to pay compensation subject to any defence that it might have. Determination of the preliminary issue necessitated an in depth consideration of the relevant EU directive to determine whether or not the UK was in breach of its insurance obligations under EU law. In that context, Freedman J observed, at paragraph 125:

> "….The effect of the existence of section 152(2) and the declaration in this case is that this was a vehicle for which the insurance obligation provided for in article 3 has not been satisfied and/or the vehicle was equivalent to or treated as an uninsured vehicle…."

The submissions of the MIB were held to be contrary to that conclusion and also inconsistent with the decision of the Court in *Delaney.* Freedman J ultimately concluded that the MIB's obligation under the Codified Directive covers a case where there is a policy of insurance in being at the time of the incident giving rise to liability but that policy is subsequently avoided *ab initio*; and that it gives 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.

[16] On appeal by the MIB, the Court of Appeal approved the approach taken by Freedman J. Further observations by Stuart-Smith LJ on the interrelationship between subsection 152(2) and 151 could be found at paragraphs 9 to 11 as follows:

> "9 Subject to section 152(2), which I set out below, section 151 of the Road Traffic Act 1988 (the Act) makes provision for an insurer that has issued a policy to pay to a person who is entitled to the benefit of a judgment (such as that obtained by Mr Colley against Mr Shuker) any sum payable under the judgment as regards liability in respect of death or bodily injury. Subject to section 152(2), therefore, Mr Colley would be entitled to look to the Insurer to satisfy any judgment for damages that he obtains against Mr Shuker.
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> 10 After the accident but before these proceedings were issued the Insurer sought and, on 27 June 2016, obtained a declaration against Mr Shuker's father that it was entitled to avoid the Policy on grounds of material misrepresentation. The misrepresentation upon which the Insurer relied was that Mr Shuker'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.
>
> 11 Pursuant to the provisions of sections 151 and 152 of the Act as they then stood, this declaration released the Insurer as a matter of English law from any obligation arising under section 151 of the Act to make payment to Mr Colley in respect of any award of damages he may subsequently obtain against Mr Shuker. That was because, as it then stood, section 152(2) provided that: (*His Lordship then set out the terms of s 152(2) as then in force, and as were in force at the time of the events with which this litigation is concerned*)"

[17] The Court of Appeal in *Colley* went on to approve, and agree with, the decision of the court in *Delaney*. Drawing all of those strands together, Mr McNaughtan submitted that UK Insurance had pursued the same course as the insurers in *Delaney* and *Colley* in this action, that is to say that they have avoided any liability under section 151 and have defended the action as Article 75 insurers. In electing to do so, they have been able to rely on defences that are available to them as Article 75 insurers, which are not available under s.151 of the 1988 Act. As Article 75 insurers, the second defender is standing in the shoes of the MIB and has open to it the same defences as are available to the MIB. In terms of Clause 8 of the Uninsured Drivers Agreement 2015 the MIB may avoid liability where a claimant

voluntarily allowed himself to be a passenger in the vehicle and knew or had reason to believe that: (a) the vehicle had been stolen; or (b) the vehicle was being used without there being in force in relation to its use a contract of insurance complying with Part VI of the 1988 Act. 5.2. The defence of knowledge of lack of insurance was not available to the second defenders in terms of section 151(4), which only allows a defence for knowledge that the vehicle was stolen.

[18] In the result, Mr McNaughtan submitted that once the policy had been avoided under section 152(2), no liability arose under section 151. UK Insurance defended the action and paid compensation to the pursuer as Article 75 insurers, that is to say as agents of the MIB. It followed that they had no right of recovery from Ms Methven under section 151(8).

Submissions for the second defender, UK Insurance Limited

[19] Mr Smith KC invited me to refuse the motion on behalf of Ms Methven, and to allow a Proof before Answer which he submitted was necessary to establish the facts forming the backdrop to the operation of sections 151 and 152 in the present case. That said, Mr Smith accepted that there were no real facts in dispute between the parties, in particular that Ms Methven had obtained the policy in question as a result of being untruthful about matters such as her age, that she owned property and that she owned the vehicle. Nor did Mr Smith dispute that the principal action had been settled by UK Insurance acting as Article 75 Insurers for the MIB. However, he submitted that the parties parted company on the question of whether or not, by obtaining a declaration in terms of section 152(2), UK Insurance fell foul of section 151. Mr Smith submitted that this was not the case. The fact that the MIB appointed an insurer to settle this action was "neither here nor there". The MIB, properly understood, had been created as a 'trade-off' with the insurance industry, as

the government of the day wished to address a situation where victims of a road traffic accident had no realistic prospect of recovery from an uninsured driver and accordingly established this scheme to compensate victims where there is no insurance in existence. More recently that approach had been confirmed as a result of the impact of EU directives which also were focussed on ensuring that victims were compensated in the case of an accident involving an uninsured driver, with the result that the window to escape liability had become narrower and narrower.

[20] Against that background, Mr Smith submitted that the purpose of section 151 was very different from that contended for by Ms Methven. Mr Smith submitted that it was important to understand the context in which UK insurance had sought the declarator under section 152(2). They had done so in the light of Ms Methven raising her own proceedings against the driver of the vehicle in the Sheriff Court. That was the motivation to seek the declarator and had more to do with Ms Methven's case than the present litigation. In any event the existence of the declarator made no difference to the rights of the insurer under section 151 for the simple reason that this was a situation where the person concerned, Ms Methven, would have been insured (emphasis added) but for the declarator. That interpretation was consistent with the language of section 151(2) which provides:

> "(2) Subsection (1) above applies to 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 whose liability is covered by the security, as the case may be, or
>
> (b) it is a liability, other than an excluded liability, which would be so covered if the policy insured all persons or, as the case may be, the security covered the liability of all persons, and the judgment is obtained against any person other than one who is insured by the policy or, as the case may be, whose liability is covered by the security."

In the present case the settlement with the pursuer was a judgment "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." The liability was one falling within the terms of subsection 2(b). The fact that the policy had subsequently been avoided was irrelevant. Thus, however the decree comes about, the insurer could not escape liability of paying the benefit of that judgment to the pursuer even if the underlying policy had been declared null and void. The question of who might ultimately be the 'paymaster' was irrelevant. Put another way it did not matter where the money to satisfy the judgment came from, the proper question was: where did the obligation to satisfy the judgment come from? That could be found in the language of subsection (5) –

> "(5) Notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy or security, he must, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment—
>
> (a) as regards liability in respect of death or bodily injury, any sum payable under the judgment in respect of the liability, together with any sum which, by virtue of any enactment relating to interest on judgments, is payable in respect of interest on that sum,
>
> (b) as regards liability in respect of damage to property, any sum required to be paid under subsection (6) below, and
>
> (c) any amount payable in respect of costs."

[21] The authorities relied upon by Mr McNaughtan were irrelevant, being concerned with the obligations on the MIB and not the point in issue in this case. Mr Smith submitted there had been no authority produced to suggest Mr McNaughtan was correct in his interpretation and that it would be a 'surprising result' if a declarator obtained under section 152(2) deprived the insurer of the right to avail themselves of the recoupment provision in section 151(8). Properly understood, UK Insurance were within the four corners of section 151. Nothing in section 152 detracted from the proposition that in circumstances such as the present, UK Insurance were not still the insurer for the purposes

of section 151. The logic underlying that conclusion was clear – it provided an absolute benefit to the person holding the judgment, and, second, provided some protection to insurers where it would be manifestly unfair for them to be found liable for the cost of meeting the judgment.

[22] Mr Smith contended further that not only were the authorities relied upon of no assistance, the interpretation favoured by Mr McNaughtan did not find support in textbooks such as MacGillivray on Insurance Law (15th Edition, 2022), passages of which had been produced for the court. In summary, Mr Smith submitted that the interpretation contended for by Mr McNaughtan on behalf of Ms Methven went too far, and that a final view ought not to be taken on the question of whether or not UK Insurance should be entitled to recover without the benefit of evidence on the question. A Proof before Answer should be allowed.

Analysis and decision.

[23] The Road Traffic Act 1988 is a UK wide statute. It is accordingly desirable that decisions of courts both north and south of the border in relation to the interpretation of that Act (or indeed any other UK wide statute) should, so far as possible, be consistent. It follows therefore that decisions of the Court of Appeal in England, whilst not strictly speaking binding on this court, should be given effect to unless, for example, the matter in question relates purely to a question of Scots Law. Put another way, this court should generally follow decisions of the Court of Appeal unless 'there are compelling reasons suggesting otherwise' (*Amery* v *Perth and Kinross District Council* 2012 SLT 395, at paragraphs 35, 50).

[24] With that in mind, what assistance do the authorities cited bring to the question of whether or not UK Insurance is disabled from relying upon the provisions in section 151 as a

result of obtaining a declarator in terms of section 152(2)? As Mr Smith correctly submitted, the decisions in *Delaney* and *Colley* were primarily focussed on issues such as the compatibility of section 152 with EU directives requiring victims to be compensated when injured by uninsured drivers, and accordingly the circumstances in which it might be legitimate for the MIB to avoid liability as the insurer of last resort. However, within those decisions can nevertheless be found clear guidance on the inter-relationship between section 151 and section 152(2), and the effect of each. That is perhaps most explicitly stated by Stuart-Smith LJ in *Colley (2022)*, at paragraph 11 where he said:

> "11 Pursuant to the provisions of sections 151 and 152 of the Act as they then stood, this declaration released the Insurer as a matter of English law from any obligation arising under section 151 of the Act to make payment to Mr Colley in respect of any award of damages he may subsequently obtain against Mr Shuker."

Whilst the reference to English law ought, with the greatest of respect, to be read as a reference to UK law, the point is clear – a declaration under section 152(2) releases the insurer from any obligation to make payment under section 151. The treatment of sections 151 and 152 otherwise in *Colley* are entirely consistent with that clear statement of the position. The iteration of section 152 and, for that matter section 151 in force at the time of the decision in *Colley* were the same as in the present case.

[25] Therefore, from the various authorities cited the following propositions can reliably be drawn:

(i) The effect of a declaration under section 152(2) of the 1988 Act is to relieve the insurer of any obligation to make payment under section 151.

(ii) The individual who is the subject of such a declaration is therefore an uninsured driver.

(iii) That this state of affairs brings into scope the MIB as the insurer of last resort. It is of note in this context that the agreement governing the participation of the MIB is called the 'Uninsured Drivers' Agreement.'

(iv) That any insurer nominated by the MIB to investigate and settle, if appropriate, any resultant claim is not settling the claim directly but is doing so 'standing in the shoes' of the MIB, or, as described by Mr Ritchie in his textbook 'An Article 75 insurer is not liable to the claimant directly. It is only the agent of the MIB who is and remains liable under the uninsured drivers' agreement.'

[26] If that is correct, then it would follow from the absence of direct liability on the insurer in terms of section 151 to satisfy any judgment, that there is equally no direct entitlement to recoup any sum paid from the now uninsured individual. The passages quoted from Mr Ritchie above succinctly explain why that is so, namely that the insurer is only the agent of the MIB. The fact that an insurer who obtains a declarator under section 152(2) may nevertheless often find themselves nominated by the MIB to handle the uninsured claim may at first sight seem a little incongruous. This becomes clearer when one bears in mind the two distinct capacities in which the same insurer may be involved, and the public policy considerations and funding arrangements underlying the operation of the uninsured drivers' agreement and the MIB, as discussed in the authorities quoted above.

[27] Mr Smith pointed to the terms of section 151(5) as supporting his contention that obtaining a section 152(2) declarator does not take the insurer outside the scope of section 151. I have concluded that that argument does not defeat the conclusions on the nature and effect of the two provisions as supported by the foregoing authorities. It is clear, when section 151 is read fairly and as a whole, that the underlying presumption is that there is a policy of insurance in existence at the time the judgment is obtained. The construction

favoured by Mr Smith would require language to be read into the section as a whole (for example that it relates to 'persons insured *or who were at one time insured'*). That is so notwithstanding the fact that section 151(5) states, inter alia

> "(5) Notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy or security, he must, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment……"

That, fairly read, is apt to cover the situation where the insurer is either entitled to avoid the policy, or may have done so once judgment has been obtained. It does not support the interpretation contended for that a declaration obtained prior to judgment under section 152(2) means that the insurer is still within the scope of section 151 in terms of obligations and consequent rights of recoupment. In any event, the plain language of section 152(2) states in terms that '(2) No sum is payable by an insurer under section 151 of this Act ….. (*where he has obtained a declaration that he is entitled to avoid the policy in question*). That language is clear and unambiguous. As a matter of logic, it follows that if no sum is payable under section 151 in the event of the policy being avoided, then nor can the insurer avail itself of the right under s 151(8) to seek recoupment of sums paid in satisfaction of any judgment arising in terms of section 151.

[28] In any event, the contrary conclusion, namely that an insurer is entitled (a) to avoid a policy of insurance under s 152(2) (b) settle a claim on behalf of the MIB, and (c) nevertheless retain a direct right to recoup any sums paid in reliance upon s 151(8) would tend fundamentally to undermine the status and purpose for which the MIB was established, as explained in the authorities cited. For that reason too, I conclude that the arguments advanced on behalf of Ms Methven are to be preferred.

Conclusion and disposal

[29] Mr Smith submitted that the question of UK Insurance's entitlement, if any, under section 151(8) can only be determined with the benefit of evidence. I considered carefully whether there might be evidence that could relevantly elucidate this question but I have concluded that there is not. The matter is one of statutory construction. The effect of a declaration under section 152(2) on obligations under section 151, and the consequent role of the MIB, have been considered at appellate level in England. The conclusion of the Court of Appeal on these matters is clear. I see no compelling reason to demur or deviate from the analysis of that court (nor, for the avoidance of doubt, from the careful analysis of Jay J at first instance in *Delaney* v *The Secretary of State*).

[30] This is a personal injury action and there are therefore no pleas in law to uphold or repel. Therefore, for all the foregoing reasons, I uphold the submissions of the second third party and dismiss the action so far as directed against her. I will reserve all questions of expenses meantime.