

Accidents Abroad

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Introduction

The growth of international travel for work and pleasure, and an ever-increasing awareness of recourse through litigation, has meant that the number of personal injury claims relating to accidents abroad has mushroomed in recent years. Whilst the details of a particular incident may appear depressingly familiar to the prospective Claimant's solicitor (a road traffic accident, an accident whilst working abroad or an injury suffered in the grounds or swimming pool of a foreign hotel), the fact that the accident has occurred in a foreign jurisdiction may create a number of difficulties. It is the intention of this short guide to focus on questions which might arise in the purely tortious arena with some reference to related insurance matters. We do not, in this guide, consider claims in contract (including contracts of insurance) or claims to enforce rights under the Package Travel, Package Holidays and Package Tours Regulations 1992.¹

As English personal injury awards are generally higher than in continental Europe and (leaving aside the special features of the U.S. systems) most other foreign jurisdictions, there have in the past been substantial advantages for Claimants in bringing their claims in England. Rome II² reversed the decision of the House of Lords in *Harding v Wealands* [2007] 2 AC 1, so that damages in any personal injury claim brought before the English courts are no longer always assessed according to English law but in accordance with the applicable law, as determined under Rome II. However, the fact that proceedings are brought in England will still be relevant and is likely to impact on the amounts awarded to Claimants. It is also procedurally more attractive for an English resident Claimant to bring his claim through English solicitors in the domestic arena.

Conversely, for a non-English resident Defendant it may be undesirable to be sued in England, and the circumstances need to be examined to determine whether the court could be persuaded that it does not have jurisdiction or should not exercise it. Likewise, in relation to questions as to which law should be applied, there may be advantages to the Claimant/Defendant in a law other than English law being applied to substantive issues in any particular case.

¹ For package holiday claims, please refer to 2TG's Practical Guide to Personal Injury Claims Under the Package Travel, Package Holidays and Package Tours Regulations, available at www.2tg.co.uk.

² Regulation (EC) 864/2007 on the law applicable to non-contractual obligations. A Practical Guide to Rome II is available at www.2tg.co.uk.

The immediate questions which need to be considered in relation to accidents abroad fall under four heads:

1. Does the English court have jurisdiction to determine the claim?
2. What is the applicable law of the tort in relation to liability? In other words, by reference to which body of national law is the conduct of the proposed Defendant to be considered, in order to determine whether such conduct gives rise to a right to damages or other remedy?
3. By what law is quantum of damages to be determined?
4. Related insurance issues.

Jurisdiction of the English Courts

There are two regimes which need to be considered when looking at the question whether the English Court has jurisdiction over a dispute: first, the Judgments Regulation Regime relating to most European countries;³ secondly, the rules for remaining foreign countries laid down by Practice Direction B to CPR Part 6 (PD6B). A modified version of the Judgments Regulation Regime applies in relation to intra-UK cases.

Cases within the Judgments Regulation Regime

If the English Court has jurisdiction on the basis of the Judgments Regulation Regime, permission to serve out of the jurisdiction is not required.⁴

The primary rule laid down by the Judgments Regulation Regime is that a Defendant should be sued in the courts of the country in which he is domiciled – see Article 4.⁵ Thus a Defendant domiciled in England may be sued in England and served with proceedings wherever he may

(temporarily) be. A Defendant domiciled in another Member State may not (under the general rule) be sued in England, even if he is temporarily in England and available to be served with process.

There are other bases for jurisdiction within the Judgments Regulation Regime but these are all exceptions to the general rule in Article 4. So, for example, if the court of another Member State has assumed jurisdiction in relation to the same claim, the English court has to decline jurisdiction, even if the Defendant is domiciled in England.⁶

For present purposes the most important exception is that contained in Article 7(2). Pursuant to that provision the court will have jurisdiction if England is the “place where the harmful event occurred”. This has been held by the Court of Justice of the European Union to mean the place where the damage occurred or where the event which gave rise to the damage occurred.⁷ In a personal injury action, the damage will generally occur at the place of the accident and so the English court may not have jurisdiction in respect of an accident which occurs abroad.

The case of *Henderson v Jaouen* [2002] 1 WLR 2971 demonstrates the difficulties facing a claimant in seeking to establish jurisdiction of the English court in respect of an accident abroad, even if (as will often be the case in respect of an English resident) the claimant returns to live in England after being injured in an accident abroad, and continues to suffer the after effects of the accident here.⁸

However, in jurisdictional terms, the impact of this restricted definition of damage has been mitigated by the decision of the European Court of Justice in Case C-463/06 *FBTO Schadevezekeringen N.V. v Odenbreit* [2007] ECR I-11321 where it was held that in certain circumstances an injured party may bring an action in the courts of his own domicile against the insurer of the tortfeasor, regardless of the domicile of the tortfeasor or insurer.⁹ Although decided in the context of a road traffic accident, this ruling is of general application to all claims. On the basis of this decision, Claimants are able to bring proceedings in the English courts against

³ The “Judgments Regulation Regime” refers collectively to The Lugano Convention 2007 (which applies to Iceland, Norway and Switzerland), The Brussels I Regulation (EC 44/2001) and, as of January 2015, the Recast Brussels I Regulation (EC 1215/2012) which apply to the other Member States of the European Union. This guide uses the article numbers from the Recast regulation.

⁴ See CPR 6.33.

⁵ Domicile is often self-evident but the rules relating to it are complicated. It should be noted that the definition of domicile for the purposes of the Judgments Regulation Regime differs significantly from the common law definition.

⁶ See Article 29.

⁷ Case 21/76 *Bier v Mines de Potasse* [1976] ECR 1735.

⁸ English domiciliary injured in RTA in France. His condition deteriorated after his return to England. The Court of Appeal held no “harmful event” occurred in England; c.f. the common law position.

⁹ We consider this judgment and its implications in more detail below.

insurers in cases where they would not otherwise have been able to do so.

Cases outside the scope of the Judgments Regulation Regime

The common law regime operates slightly differently. The key question in such cases is whether the Defendant can validly be served. The rules as to service in CPR Part 6 determine the scope of the Court's jurisdiction.

If the Defendant is within the jurisdiction for the purpose of service, he may be served (without the permission of the court) and sued in England. If he is not within the jurisdiction, permission to serve process out of the jurisdiction may be granted by the Court pursuant to CPR 6.36, on a number of grounds¹⁰ including on the basis of domicile in England (if the Defendant is temporarily abroad) - see PD6B 3.1(1).

PD6B 3.1(9) is in similar, but not identical, terms to Article 7(2) of the Judgments Regulation Regime (see above) and is applied differently. Pursuant to PD 6B 3.1(9) the English courts have jurisdiction in claims in tort where "(a) damage was sustained within the jurisdiction; or (b) the damage sustained resulted from an act committed within the jurisdiction". The scope of this provision¹¹ has been considered in a number of cases, beginning with *Cooley v Ramsey* [2008] EWHC 129 (QB) in which the claimant, a UK national, was seriously injured in a road traffic accident in New South Wales. The Defendant was an Australian national, domiciled in Australia and insured under an Australian motor insurance policy. Some months after the accident the claimant was repatriated to the UK so that his parents could assist with his long term care. The Defendant made an application that the courts of England and Wales had no jurisdiction in the matter or should not exercise any jurisdiction. The application was dismissed by Tugendhat J. The Judge held that "damage was sustained within the jurisdiction" for the purposes of the CPR in circumstances where the claimant continued to feel the effects of his injuries here and incurred expenses here on care and similar matters.

Subsequently, in *Wink v Croatia Osiguranje* [2013] EWHC 1118 (QB), a case arising from an

accident in Croatia,¹² the High Court has confirmed that pain, suffering and even loss of earnings which continue long after an injury or accident can form the basis of an application for service out of the jurisdiction; a narrow construction of the rule, accounting for only direct and not indirect damage, was rejected.

The Court of Appeal came to consider this issue in *Brownlie v Four Seasons Holdings Inc* [2015] EWCA Civ 665, a case arising from a fatal accident in Egypt. The previous decisions were overruled, and the Court of Appeal held that in the personal injury context the reference to "damage" in the CPR should be construed in accordance with Rome II, such that only direct, rather than indirect, damage is relevant. Following this decision, further argument of the point can be expected at the appellate level, particularly as the decision appears to create an anomalous distinction between personal injury and fatal accidents.

Additional Defendants and Third Parties

A Defendant domiciled abroad may be sued in England in respect of an accident abroad if it is appropriate for them to be joined as a second or additional defendant — see Judgments Regulation Regime Article 8(1) and PD 6B 3.1(3). So, for instance, a claim against a foreign Defendant who is alleged to have dropped a scaffold clip onto the Claimant's head on a building site in France may be joined with a claim commenced in England against the victim's English employer for failing to provide a proper hard hat on the building site in question. The key difference between the common law and the Judgments Regulation Regime is that under the common law it is only necessary that the court has jurisdiction over the original Defendant, whereas under the Judgments Regulation Regime it is also necessary that the original Defendant is domiciled in England.¹³

Both the Judgments Regulation Regime and the common law permit third parties to be joined to a

¹² Prior to Croatia's entry into the European Union. The case would now be decided under the Judgments Regulation Regime.

¹³ Article 8(1), in its previous form, has been considered by the ECJ in the cases of C-103/05 *Reisch Montage* [2006] ECR I-6827 and C-98/06 *Freeport* [2007] ECR I-08319. In *Reisch Montage* the CJEU held that a claim could not be made on the basis of Article 8(1) if it was for the sole purpose of removing the Defendant from the jurisdiction of the court of his domicile. However, in *Freeport* the CJEU held that for the purposes of Article 8(1) there is no requirement to establish specifically that proceedings were not brought with the sole object of ousting the jurisdiction of the courts of the Defendant's domicile.

¹⁰ Set out in PD 6B.

¹¹ In its previous version of CPR 6.20(8).

claim by a Defendant even though they are domiciled outside the jurisdiction — see Article 8(2) and PD 6B 3.1(4).

Forum Conveniens

Perhaps the most important distinction between the Judgments Regulation Regime and the common law for present purposes is that under the common law an English court can stay a claim if the English court is not the most appropriate forum for the dispute to be heard (*forum non conveniens*). This, for example, allows the court to intervene to prevent forum shopping where the case would more appropriately be heard elsewhere. Relevant factors include the location of witnesses, convenience and expense and the applicable law.

Under the Judgments Regulation Regime, however, the court, if it has jurisdiction, does not have any discretion to stay its proceedings on the grounds of *forum non conveniens*, even in favour of a non-Judgments Regulation Regime State: see *Owusu v Jackson* [2005] 2 WLR 942. This rule, which is not considered by the Recast Brussels I Regulation, has potential to encourage forum shopping, as it allows a Claimant to bring a claim in a jurisdiction which has only an incidental connection with the accident, without fear of the claim being stayed in favour of a more appropriate jurisdiction. It is an interesting question whether and to what extent a Claimant who chooses to bring a claim here when England is an inconvenient forum, but where the Judgments Regulation Regime applies, can nevertheless be penalised in costs.

Objecting to Jurisdiction

The procedure for objecting to jurisdiction under either regime is set out in CPR Part 11. The key point to bear in mind in relation to CPR 11 is that there is only a limited time in which to raise an objection to jurisdiction.¹⁴ CPR 11(4) provides that an application under CPR 11 must be made within 14 days after filing an acknowledgement of service. It is important to note that extending the time for the Defence (whether by agreement or court order) does not extend the time for objecting to jurisdiction and indeed may be treated as being inconsistent with an intention to challenge the

jurisdiction.¹⁵ If a Defendant does not make an application within the period specified by CPR 11(4) he is to be treated as having accepted jurisdiction — CPR 11(5).

It is for this reason that a Defendant's solicitor should make sure not to file an acknowledgment of service and obtain an extension of time for serving a defence before putting the papers to one side whilst the merits are investigated. It may then not be realised, until too late, that the jurisdiction of the court to try the case should have been challenged by an application under Part 11.

Law of the Tort

On 11 January 2009, Rome II came into force in the United Kingdom, introducing uniform choice of law rules for non-contractual obligations and replacing the previous choice of law rules contained in the Private International Law (Miscellaneous Provisions) Act 1995 ("the Act").

Initially, there was a period of uncertainty as to the temporal scope of Rome II. It was not until November 2011 that clarity was achieved, with the CJEU holding in Case C-412/10 *Homawoo v GMF Assurances SA* that Rome II is to be applied only in cases where the event giving rise to damage occurred after 11 January 2009.¹⁶

The Act will continue to determine the applicable law in cases to which Rome II does not apply.¹⁷ It is worth noting that within its temporal and material scope, Rome II is applied universally, regardless of the location of the accident: see Article 3.¹⁸ For example, it would apply to proceedings brought in England in relation to an accident in Australia.

The new rules

¹⁴ Although in an appropriate case an extension may be granted: see e.g. *S.E.T. Select Energy GMBH v F&M Bunkering Limited* [2014] EWHC 192 (Comm).

¹⁵ See *Global Multimedia International Ltd v ARA Media Services* [2006] EWHC 3107 (Ch).

¹⁶ Disputes over what precisely constitutes the event giving rise to damage in cases arising in certain contexts mean that some uncertainty over temporal application of Rome II continues, see e.g. on product liability *Allen v Depuy International Ltd* [2014] EWHC 753 (QB).

¹⁷ The provisions of the Act are dealt with in previous editions of this Guide, available at www.2tg.co.uk.

¹⁸ Note that Rome II does not as such apply to resolve choice of law issues in intra-UK cases. However, the Law Applicable to Non-Contractual Obligations (England, Wales and Northern Ireland) Regulations 2008 (SI 2008/2986) applies the same rules to such cases.

Article 4 is entitled “General Rule”¹⁹ and comprises three elements: a general principle, an exception and an escape clause. Article 4 as a whole looks not dissimilar to the previous provisions under the Act, although differences can arise when the courts come to apply it.

The general principle: Article 4(1)

The general principle is that the applicable law will be the law of the country in which the damage occurs or is likely to occur – *lex loci damni*: see Article 4(1).²⁰ Any role for the law of the country in which the event giving rise to the damage occurred or in which the indirect consequences of an event occurred is specifically excluded.

The general rule focuses on the distinction between direct and indirect damage. This distinction is familiar from the CJEU’s caselaw on Article 7(2) of the Judgments Regulation. The CJEU has drawn this distinction and only gives a determining role to direct damage: see Case C-364/93 *Marinari* [1995] ECR I-2719. It is clear from the *travaux préparatoires* of Rome II that the legislature intended to reflect this distinction in Article 4(1) and, therefore, the CJEU’s caselaw on this point may be of assistance in interpreting Rome II.

Article 4(1) should present few problems in a straightforward personal injury case. The country in which the injury was sustained, i.e. where the accident took place, will generally be the country in which damage occurs: see Recital 17 of Rome II.²¹ This will be so even where the tortious act (eg. negligent servicing of a car) has occurred in a different country. Furthermore, the fact that the victim subsequently suffers ongoing consequences in another country should not be relevant: c.f. *Henderson v Jaouen* [2002] 1 WLR 2971.

However, more difficult questions arise in related areas, especially in claims involving indirect victims or, possibly, indirect damage. For example, which law should apply to a claim by dependents in England in respect of a fatal accident abroad is a matter on which there are divergent opinions and in respect of which the law is not settled.²²

¹⁹ Articles 5-9 provide for specific cases: product liability, unfair competition, environmental damage, intellectual property and industrial action.

²⁰ Damage includes damage likely to occur: see Article 2(3)(b).

²¹ Note that this accords with the general rule under the Private International Law (Misc Provisions) Act 1995.

²² For a recent decision which indicates that such claims are governed by the law of the place of the accident, see

The exception for common habitual residence: Article 4(2)

The general principle is displaced where the Claimant and the person claimed to be liable share a common habitual residence at the time when the damage occurs. A similar concept is found in the conflicts rules of a number of Member States and, indeed, in England in the “cocoon” cases²³ under the Act. However, it should be noted that Article 4(2) is a rigid rule not a flexible exception as under the Act.²⁴ The only scope for argument under Article 4(2) is whether there is in fact common habitual residence. If there is, it automatically displaces the law applicable under Article 4(1).

In applying the concept of habitual residence for Article 4(2), the relevant person is the one “claimed to be liable”, which may not be the named Defendant. It was held in *Winrow v Hemphill and Ageas Insurance Ltd* [2014] EWHC 3164 (QB) that, in a road traffic accident, it is the habitual residence of the alleged tortfeasor, and not of his insurer, with which the court is concerned.²⁵

The “escape clause”: Article 4(3)

If it is clear that the tort is manifestly more closely connected with a country other than that indicated by Article 4(1) or (2), the law of that country will apply: see Article 4(3). This Article is in similar terms to s.12 of the Act although some commentators have questioned whether the standard of “manifestly” is higher than that of “substantially” under the Act. Although Article 4(3) specifically refers only to pre-existing relationships, such as contracts, being relevant to the assessment, all the circumstances of the case fall to be included in the Article 4(3) assessment, including where the accident or damage occurred, any common habitual residence and the consequences of the tort.²⁶

Bianco v Bennett [2015] EWHC 626 (QB). In a pre-Rome II context, see *Cox v Ergo Versicherung AG* [2014] AC 1379.

²³ Cocoon cases are cases where all the relevant parties are from a country other than that where the accident occurred and there is no material connection between the tort and the place where it occurred. For example, *Edmunds v Simmonds* [2001] 1 WLR 1003 is a cocoon case.

²⁴ Had Article 4(2) applied the result on the issue of applicable law in *Harding v Wealands* [2007] 2 AC 1 might have been different thereby rendering redundant the argument on substance and procedure.

²⁵ See also *Jacobs v Motor Insurers’ Bureau* [2011] 1 All ER 844.

²⁶ See *Winrow v Hemphill and Ageas Insurance Ltd* [2014] EWHC 3164 (QB) at [43] and [50].

The burden for showing that the law which would otherwise be applied has been displaced under Article 4(3) is on the party asserting that this is the case.²⁷

An open question exists as to whether the wording of Article 4(3) permits displacement of the law determined by Article 4(2) in favour of that determined by Article 4(1): the wording would suggest not, but there is no other good reason why not.

Standards a matter for local rules?

The applicable law may lay down what the ingredients of the relevant tort comprise — for instance, if strict liability applies, there is no ingredient of proving “fault” but it may be necessary for instance, in a road traffic accident, to establish the occurrence of an impact with the defendant’s car. Where the applicable law requires proof of fault, typically proof of a lack of reasonable care, it may be more difficult to identify the standard by which proof of fault is to be established. As a matter of English law the relevant standard has generally been determined by reference to the rules and standards of the place where the accident occurred.²⁸ The Court of Appeal has recently affirmed this position, making clear that “an Englishman does not travel abroad in a cocoon.”²⁹

This position is preserved by Rome II; Article 17 directs courts to take account of the rules of safety and conduct in force at the place and time of the event giving rise to liability. Thus, in considering a road traffic accident abroad, the local rules of the road are relevant in assessing breach of duty of care: for example in France one is expected to drive on the right, not the left; in California one is entitled to go through a red light to turn right, provided one gives way to traffic coming from the left. Likewise in an accident in a hotel, fault is judged by reference to local standards and regulations.

²⁷ Ibid. [42].

²⁸ See *Evans v Kosmar Villa Holidays Limited* [2008] 1WLR 297 where the Court of Appeal affirmed *Codd v Thomson* (TLR 20/10/00) where it had previously been held that there was no requirement for a hotel abroad to comply with English safety regulations and that conduct had to be judged by reference to local safety requirements.

²⁹ See *Lougheed v On the Beach Ltd* [2014] EWCA Civ 1538.

However, in the field of industrial accident or disease claims, the position is not so clear. There have recently been claims made against English companies alleging negligence in and about operations in foreign countries where the whole spectrum of industrial safety lags several decades behind that in this country. These claims appear to have proceeded on the basis that the appropriate standard for safeguarding workmen is a universal one applicable worldwide, regardless of the applicable law, rather than a standard tailored to local conditions. A similar approach was taken in *Booth v Phillips* [2004] 1 WLR 3292 where it was held that the standard of care expected of an English master of a merchant vessel owned by a Liberian company, registered in the Bahamas and managed by a Jordanian company, was an international standard. Whether such an approach is consistent with Rome II is perhaps questionable.

Practicalities of pleading foreign law

Before pleading a foreign law a Claimant’s solicitor whose client has suffered an injury abroad will want to inform himself whether the law of the place of the injury creates a sufficiently generous law for establishing liability — for instance, does negligence have to be proved or is strict liability applied? Is a deduction made for contributory negligence when the Claimant allows himself to be driven by a drunk? Are there statutory regulations which have to be strictly complied with? The Defendant’s solicitor will carry out the same investigation before deciding whether to challenge the Claimant’s case as to the correct applicable law. Traditionally, foreign law has been treated as a matter of fact in an English court. Therefore, unless, a party pleads (and proves) foreign law, the court will simply apply English law.³⁰

The law applicable to quantum

Under the Act, if proceedings were brought in England, the determination of the law, applicable under the 1995 Act to issues of liability in the case, was only part of the story. The applicable law only governed the *substantive* law applicable to the case. The law of the country where the proceedings were brought (the *lex fori*) governed the *procedural* law.

³⁰ Whether this is sustainable post-Rome II remains questionable, though it was recently adopted by Warby J in *Bianco v Bennett* [2015] EWHC 626 (QB) and by the Court of Appeal in *Brownlie v Four Seasons Holdings Inc* [2015] EWCA Civ 665.

An assessment of quantum involves both substantive and procedural law. One can see that this must be so at the extremes. It is a procedural rule of English law that damages fall to be assessed by judge (or jury), but not by professionally qualified assessors. Therefore, if it be the law of damages of a foreign country that damages are assessed in such a manner, such law will not be applied in a case brought in England, regardless of the applicable law of the tort. On the other hand, the “heads of damage” recoverable in an action in tort have long been held to be governed by substantive, not procedural, law, i.e. by the applicable law not by the *lex fori*.³¹

In *Harding v Wealands* [2007] 2 AC 1 the House of Lords held that the assessment of damages was a procedural matter to be determined by English law as the *lex fori*. The position following the decision of the House of Lords was that all matters relating to the quantum of damages, which do not go to the actionability of the tort (such as heads of damage and foreseeability of damage), including the question of caps, are governed by the law of the forum. The effect of the decision was to widen the application of the law of the forum and to diminish the scope of the applicable law.³²

Article 15(c) of Rome II has the effect of reversing the ruling in *Harding* by providing that the assessment of damages will be governed by the applicable law. However, although the scope of the applicable law is clearly wider following Rome II, a number of issues remain unresolved. For example, Rome II only provides for law or rules to apply but much of the process of the assessment of damages in the various Member States is determined not by law or rules but by practice. In *Wall v Mutuelle De Poitiers Assurances* [2014] 3 All ER 340, the Court of Appeal concluded that a narrow view of “law” is inappropriate for these purposes, and that guidelines which may be disapplied in individual cases form part of the law to be applied under Rome II. A foreign court applying English law would therefore have reference to the Judicial College Guidelines, and an English court to any foreign equivalent. It is unclear how far this concept of “soft law” extends and what other matters may be comprised within it, and a large number of arguments can be expected to take place in the courts in this regard,

particularly with regard to concepts such as discount rates.³³

Furthermore, the distinction between substance and procedure is still difficult and is preserved: see Article 1.3.³⁴ Procedural law will continue to have a significant impact upon the level of damages awarded, for example by dictating the manner in which expert evidence is gathered and presented (as determined by the Court of Appeal in *Wall*). Debates about these issues are in a different context post-Rome II but there are nonetheless substantial questions as to how far the applicable law extends and what the role is of the *lex fori*.

What can be said with some confidence is that despite the uniform choice of law rules in Rome II and the wider scope for the applicable law, the courts in different countries will still arrive at different conclusions as to quantum even if they are applying the same underlying law. In *Wall* the Court of Appeal confirmed that nothing in Rome II mandates the courts of the different Member States to seek to award the same amount of damages. However, the fact that once the transition period between the Act and Rome II comes to an end, the assessment of damages will be carried out in accordance with the applicable law rather than the law of the forum will mean that, in relation to accidents abroad, the English courts will increasingly have to apply foreign law. Clearly damages will still fall to be assessed according to English law in relation to accidents abroad in certain cases, for instance, where the victim and tortfeasor are both resident in England, but these cases will become the exception rather than the norm.

Related insurance issues

Direct right of action against insurer

Under a number of foreign systems of law the liability insurers of the tortfeasor are made directly liable to the victim of an accident caused tortiously by their insured, and accordingly the insurers can be sued directly by the victim.

A direct right of action against motor insurers was introduced into English law by The European

³¹ See *Boys v Chaplin* [1971] A.C. 356.

³² The Supreme Court’s recent decision in *Cox v Ergo* [2014] AC 1379 should, however, be understood as limiting the effect of *Harding* by recognizing a wider role for the substantive law.

³³ In *Stylianou v Masatomo Toyoshima* [2013] EWHC 2188 (QB), Sir Robert Nelson indicated that discount rates should be determined by the law of the tort.

³⁴ The wide definition of procedure adopted by the House of Lords in *Harding* does not appear to be sustainable post Rome II. The term “procedure” in the Regulation has to be given an autonomous interpretation.

Communities (Rights against Insurers) Regulations 2002³⁵ which implemented the Fourth Motor Insurance Directive in relation to accidents within the EU.³⁶

In the case of *C-463/06 FBTO Schadevezekeringen N.V. v Odenbreit* the European Court of Justice considered the jurisdiction rules in the Judgments Regulation in relation to direct actions provided for by the Motor Insurance Directives. The facts of the case were that the claimant, Jack Odenbreit, who was domiciled in Germany, was injured in a road traffic accident in the Netherlands as a result of the fault of a Dutch domiciliary. The insurer of the person responsible for the accident was also domiciled in the Netherlands. Mr. Odenbreit commenced proceedings against the insurers in Germany. The insurers challenged the jurisdiction of the German court which made a reference to the CJEU on the interpretation of the Judgments Regulation. In its judgment the CJEU held that on the basis of Article 11(1)(b) and 13(2) of the Judgments Regulation an injured party may bring an action directly against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that a direct action is permitted³⁷ and the insurer is domiciled in a Member State. The European Court stated that this construction of the insurance rules in the Judgments Regulation accorded with the objective of the rules set out in the Recitals:

“...in relation to insurance contracts...the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.”

For an English lawyer advising an English resident victim of an accident abroad, the procedural advantage of being able to sue in England is obvious. However, the outcome of the claim will depend on the applicable law and it will be necessary to prove that law with the help of a suitably qualified foreign lawyer. What substantive

advantage will accrue to the Claimant will depend upon the way the foreign law is interpreted and applied by the English courts.

The potential implications of *Odenbreit* are wide-ranging. In the case of *Keefe v Hoteles Pinero Canarias SL* [2015] EWCA Civ 598, the Court of Appeal held,³⁸ that where the English courts have jurisdiction over a claim against an insurer by reason of the *Odenbreit* decision, a Claimant will also be able to bring an action against the insured party; this is so even where there would be no other basis under the Judgments Regulation for English jurisdiction over the insured.

In another judgment, the CJEU considered whether parties other than the victim can benefit from the interpretation of the Judgments Regulation as expounded in *Odenbreit*. In Case C-347/08 *Vorarlberger Gebietskrankenkasse v WGV-Schwabische Allgemeine Versicherungs AG*,³⁹ the CJEU had to consider whether a social security body, who had a direct claim⁴⁰ against insurers of a tortfeasor for recoupment of benefits paid out to an injured party, could bring proceedings in the state in which the body was established. The CJEU held that the social security body could not have the benefit of the specific insurance provisions in the Judgments Regulation. The CJEU's decision is based upon the premise that the purpose of the insurance provisions is to protect the weaker party by rules of jurisdiction more favourable than the general rules provide for. As it was not argued that the social security body was an economically weaker party or less experienced legally, the benefit of the insurance provisions could not be extended to it.

Although *Vorarlberger* was concerned with the position of a social security body, the reasoning underlying the decision has potentially wider implications. In the decision the CJEU specifically refers to the position of other potential claimants in the following terms:

“...where the statutory assignee of the rights of the directly injured party may himself be considered to be a weaker party, such an assignee should be able to benefit from special rules on the jurisdiction of courts laid down in those provisions. This is particularly the

³⁵ SI No 3061. Note that the Regulations provide for a direct right of action to all victims of accidents within the UK. It does not assist the victim of an accident abroad. See *Nemeti v Sabre Insurance Company Limited* [2012] EWHC 3355 (QB).

³⁶ Directive 2000/26/EC (“The Fourth Motor Insurance Directive”).

³⁷ Note that the direct right of action can operate if permitted under the law applicable to the non-contractual obligation or to the contract of insurance. Under the pre-Rome II provisions, it has been held that the direct right of action has to be permitted under the law of the insurance contract, not the law of the forum: see *Jones v Assurances Generales de France (AGF) SA* [2010] IL Pr 4.

³⁸ Confirming the *obiter* indication in *Maher v Groupama Est* [2010] 1 WLR 1564 at [18].

³⁹ [2009] ECR I-08661.

⁴⁰ Based on a statutory assignment.

situation...of the heirs of the person injured in the accident.”

Insurers and claimants should also be aware of the stringent requirements imposed upon a party seeking to rely upon a jurisdiction agreement in this context by the Judgment Regulations Regime (Article 15).

Insurance cover

In most cases of tortious conduct, particularly that committed by individuals, the existence and extent of insurance cover is a paramount consideration. In the case of road traffic accidents the expectation is that there will be insurance available. In the UK, The Road Traffic Act 1988, after all, requires compulsory insurance and effectively insists upon unlimited liability insurance, by the requirement that the relevant insurer must satisfy without limit any judgment obtained against its insured. Then there is the MIB scheme to cover uninsured or untraced drivers.

But the Road Traffic Act does not apply to regulate insurance arrangements outside the U.K., and there is no guarantee in foreign jurisdictions: (a) that insurance is compulsory; (b) that insurance, if compulsory, is set at an adequate minimum limit of indemnity; (c) that there is any effective compensatory mechanism to deal with the failure to insure even where such insurance is compulsory. Even in EU states, where road traffic liability insurance is compulsory and there is a mechanism for providing compensation where such insurance has not been taken out, the minimum required cover is inadequate to cover awards in the U.K. for injuries of maximum severity. The Fifth Motor Insurance Directive increased minimum permitted insurance limits to €1,000,000 per victim or €5,000,000 per accident,⁴¹ raising the previous minimum of €350,000.⁴²

Even where insurance is provided well above the EU required minimum it may be capped at a figure referable to the maximum conceivable award in the foreign country, a figure which is still woefully inadequate to cover large quantum claims assessed in accordance with English law or rules of assessment. This problem is particularly acute for English tourists who rent foreign hire cars, who

will usually not appreciate that the level of cover is wholly inadequate to meet any claim assessed in accordance with English law or rules of assessment.

Conclusion

The combined effect of the decision in *Odenbreit* and Rome II has resulted in a significant increase in the number of cases in which English judges now have to apply foreign law both in relation to liability and to quantum. The increased need for evidence of foreign law necessarily results in increased complexity and cost. Furthermore, uncertainties and disputes as to the correct application of Rome II will remain particularly acute until definitive guidance is obtained from the national courts and, ultimately, the CJEU.

As always, the most important advice to anyone dealing with a claim arising out of an accident overseas is to seek to identify any jurisdiction or choice of law issue as soon as possible. As seen above, any jurisdictional challenge must be made swiftly and foreign law must be carefully pleaded. Further, if a party is considering taking a jurisdictional point or relying on foreign law it is important to obtain the advice of a foreign lawyer at an early stage to help determine whether there is any practical advantage in disputing jurisdiction or relying on a foreign law. There is, after all, little point in disputing jurisdiction or relying on a foreign law if the foreign jurisdiction or law is likely to be less favourable to the client.

Disclaimer

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⁴¹ The same minimums are required under the Codified Motor Insurance Directive 2009/103/EC.

⁴² This limit was contained in the Second Motor Insurance Directive 84/5/EEC.

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Howard Palmer has conducted many high-profile cases in the constantly evolving areas of jurisdiction and applicable law.

He acted for the respondent in the landmark House of Lords appeal in *Harding v Wealands* [2007] 2 A.C. 1.

He has also been involved in a wide range of disputes on applicable law: *Beauregard v Sturrock* – England or Florida?; *Wortham v Deerhurst Resorts* – England or Ontario?; *Re Prinzivalli* - England or Italy?; *Brownlie v Four Seasons* - Canada, Egypt or England?

On issues of jurisdiction, Howard is expert in the application of the Brussels Regulation (44/2001; now 1215/2012) as well as CPR Pt 6 (service out of the jurisdiction). He has advised extensively on available jurisdictions for:

- Claims against Canadian and French ski resorts for injuries sustained there
- Claims for Road Traffic Accidents in various states of Australia (*Cooley v Ramsey*)
- Claims in foreign territorial waters or on the high seas

Other cases include:

- *Nemeti* (C.A.) - Striking out a claim for negligence in a Romanian RTA
- *Young v Jankowitz* (C.A.) - Striking out claim for clinical negligence in South Africa
- *Wagenaar* (C.A.) - Defeating claim which alleged negligence against ski instructor
- Tetraplegia caused on a yacht in Portuguese territorial waters, subject to protection under the Merchant Shipping Acts
- Plane crash in Minnesota, USA
- Claim for injury at airport, subject to the Montreal Convention

Various Road Traffic Accidents in Spain, Romania, Poland, France, Greece, Germany, Dubai and Lithuania.



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Charles is a commercial silk who specialises in travel, product liability, insurance & reinsurance, professional negligence and private international law. He is a former law lecturer and management consultant. He has extensive experience of dealing with complex travel claims with a cross-border element. Notable private international law and travel cases include *Allen v Depuy*; *RSA v Rolls-Royce*; *Re Baillies*; *Stonebridge v Omex*; *Hulse v Chambers*; *Kolmar v Visen*; *Harding v Wealands*.

He is recommended in Chambers Bar UK and Who's Who Legal as a leading Travel silk: in the latter he is listed as the most highly regarded silk for Travel. He is also recommended in the legal directories as a leading silk for commercial litigation, commercial fraud, professional negligence, product liability and insurance. Charles is an assistant editor of *European Civil Practice* (Sweet & Maxwell, 2nd ed.) and he has lectured extensively on travel, insurance, commercial fraud and the conflict of laws.

"Extraordinarily impressive and is sensible and incredibly persuasive in court", "polite and charming to be against and an intellectual heavyweight"; "really good on his feet"; "terrific, very reliable, very clever and very focused"; "superb lawyer who is clever, erudite and also incredibly user-friendly. He wears his learning lightly, and you can ask him anything"; "a phenomenal legal brain, who slices up any problem, produces a solution and then argues it to the end of the earth"; "able to respond quickly to every question or query thrown at him"; "intelligent, calm and measured"; "somehow always persuade[s] the judge. He just always nails what the issues are and is very impressive."

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Marie Louise has a specialist practice, focusing on travel, private international law and EU law. She advises on jurisdiction, choice of law and related procedural issues in a wide variety of claims including commercial, insurance, product liability, employment, personal injury and professional negligence claims. Marie Louise has particular expertise in cross-border travel claims and acts in many of the leading cases. Recently she has appeared in the Supreme Court in *Cox v Ergo Versicherung*, in the Court of Appeal in *Brownlie v Four Seasons*, *Wall v Mutuelle de Poitiers* and *Nemeti v Sabre Insurance*, and in the High Court in *Moreno v MIB*, *Bianco v Bennett and Winrow v Hemphil*. Apart from her career in Chambers, Marie Louise has also taught European law at Cambridge. She is frequently invited to lecture in this country and abroad. She is recognised in the legal directories for her conflict of laws and EU law expertise.

“In terms of technical expertise specific to jurisdiction she is the number-one junior barrister in the country; she is phenomenal.” “Fantastically efficient; she gets to grips with cases so quickly and immediately understands where the issues are.” “She’s absolutely first-rate. You go to her if you need to have confidence that you’ve got an understanding of the international element of a case”. “She has a phenomenal brain when it comes to jurisdiction. She really does know the regulation inside out.” “...superb on anything to do with EU law or any case with a foreign element”; “very experienced and thorough”

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Alistair graduated with a First Class degree in Law from Gonville and Caius College, Cambridge and is a scholar of Gray’s Inn. He is regularly instructed in claims involving cross-border elements in a variety of contexts, and has particular experience of dealing with claims arising from international travel.

Alistair’s recent instructions include the cases of *Wigley-Foster v Motor Insurers’ Bureau* and *Moreno v Motor Insurers’ Bureau*, which raise complex questions of applicable law and the scope of liability following accidents abroad. He assisted Benjamin Browne QC and Marie Louise Kinsler of 2TG on the case of *Wall v Mutuelle de Poitiers* [2014] EWCA Civ 138, a leading case on the scope of the applicable law under the Rome II Regulation.

Alistair assisted Andrew Miller QC in successfully resisting a challenge to the jurisdiction of an arbitral tribunal in a £7 million dispute concerning a captive power plant in Eastern Europe. The case involved multiple separate contracts and jurisdiction clauses.

In addition to questions of jurisdiction and applicable law, Alistair has experience of the particular issues which are raised by travel claims. His recent work has included cases raising questions regarding the relevance of local standards and practices. Alistair is also well-placed to deal with claims raising questions under the Athens and Montreal Conventions and the Package Travel Regulations.



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