CASE NOTES:
DHV v Motor Insurers' Bureau [2025] EWHC 2002 (KB)

ROME II, RECITAL 33 AND RESTITUTIO IN INTEGRUM

On 31st July 2025, judgment was handed down in *DHV v Motor Insurers' Bureau* [2025] EWHC 2002 (KB)[1]. This was a personal injury case arising out of a road traffic accident in Spain, in which Mr Justice Dexter Dias ("**the Judge**") was called upon to decide on no less than 14 substantive issues.

Although this is not the first case in which Spanish law quantum has been determined by an English Court[2], it is the first reported case in which guidance has been provided as to the applicability and effect of Recital 33 of Regulation (EC) No.864/2007 ("**Rome II**") to the assessment of damages under Spanish law. The Judge's comments on Recital 33 are however equally applicable to all foreign law quantum cases to which Rome II applies.

It is on that issue that this note focuses[3].

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Relevant background

DHV brought a compensation claim against the MIB following a collision with an uninsured Spanish driver in Mallorca in the early hours of the morning in July 2017. As a result of the collision, DHV sustained severe brain injuries.

Although primary liability of the uninsured Spanish driver, and therefore liability of the Motor Insurers' Bureau ("**MIB**") had been admitted prior to the commencement of the trial, contributory fault and quantum remained in dispute.

The Claimant ("**DHV**") contended that no contributory fault should attach to him. In contrast, the Defendant ("**MIB**") argued that there was significant and greater contributory fault on the part of DHV, on the basis that he had been intoxicated and lying down in the road at the time of the collision. The claim was pleaded at over £3,000,000.

Ultimately, the Judge agreed with MIB and assessed DHV's contribution to the accident at 65%. The remaining 35% was attributed to the uninsured Spanish driver of the Hyundai minivan involved. This resulted in an award of compensation to DHV of approximately £213,000 in damages and a further £145,000 by way of penalty interest.

DHV's claim was brought against the MIB in England pursuant to regulation 13 of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 ("**the 2003 Regulations**"). Under the scheme of the Motor Insurance Directives, the MIB would stand in the shoes of the Spanish Guarantee Fund, the Consorcio de Compensaction de Seguros ("**CCS**") and then seek reimbursement from the CCS.

Although there was agreement between the parties that the law applicable to the claim was the law of Spain, there was disagreement as to how the application of Spanish law arose. DHV contended that Spanish law arose as a result of the application of Rome II whilst MIB argued that it was applicable pursuant to the 2003 Regulations alone. On its face this might appear to have been a highly technical dispute, however it was one which ultimately carried with it great significance for the parties.

This followed from the fact that Spanish law uses a tariff system – the *Baremo* – in order to quantify damages in cases of personal injury. The *Baremo* was substantially revised with effect from 1st January 2016 and is now more generous to claimants. Even so, the limits prescribed by the new *Baremo* are still such that any award that DHV would have been entitled under a strict application of the system would fall far

1 A separate short judgment on the application of Spanish penalty interest was also handed down by Dexter Dias J on 1 August 2025. It is the latest decision in a long line of cases in which the English courts have awarded Spanish penalty interest: see *DHV v Motor Insurers' Bureau* [2025] EWHC 2038 (KB).

2 See *Scales v MIB* [2020] EWHC 1747.

3 Although not addressed in this note, the judgment is also notable for the strong criticism made of the Claimant's Spanish Law expert. The judgment serves as a stark reminder of the importance of instructing the right Foreign Law expert, and ensuring that they are aware of, and comply with, their obligations under CPR Part 35 where - as in England - foreign law is treated as a question of fact which must be proved.

short of the actual losses he suffered in England, his place of habitual residence. That is because, under the *Baremo*, future rehabilitation and care expenses are only recoverable in cases of exceptionally grave injuries and even then, the amounts recoverable are strictly conscribed. On a strict application of the *Baremo*, DHV's injuries, although very serious, would not have met the threshold for recovery under these heads of loss.

It is for that reason that DHV sought to argue that Recital 33 of Rome II could be used by a Spanish Court to justify going beyond the strict limits of the *Baremo*, and thus to award compensation for actual losses in the state of habitual residence at a greater level than would be awarded to an injured person in Spain.

However, this argument would be "*cut off at the root*" if Spanish law did not apply to the claim as a result of Rome II. It was only if Rome II applied that Recital 33 would be engaged and only then would it be necessary for the Court to go on to consider the effect, if any, that it would have.

This is why the proper route to the application of Spanish law assumed such importance in this case.

The context to the parties' submissions on the route to Spanish law: *Moreno v MIB* [2016] UKSC 52 ("*Moreno*")

As aforementioned, DHV's claim was brought against the MIB pursuant to regulation 13 of the 2003 Regulations. These regulations transposed into English law the obligations under Articles 5,6 and 7 of the Fourth Motor Insurance Directive. In particular, prior to the UK's withdrawal from the European Union, Article 7 entitled an injured party resident in the UK to apply for compensation to the Compensation Body in the UK following an accident in another member state involving an uninsured vehicle; it also contains provisions regarding reimbursement of the Compensation Body by the relevant Guarantee Fund.

The background, genesis, development and aim of this aspect of the scheme created by the Motor Insurance Directives were reviewed and explained in detail by the Supreme Court in *Moreno*.[4]

In *Moreno* the issue on appeal was whether compensation under the 2003 Regulations was to be measured according to English law (because of the specific wording in regulation 13(2)(b)) or according to Greek law (the accident having occurred in Greece). The Supreme Court overruled two previous Court of Appeal decisions as to the wording of regulation 13(2)(b) and held that the compensation due under regulation 13 to a UK resident who had been injured in a road traffic accident in another Member State should be assessed by reference to the law of that State, not by reference to English law.[5]

However, the central question in *Moreno* was what law applied to assess damages and not the legal route by which that law came to apply. The latter question was not explicitly addressed by the Supreme Court. Notwithstanding this, both parties sought to argue that the Supreme Court's judgment in *Moreno* supported its own reading of the proper route to Spanish law.

The parties' rival submissions on the route to Spanish law

DHV contended that this was a case in which there was a conflict of laws because DHV was injured in Spain but had brought a claim for compensation for his injuries and losses in England. Thus, Rome II, which is a part of Spanish law by way of being directly applicable to it, was engaged and it was because of Rome II that, under the 2003 Regulations, the law of the "*state of accident*" applied. It was also submitted that applicability of Rome II in conflict of laws road traffic accident claims was confirmed by the Supreme Court at [20] – [21] of *Moreno*.

In this passage of the judgment in *Moreno*, Lord Mance cites from the judgment of Moore-Bick LJ in *Jacobs v MIB* [2010] EWCA Civ 1208 ("***Jacobs***"):

> "*The obligation imposed on the bureau by regulation 13(2)(b) to compensate the injured party in accordance with the provisions of article 1 of the Second Directive carries with it the implicit proviso that the injured party must be able to show that the driver is liable to him. As in the case of a claim under regulation 12, that is a question to be determined by reference to the applicable law identified in accordance with the appropriate conflicts of laws rules. At the time the 2003 Regulations were made the applicable rules were those of the Private International Law (Miscellaneous Provisions) Act 1995, but since the introduction of Rome II, the rules set out in that Regulation will apply and will normally lead to the application of the law of the country in which the accident occurred*" (own emphasis added)

At [21] in *Moreno,* Lord Mance concludes that "*there is no reason to differ from this analysis*".

In contrast, MIB contended that the observations of the Supreme Court at [20] – [21] were obiter, because at no point in the judgment did the Supreme Court engage with, discuss and explicitly decide that Rome II applied to Ms Moreno's case. Rather, it was argued that the central reasoning in *Moreno* was to be found at [29] to [31] of the judgment. This passage made clear that the aim of the scheme was that, if a victim

4 See *Moreno* at [2] – [17].
5 Ibid at [29]-[31].

has recourse to the compensation body established in his own state of residence, he is entitled to the same compensation as that to which he is entitled against the guarantee fund of the state of the accident. Hence why it is necessary to apply the law of the state of the accident to determine that sum.

Therefore, there is no choice of law issue arising in claims for compensation brought under the 2003 Regulations such that Rome II does not fall to be considered nor does it apply. MIB further relied on [43] of *Moreno*, where the Supreme Court found it unnecessary to address further submissions as to the application and/or relevance of the Rome II Regulation to such claims, arguing that this provided additional support for the application of Spanish law arising pursuant to the 2003 Regulations alone.

The Judge's conclusion on the route to Spanish law

Ultimately, Dexter Dias J agreed with DHV: the Supreme Court's observations at [20]-[21] in *Moreno* could be taken as support for the law of the state of the accident applying because of Rome II. Here, in the Judge's view, the Supreme Court were endorsing "*in terms*" the analysis of the Court of Appeal in *Jacobs*: to decide which law applies in a regulation 13 compensation case, the trial court should normally follow Rome II, which in turn leads to the application of the law of the country "*in which the accident occurred*."[6]

Whilst the Judge did agree with MIB that this passage was properly viewed as obiter, to disregard it on that basis was to "*undervalue the force of obiter from the Supreme Court*." On the contrary, it was "*highly persuasive*" and there were no sufficient differences between the factual situation in *Moreno* and DHV's case to put aside what the Supreme Court had "*clearly indicated*"[7] about Rome II.

Accordingly, Rome II was held to apply to DHV's case and it was because of Rome II that Spanish law applied to the claim. The effect of Recital 33, if any, therefore fell to be considered.

The effect of Recital 33 of Rome II

Before turning to the parties' rival submissions, it is important to set out the text of Recital 33 in full, which states:

> "*According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.*"

DHV submitted that Recital 33 reflected an important concept fundamental to justice in DHV's case, namely compensation for actual losses incurred. As such, it must have some effect and could not be merely exhortatory. It was also contended that the most persuasive explanation as to how Recital 33 should be applied was to be found in the Opinion of Advocate General Wahl in *Lazar v Allianz SpA* C-250/14, where it was said at [82] that:

> "*Lastly, although the lex loci damni may, in some circumstances, be considered to be unfavourable where the more or less direct victims have their habitual residence in a country other than the country in which the accident occurred, recital 33 in the preamble to the Rome II Regulation specifically requests the court seized to take into account, when quantifying damages for personal injury "all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention." The Court is therefore requested, as far as possible, to take into account, in particular in assessing damage suffered by persons who are not resident in the country where the fatal accident occurred, differences in the standard of living and the expenses actually incurred or borne by those victims in their country of residence.*" (own emphasis added)

The important words here were "*as far as possible*". DHV argued that the English Court should do what was *possible* under Spanish law to achieve the result envisaged by Recital 33 and not just what a Spanish Court would normally do or probably do.

In contrast, MIB argued that Recital 33 has no legal effect and nugatory exhortatory effect. It is "*toothless*" because, being a mere preamble and not part of the body of Rome II itself, it is incapable of altering substantive Spanish law. To make good this proposition, MIB relied on extracts from both *Halsbury's Laws of England*[8] and *Dickinson*[9], the latter of which had previously been described by the Court of Appeal as a "*valuable monograph*"[10]. Accordingly, Recital 33 could not possibly be understood as enjoining the Court to achieve a different result, to push the envelope or to give the Claimant the benefit of the doubt. Such an approach was explicitly rejected by the EU Council during the legislative passage of Rome II.

Similarly, it was submitted that the Court should reject DHV's attempt to elevate the words used by AG Wahl in *Lazar* in

6 *DHV v MIB* at [105].
7 Ibid at [126]
8 5th edn, 2023
9 Dickinson A, The Rome II Regulation: The Law Applicable to Non-Contractual Obligations (Oxford University Press 2008).
10 See *Wall v Mutuelle* [2014] EWCA Civ 138 at [16].

mentioning Recital 33 – that the court is requested to take into account expenses actually incurred "*as far as possible*" – into some kind of change of substantive Spanish law of assessment, so as to permit findings that a Spanish would be very unlikely to make. Given the express wording of Recital 33, "a*s far as possible*" could only mean, in this context, "*according to the current national rules on compensation*." Therefore, even if Recital 33 were to be considered relevant, the quantification of damages must still be carried out according to the current Spanish law rules on compensation.

The Judge's reasoning as to the effect of Recital 33

The Judge begun by citing from *Halsbury's* and CJEU case law, which both made clear that although recitals are useful aids to interpretation of articles contained within regulations, they are not legal rules which can alter the scope of a provision being construed. The Judge also conducted a detailed examination of *Dickinson,* in which the legislative history of the passage of the Rome II Regulation is set out. It was clear from this legislative history that the European Parliament had proposed an amendment to Rome II to "*apply the principle of restitutio in integrum, having regard to the victim's actual circumstances in his country of habitual residence*" but that this had been rejected. The compromise amounted to a reminder in Recital 33 to "*take into account all relevant circumstances … including … the actual losses*". However, in the end Dickinson concludes that:

> "*as a mere recital in an instrument dealing with rules of private international law, [recital 33] cannot possibly modify the rules applicable to the assessment of damages in Member States, and it cannot alter the way in which the Rome II Regulation … approaches these questions*."[11]

In this vein, the Judge observed that the terms of Recital 33 "*make it clear that the foreign court quantifying damages should do so "according to the current national rules on compensation" and "not outside or beyond those national rules*."[12]

Ultimately then, the Judge found that Recital 33 is not and cannot amount to a legal rule:

> "*While it can inform the interpretation of Rome II and its application … it cannot change substantive Spanish law. While it acts as an exhortation and reminder about one aspect of the philosophy underlying Rome II, it has no more than persuasive force or interpretative weight*."[13]

The Judge also noted that he had not been provided with any comparable cases in which a Spanish Court had applied Recital 33 in the way DHV suggested it could be or, indeed, where it had explained any relevance that it might have had to a road traffic accident claim. This lack of support in decided Spanish cases left DHV in the position of urging the Court to apply Spanish law in a way that may have meant "*pushing the envelope*", "*at the extreme end of any discretion*" and to do something that a Spanish Court "*even very probably*"[14] would not do.

This was rejected wholesale by the Judge. Indeed, the judgment serves as a trenchant reminder of the approach to be adopted by an English Court when applying foreign law, as recently set out by the Privy Council in *Perry v Lopag* [2023] UKPC 16. The task of the English Court was to determine what the highest Spanish Court would decide i.e. what it would do or would probably do and not what it may decide at "*an extreme end of any discretion*." The approach contended for by DHV was "*fanciful and wrong*".[15]

In light of the foregoing analysis, the Judge found:

> "*no credible basis to conclude that because of Recital 33 a Spanish Judge would award compensation to an English resident injury party for actual losses that go beyond what would be awarded under the Baremo to a Spanish resident.*"[16]

A second bite of the cherry? Article 33 of the Baremo

However, this was not the end of the matter, given that DHV sought to argue that compensation for his actual losses in England in excess of the specified *Baremo* limits could, in fact, be compensated for under the *Baremo* itself. That is to say, it was contended that Spanish law itself permitted an approach virtually identical to that which the DHV said was exhorted by Recital 33 of Rome II. On DHV's case, this was due to the operation of Article 33(2) of the *Baremo*. Article 33(2) provides that:

> "*The principle of full reparation is intended to ensure full compensation for the damages suffered. Compensation under the system considers any personal, family, society and economic circumstances of the victim, including those affecting loss of income and loss or diminution of earning capacity*."

Given the wording in Article 33(2) and the principle of full restitution it espoused, DHV's Spanish law expert was of the opinion that Article 33 of the Baremo permitted a Spanish Court to make an award of actual losses in England, even if these exceeded the expressly stipulated limits of the *Baremo*.

11 *DHV v MIB* at [113]
12 Ibid at [114]
13 Ibid at [128]
14 Ibid at [141]
15 Ibid at [145]
16 Ibid at [130]

However, the difficulty with this opinion was that the Claimant's Spanish Law expert had been unable to lay before the Court any authority from Spain indicating that Article 33(2) resulted in the Spanish court awarding compensation losses beyond the stipulated *Baremo* limits, either in a domestic case or a foreign resident case. In the Judge's opinion, if Article 33 did have the legal effect that DHV was contending for then the probability was that there would have been cases out of the "*thousands of cases litigated in Spain since the inception of the Baremo in which the Article 33 would have been invoked to go outside*" its express limits. The lack of a single case was "*powerful inferential evidence about the true status a Spanish court would grant article 33*".[17]

Furthermore, Article 33(2) had to be read in the context of its immediately neighbouring provisions, including Article 33(5). Article 33(5) provides that:

> *"The objective nature of the valuation of the damage means that compensation is paid in accordance with the rules and limits established in the system, so that compensation cannot be set for concepts or amounts other than those provided for therein."* (own emphasis added).

Hence, this provision makes plain that compensation "*cannot*" be awarded for amounts not provided for within the "*rules and limits established*" in the *Baremo*. If Article 33(2) could be utilised in the manner contended for by DHV then "*this would cut across the very grain of the deliberately formalised and carefully calibrated*" system of the *Baremo*, which had been "*constructed to promote predictability, clarity and consistency*." In ultimately rejecting DHV's argument in respect of Article 33, the Judge concluded that the concept of an expansive *Baremo* would be *"inimical to the system design" and "exude capriciousness*."[18]

It followed that recourse could also not be had by DHV to the general principle of restitutio in integrum in order to bypass the strict limits and conditions of the *Baremo*.

The consequences of the Judge's rejection of DHV's arguments

The consequence of the Judge's rejection of DHV's argument in respect of Recital 33 and Article 33 was a significant curtailment of the amount of damages that he could recover. The limits and conditions of the Baremo were to be strictly applied. This meant, inter alia, that the Claimant could not recover anything for 'pre-consolidation' care or for future care or rehabilitation. In a claim which had been pleaded at over £3,000,000, net of the deduction to be made for DHV's contributory negligence, only a fraction of this figure – indeed, less than one tenth - was eventually awarded by way of damages.

Key takeaways

As regards the question of why the law of the state of the accident applied to govern a claim brought under the 2003 Regulations, all roads did lead to Rome (II).[19] However, this ultimately proved to be a Pyrrhic victory for DHV given the Judge's conclusion that Recital 33 made no difference to how a Spanish Court would award damages in a case of this nature. The road to Rome (II) was therefore more of a cul de sac than it was a highway to full recovery for actual losses.

The argument advanced by DHV in respect of Recital 33 will be familiar to practitioners in this area of law; it is one that has been deployed on behalf of claimants at joint settlement meetings for many years. However, in light of Mr Justice Dexter Dias' conclusion that Recital 33 does not amount to a legal rule, this will likely scotch future attempts by claimants to rely on it in quantum cases to which Rome II applies.[20]

The future impact of this decision on claimants should not be understated. It will now be necessary to show, by reference to expert evidence, that pursuant to the applicable law a foreign court would allow an English claimant to recover the care and rehabilitation costs they are likely to incur; and a general right to restitutio in integrum will not suffice for this purpose.

The difficulty posed to claimants by the existence of limits to compensation under a foreign law is one of some antiquity. And yet, in the aftermath of *DHV v MIB*, a solution to this problem for claimants seems to be further away than ever. The High Court has made clear that Recital 33 does not provide the answer. Accordingly, this is an issue which will likely continue to vex claimants for years to come.

Lucy Wyles KC and Poppy Blackshaw acted for the MIB at trial, instructed by Weightmans LLP.

17 Ibid at [138].

18 Ibid at [153].

19 That the law of the state of the accident applies to a claim brought under the 2003 Regulations as a result of the Rome II Regulation, rather than pursuant to the 2003 Regulations alone, may come as a surprise to practitioners in this area of the law. However, as a result of the UK's withdrawal from the European Union, the claim advanced by DHV under the 2003 Regulations was actually to be the last of its kind brought in the English Courts. Therefore, the practical significance of the Court's conclusion on the route to the application of the Spanish law in claims brought under the 2003 Regulations is likely to be of very limited significance.

20 Such claims are still likely to be plentiful given the retained status of the Rome II regulation in English law.