Butterworths Personal Injury Litigation Service

Bulletin Editor
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Please file immediately behind the Bulletins Guidecard, in Binder 6. **The Binder should now contain Bulletins 99 to 113**.

ROAD ACCIDENTS ABROAD WITHIN THE EU

According to a European Commission report from 2010[1], more than 1.5m people are injured in road accidents within the European Union (EU) every year, 35,000 fatally. With its recently extended membership and the prospect of ever greater migration within the EU, accidents abroad are becoming an increasingly important staple of many RTA personal injury practices. These claims have the potential to be more profitable, they are excluded from the Portal scheme, and they are certainly more intellectually challenging than the run of the mill domestic RTA. However this comes at a price. A working knowledge of European Law (especially the Six EU Motor Insurance Directives[2]); the practical implications of these on the proper interpretation of our own national law provision; an appreciation of wider Community law principles; an understanding of Brussels I[3] that governs which national court system has jurisdiction; and an appreciation of Rome II[4] for determining which national law applies all are basic to competency in this field. There is also a higher litigation risk attached to pursuing these claims as the Motor

1 Towards a European road safety area, COM(2010) 389.

2 Culminating in the consolidating directive: Council Directive 2009/103/EC of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability.

3 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

4 Council Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations.

Insurance Directives do not attempt to harmonise the different legal systems of individual member states. Consequently, foreign accident claims regularly feature tricky technical issues.

There have been a number of interesting developments over the past few months. Most of which appear to have escaped comment elsewhere and as they are important, they justify more explanation than is usual within this bulletin. Unfortunately this comes at the expense of other equally interesting developments in personal injury law and practice.

The direct right against an insurer

Some EU member states confer a long established legal entitlement that enables claimants to pursue a claim against an opponent's indemnifying insurer directly, without the need to join the insured wrongdoer. This remedy only exists in a limited form in the UK under regulation 3 of the European Communities (Rights Against Insurers) Regulations 2002. The 2002 Regulations, which came into effect just over ten years ago[5], were intended to give effect to article 3 of the Fourth Motor Insurance Directive[6] but as we shall see in *Nemeti*, they don't completely achieve the full effect of the direct right conferred under the Directive. Hitherto, UK citizens were only able to pursue the conventional common law right of action against the tortfeasor. Section 151 of the Road Traffic Act 1988 (RTA 1988)[7] only provided an indirect or subsidiary right[8] to an indemnity from the defendant's motor insurer. The differences between these two causes of action are also examined in *Nemeti*.

It will be recalled that one of the first milestone cases concerning the direct right was *FBTO Schadeverzekeringen NV v Jack Odenbreit*, CJEU 2007 Case 0463/06 in which the Court of Justice ruled that a German national injured in the Netherlands was entitled to sue the defendant's Netherlands based insurer – in his local court in Germany. That ruling was based on rights conferred, not under article 3 of the Fourth Motor Insurance Directive[9] as

5 They came into force on 19 January 2003.

6 Council Directive 2000/26/EC of 16 May 2000. Article 3 provides: Each Member State shall ensure that injured parties … enjoy a direct right of action against the insurance undertaking covering the responsible person against civil liability. This is now article 18 of the consolidated Sixth Motor Insurance Directive (see below).

7 First conferred under s 10 of the Road Traffic Act 1934.

8 Section 151 (2) of the 1988 Act assumes that the claimant already has a judgment against the insured.

9 Op. cit.

one might have anticipated, but as a consequence of a purposeful interpretation of article 11 of the Brussels I[10] convention, which deals with cross jurisdictional issues. However that ruling was not a complete solution. The technical right to sue an insurer based in a foreign EU member state direct from the claimant's own national court system, without having to sue the foreign driver or vehicle owner, carries with it a number of considerations, such as (prior to the implementation of Rome II in 11 January 2009) which country's law applies and what procedural rules fall within the jurisdiction of the home court[11], as well as corollaritive factors such as: limitation; foreign law; local standards; selection of local experts; problems with witnesses and evidence generally; different recoverable costs tariffs, ATE legal expenses insurance; service of process abroad, including cost of translating the claim; to cite but a few.

It may also be recalled that article 4 of the Fourth Motor Insurance Directive requires member states to ensure that all authorised motor insurers appoint a claims representative for every European Economic Area (EEA) member state, to handle claims by victims injured in their own EEA state of residence. But the article 3 direct right did not confer on the foreign claims representatives the capacity to be sued. Their role is to investigate claims and negotiate settlements, not to become embroiled in a contested action. Their circumscribed role was later confirmed in express terms in article 5 of the Fifth Motor Insurance Directive[12].

However, a recent CJEU ruling has simplified at least the initial stage of the process of pursing a direct action against a foreign EEA insurer both under what is now article 18 of the Sixth Motor Insurance Directive[13] and more generally where an insurer is sued in its home court under the Brussels I convention[14].

10 Op. cit. The Brussels I convention is of general application for determining the jurisdiction of non contractual situations. Article 11 entitles a claimant to join an insurer to an action in certain defined circumstances, see also articles 8 to 10.

11 See the case comment below in *Wall v Mutuelle De Poitiers Assurances* [2013] EWHC 53 (QB).

12 Council Directive 2005/14/EC of 11 May 2005.

13 Council Directive 2009/103/EC of 16 September 2009 that consolidates the previous five motor insurance directives. Article 18 replicates article 3 of the Fourth Directive cited above.

14 See articles 8 to 10 of Council Regulation (EC) No 44/2001 of 22 December 2000.

The role of claims representatives in civil actions

Spedition Welter GmbH v Avanssur SA Case C-306/12

Claims representative are authorised to accept service of proceedings

(R. Silva de Lapuerta, President of the Chamber, J. L. da Cruz Vilaça, G. Arestis, J. C. Bonichot (Rapporteur) and A. Arabadjiev, Judges)

The facts: A German owned vehicle sustains damage in the outskirts of Paris by a vehicle insured by a company based in France. This was an accident damage claim; there was no injury, so article 18 of the Sixth Directive did not apply. However the role of the claims representatives, as set out in articles 21 and 24, encompass accident damage claims.

The German civil law code, unlike our 2002 Regulations, extends the direct right of action to accidents in foreign EEA member states.

The issue before the court (presumably based on the direct right against insurers conferred independently of the Sixth Motor Insurance Directive[15] by article 11 of the Brussels I convention) was whether the French insurer's claim representative had authority to accept service of the proceedings that had been issued in Germany. The French insurers disputed this and insisted on being served in France. This usually involves translation and foreign service costs and delay in putting this into effect.

The decision: The Court of Justice ruled that article 21 (5) of the Sixth Motor Insurance Directive 'must be interpreted as meaning that the claims representative's sufficient powers must include authority validly to accept service of judicial documents necessary for proceedings for settlement of a claim to be brought before the court having jurisdiction' – in other words: yes, they did have power to accept service of the claim form.

Comment: This important ruling appears to have escaped the notice of almost every legal commentator. It should expedite and simplify many foreign road accident claims within the EEA that are otherwise relatively straightforward on liability. Henceforth, proceedings can be issued in the UK courts in the usual way and served (without the extra translation costs) on the local claims representative for the foreign insurer or the MIB if the insurer has failed to respond to the claim within three months[16].

However, there are a number of caveats:

- The claims representative's authority is restricted to accepting service of court documents. Article 21.6 of the Sixth Motor Insurance Directive expressly states that its presence in the claimant's home jurisdiction does not signify that the insurer is domiciled there.

[15] Ie independently of article 18 of the Sixth Motor Insurance Directive, op. cit.

[16] See article 24 of the Sixth Motor Insurance Directive.

- If a settlement cannot be negotiated through the claims representative it may still be necessary to deal with the foreign insurer's legal representative abroad, even if that may seem somewhat counter intuitive from an administrative viewpoint.
- In the UK the 2002 Regulations confine the direct right to (i) accidents, (ii) occurring in the United Kingdom and (iii) where the claimant has a cause of action against an insured person and (iv) only to the extent that the insurer is 'liable to the insured person'[17].
- The 2002 Regulations are currently under investigation by the European Commission as they appear to breach the wider scope required under the Directives.
- For accidents that post date 11 January 2009, Rome II governs both the substantive law and procedural rules that are applicable to the accident – this will usually be the law of the place where the accident occurred[18].
- If liability is contested then there may be only a modest practical benefit to be gained from issuing proceedings in the home court and the defendant may also argue for a different jurisdiction.

Given that liability is not contested in the overwhelming preponderance of motor accident claims, this ruling will benefit RTA practitioners handling claims featuring accidents abroad within the EEA. Such claims are not just the preserve of UK citizens abroad on holiday or business but, as the next case illustrates, they include a significant number of migrant workers resident (albeit temporarily) in the UK but travelling home or elsewhere in the EEA.

The dangers of changing causes after a primary limitation date has expired

Nemeti and others v Sabre Insurance Co. Ltd [2013] EWCA Civ 1555

- Section 3 EC Rights Against Insurers and s 151 of the RTA 1988 are distinct causes of action.
- Section 35 of the Limitation Act 1980 (LA 1980) as an exception to a basic rule is to be applied strictly.

(Sir Terence Etherton, Lady Justice Hallett, VP and Lady Justice Sharp)

The facts: The claimants were Romanian nationals, presumably resident in the UK, and who were injured on 27 December 2007 in Romania. They were being driven by the insured vehicle owner's son; apparently without the father's knowledge or permission. The driver was killed and the claimant

[17] The 2002 Regulations do not attempt to nullify the effect of any contractual limitation in scope or exclusion clauses, confer s 148 and s 151(2) of the RTA 1988.

[18] See article 4.1 of Rome II: …' the law of the country in which the damage occurs …'.

passengers were injured. The accident predated Rome II but it was common ground that Romanian law applied and, along with it, its non-extendable three year limitation period for bringing a claim.

Their solicitors issued claims against the vehicle owner's Romanian insurer under regulation 3 of the European Community (Rights Against Insurers) Regulations 2002, close to the expiry of the limitation date and in the mistaken belief that the son was covered by his father's policy; he wasn't.

The original Claim Form gave brief details of the claims which were for 'damages for personal injuries and losses' arising from the accident and referred to the Respondents' 'duty to indemnify their insured for negligent acts or omissions' under regulation 3.

Only after the three-year limitation had expired did the solicitors realise their error: not only had the accident occurred outside the UK (see the comment above under *Spedition*) but also the driver was not covered by his father's insurance policy[19].

As this was a UK action, the claimants sought to amend the proceedings by substituting the father's insurers with estate of the son / driver as defendant and by removing the reference to regulation 3.

The insurers appealed against a first instance decision granting the amendment under CPR Rule 19 and section 35 of the LA 1980.

The issues:

- Did the court have the power to substitute a new party after the limitation period had expired (which was addressed by the court)?
- Did a proper interpretation of the combined effect of articles 3, 13 and 18 of the Sixth Motor Insurance Directive, as interpreted by the Court of Justice, extend the direct right to embrace to a claim against an unauthorised driver of an otherwise insured vehicle[20] where the accident occurred abroad but within another EEA member state? If so, did

[19] Intriguingly, no one thought to apply a purposive interpretation of the scope of civil liability insurance cover required by what is now articles 3 and 13.1(a) of the Sixth Motor Insurance Directive, nor was any mention made of the key CJEU ruling in *Rafael Ruiz Bernáldez* 1994 Case C-129/94. Nor did anyone think to argue a purposive interpretation of regulation 3 such as to extend the geographic scope of this national law provision so that it was in keeping with the wider geographic scope required by article 18 of the Sixth Motor Insurance Directive and article 11 of the Brussels I convention. Arguably the latter exercise would have failed under the *contra legem* principle.

[20] See s 151(3) of the RTA 1988 which nullifies an exclusion based on unauthorised use in favour of a third party claimant. See also article 2 of the Second Motor Insurance Directive (84/5/EEC) from which s 151(3) is derived.

the UK national law provision fully transpose that Community law? If not, were the claimants entitled to damages against the Secretary of State under the *Francovich* principles? (These issues were not raised because the claimants' proposed amendment sought to abandon the regulation 3 claim).

The decision: The defendant's appeal was upheld and the amendment was refused.

The court made the following findings:

1. (*Obiter*) that the statutory right of action conferred by regulation 3 did not apply as (i) the tortfeasor was deemed to be uninsured and (ii) the accident occurred outside the UK. So this was doomed to fail from the outset because these preconditions were not met.

2. That the statutory conditions precedent imposed for the relief conferred by CPR 19.1 and section 35 combined were not met:

   (a) The relevant parts of CPR Rule 19.5 provide as follows:

   '(*2*) *The court may add or substitute a party only if* – (*a*) *the relevant limitation period was current when the proceedings were started; and* (*b*) *the addition or substitution is necessary.*

   (*3*) *The addition or substitution of a party is necessary only if the court is satisfied that* – …

   (*b*) *the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as Claimant or Defendant* … .'

   (b) Section 35 only conferrs a discretion to substitute a party where that step is 'necessary for the determination of the original action'[21].

The proposed substitution, although featuring the same basic case facts, amounted to a completely different cause of action. The claimants were seeking to abandon one claim by substituting it with another:

- Regulation 3 confers a direct right of action against an insured tortfeasor's insurers. It is effectively a claim for indemnity bestowed by statute.
- Section 151 confers an indirect right of action (albeit against the same insurers) but it is one based on an entirely distinct civil law right of action against a different defendant (in this case the deceased tortfeasor's estate). Section 151 is premised on the claimant establishing a common law right of action against the tortfeasor.

What the claimants' amendment sought was to replace one action with another: not to continue with it.

There was no discretion in section 35 'to do justice to the situation'.

[21] See section 35(5)(b) of the LA 1980.

Section 35 is prescriptive in the way it provides a statutory exception to a general rule. In the words of Hallet LJ, who delivered the only reasoned judgment, the limitation rules are designed:

> 'to ensure that defendants and their insurers are put on notice within a reasonable time so that an effective investigation of the claim can take place and that books can be closed after a reasonable time.'

The claimants were unable to satisfy the condition precedent for the exercise of the section 35 discretion.

Comment: This case is noteworthy for several reasons:

- Firstly, it provides helpful clarification of the essential differences between the direct and indirect statutory remedies against motor insurers.
- It also confirms that section 35 only permits an amendment outside the limitation period in certain specified circumstances and that the court will apply an objective and dispassionate approach to deciding whether those preconditions are met.
- Thirdly, it appears to be the first instance that a senior appellate court has acknowledged, albeit *obiter*, that regulation 3 does not appear to fully implement Community imposed direct right of action. This issue was considered in the writer's series of four articles published in the New Law Journal last year under '*On the Right Road*'.
- This case also neatly illustrates the dangers inherent in failing to fully appreciate the primacy and extent of Community law in this area of practice, a phenomenon that seems to be widespread.
- The court also hinted at, but understandably decided to steer clear of, a host of unaddressed issues as to jurisdiction and applicable law that are raised by these cross border claims. However, in this case the liability of the driver responsible was conceded.
- The case serves as a cautionary tale against putting all one's eggs in one same basket. Often it is safer to pursue both the civil law action against the responsible driver(s) and the direct right against the insurer concurrently; 'belt and braces' is often the wisest counsel even if this risks introducing further complications, such as conflicts over jurisdiction for instance.

Applicable law for accidents abroad but within the EEA featuring uninsured or untraced drivers

Although most road accidents that take place within the EEA will be subject to the law of the country where the accident occurred, in accordance with the terms of Rome II[22], because that is where the victim's injury and loss is

[22] Op. cit.

sustained[23], a statutory exception is created by the UK's implementation of articles 10 and 25 of the Sixth Motor Insurance Directive. Article 10 confers on the MIB:

> 'the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied.'

This is the primary law source for the MIB Agreements that apply to accidents in the UK. However, the MIB's duty to compensate under this domestic regime is extended by article 25 to victims of accidents occurring in a foreign EEA state where the vehicle is untraced or the foreign insurer cannot be traced within two months of the accident.

The requirement originated in the Fourth Motor Insurance Directive in 2000 and it was implemented in the UK by regulation 13 of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003. This UK provision expressly provides that the MIB:

> 'shall compensate the injured party in accordance with the provisions of Article 1 of the second motor insurance directive[24] as if it were the body authorised under paragraph 4 of that Article[25] and the accident had occurred in Great Britain'[26].

What follows is a failed challenge by the MIB in which it sought to argue that Rome II applied where a victim was injured in an accident in a foreign EEA country.

Bloy and another v Motor Insurers' Bureau [2013] EWCA Civ 1543

Uninsured driver claims against the MIB featuring an accident in a foreign EEA member state are governed by UK law

(Sir Terence Etherton, Lady Justice Hallett and Lady Justice Sharp)

The facts: The claimant was a grievously injured young child and also his mother. They were British citizens, resident in the UK but injured abroad by an uninsured driver in Lithuania. Liability was conceded.

Due to special transitional provisions that no longer apply, the level of the Lithuanian MIB's compensatory guarantee[27] was probably less than 10% of

23 This basic rule is set out in article 4 of Rome II.

24 EU Motor Insurance Directive (84/5/EEC). Article 2 is now to be found in article 10 of the Sixth Motor Insurance Directive.

25 Ie as though it were the national compensating body, *viz*: the MIB.

26 See reg 13(2)b of the 2003 Regulations.

27 Article 9 of the Sixth Motor Insurance Directive sets out the minimum amounts of compensatory guarantee required.

the damages which would be likely to be recoverable in the UK through the combined effect of our civil justice system and the Uninsured Drivers Agreement 1999. The MIB was concerned that its prospects of recovering the substantial difference in outlay[28] was prevented by an intra-bureau agreement[29] it had entered into that restricted its right to recoupment from its Lithuanian equivalent to the levels pertaining at the accident location. Accordingly it sought to revisit a challenge it had previously lost in *Jacobs v Motor Insurers Bureau* [2010] EWHC 231; attempting to distinguish it and dressing up its earlier case in different rhetorical clothing. The issue was basically the same: the MIB argued that as the accident occurred abroad Rome II choice of law considerations applied with the effect that the MIB's duty to compensate was limited to the paltry levels prescribed under Lithuanian law.

The decision: The MIB's appeal against a first instance decision that applied *Jacobs*, was dismissed. It held that the *Jacobs* ratio did apply. The right of an injured person in these circumstances to make a claim against the MIB derives from the 2003 Regulations. This is domestic legislation. Rome II choice of law provisions simply did not arise. The victims' extensive compensatory needs were to be quantified applying UK law and procedure. The MIB's request to refer the issue to the Court of Justice of the European Union was refused.

Comment: The effect of regulation 13 (and arguably of a proper interpretation of article 25[30]) is that UK residents injured abroad in an EEA country will often be better off, procedurally and financially, where the driver responsible is either uninsured or untraced, because the MIB must handle the claim in the UK under the 2002 Regulations and to UK standards. This creates something of an anomaly when one compares this approach to victims of identified and insured drivers abroad.

Quantifying a claim governed by foreign law under Rome II

***Wall v Mutuelle De Poitiers Assurances [2013] EWHC 53* (*QB*)**

Local practice can be applied to procedural issues even where foreign law and procedural rules apply under Rome II

(Justice Tugendhat)

The facts: An English motorcyclist was knocked off his bike and very seriously injured by a French driver in France. Liability was not disputed. He had a substantial claim for future loss of earnings and long term care needs.

[28] Permitted under article 24 of the Directive.

[29] The *Comité Européen Des Assurances* Agreement, dated April 29, 2002.

[30] From which our national provision is derived, see above.

It was common ground that under article 4 of Rome II French law applied not just to the issue of primary liability but also to determine 'the existence, the nature and the assessment of damage or the remedy claimed'[31]. The defendant insurer wanted to employ the continental model of inquisitional claims investigation and to use a single joint expert. The claimant's representative argued that this would not do justice to the claimant's case and sought to rely on their own medical, care and accountancy experts and for the CPR to apply in this regard.

The decision: Article 1.3 of Rome II expressly excludes procedure and evidence from its conflict of law provisions so that the law of the forum (ie in this case our UK law including the CPR Rule 35) still governed the quantification of the heads of claim permitted under French law. The obligation on the local court to apply French law did not require that court to put itself in the position of a French court and to decide the case as that court would have decided it. Accordingly our national law determined what evidence is required to establish the claim. It is interesting to note that Tugendhat J appeared to be singularly unimpressed by the prototype single expert report used in France.

THE EU MOTOR INSURANCE DIRECTIVES

Controls on the level of damages

It is well established that the Motor Insurance Directive not intend to harmonise the civil liability laws of member states and whilst the First Motor Insurance Directive[32] also left the Member States free to determine, in particular, which kind of damage should be compensated, its extent and the persons entitled to claim, it later sought to close some of these gaps in uniformity in the Second and Third Motor Insurance Directives[33]. Article 9 of the consolidating Sixth Motor Insurance Directive[34] imposes minimum amounts of compensation for compulsory civil liability insurance cover, at least in respect of the following:

(a) in the case of personal injury, a minimum amount of cover of EUR 1,000,000 per victim or EUR 5,000,000 per claim, whatever the number of victims;

(b) in the case of damage to property, EUR 1,000,000 per claim, whatever the number of victims.

31 The words in italics are taken from article 15 – Council Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (aka Rome II) dealing with the scope of the law applicable under article 4 ibid.

32 Council Directive of 24 April 1972 (72/166/EEC).

33 Council Directives (84/5/EEC) and (90/232/EEC).

34 Council Directive of 16 September 2009 (2009/103/EC).

Although some transitional arrangements existed for some members, these minimum levels apply uniformly across the EEA from 11 June 2012. These levels are required to be reviewed every five years.

In the UK, section 145 of the RTA 1988 requires compulsory third party cover to indemnify personal injury claims in full but its sets a £1m statutory minimum of cover for property damage. Some foreign EEA jurisdictions adhere to the Community law minima and practitioners will need to be mindful of this where they are representing a claimant injured in a foreign EEA country by an insured defendant (see above).

The Community law principle of equivalence requires member states to ensure that the compensatory guarantees afforded to victims of uninsured and untraced drivers under article 10 of the Sixth Motor Insurance Directive be no less favourable than those governing similar domestic actions against identified and insured defendants. The result being, as a statement of general principle, that if a head of claim is permitted under normal civil law principles to the victim of an insured driver, this should also be guaranteed under the rules for compensating victims of uninsured and untraced drivers, in this country: the Uninsured Drivers Agreement 1999 and the Untraced Drivers Agreement 2003.

Drozdovs v Baltikums AAS CJEU 2013 C-277l12

A financial limit imposed under Latvian law infringed Community law

(Judges Silva de Lapuerta (President of the Chamber), da Cruz Vilaca, Arestis, Bonichot and Arabadjiev (Rapporteur))

The facts: This was a claim presented on behalf of a young boy who was orphaned by the death of both parents as a result of a road accident in 2007 in Latvia caused by the fault of a drunk driver. The defendant had third party insurance cover with Baltikums. Under Latvian law, a claim for 'non-material damage' for the boy's injuries including the psychological distress of his bereavement was permitted and there was no automatic financial limit imposed. However under a Latvian decree[35], the insurer's liability to the claimant for his non-material damage was set at a notional figure of LVL 100.

The decision: The restriction was illegal. These were deemed to be damages for personal injury. Article 1 of the Second Directive[36] required compulsory cover against civil liability, for both damage to property and personal injuries, to extend at least up to certain specified sums. These minima were imposed to

[35] Articles 7 of Decree No 331.

[36] (84/5/EEC). Article 1 is now article 9 of the Sixth Directive (2009/103/EC).

reduce the disparities between the laws of different member states concerning the extent of compulsory insurance cover required under Article 3 of the First Directive[37].

Petillo and another v Unipol Assicurazioni SpA C-371/12

(Judges Silva de Lapuerta, President of the Chamber, da Cruz Vilaça, Arestis, Bonichot, Arabadjiev (Rapporteur), Advocate General)

The facts: On 21 September 2007 Carlo Petillo sustained minor injuries in a rear end collision in Italy by a car insured by Unipol; liability was not contested. He presented his claim against Unipol direct, which included a claim for non-material damage, which is a similar concept to general damages in the UK but which, as a unitary concept, cannot be divided into categories or headings. Under Italian law, the prescribed levels of compensation awarded for such loss where there are minor injuries differentiates between claims caused by the use of motor vehicles and waterborne craft, on the one hand, and claims based on other liability scenarios, on the other. Under this code the level of compensation prescribed for road accident injuries is considerably less than would otherwise be the case[38]. The Italian court referred the issue as to whether this infringed the Second Directive to the CJEU.

The decision: No it did not. On the facts, the CJEU found that this legislation did not automatically exclude or disproportionally limit the victim's right to compensation. It held that the directives do not preclude, in principle, either national legislation imposing binding criteria on national courts as to how the non-material damage should be compensated or specific schemes adapted to the particular circumstances of road traffic accidents, even if these schemes are less favourable to the victim than would be awarded to accidents other than road traffic accidents.

Comment: This decision might well have a bearing on any plans by the Government to prescribe fixed awards for minor whiplash injury awards.

Secretary of State for Transport's review of the MIB Agreements

In February 2013, the Department for Transport initiated a consultation on its proposals for revising the Uninsured Untraced Drivers Agreement 1999 and the Untraced Drivers Agreement 2003. The proposals were largely confined to procedural issues and it is claimed that this was the outcome of three years of discussions with the Motor Insurers Bureau. A final report was planned for July 2013. A number of respondents pointed out that both MIB Agreements had many failings that needed addressing and some observed

37 (72/166/EEC).

38 Under article 139 of the Private Insurance Code.

that they also breached Community law. The DfT denies that its arrangements with the MIB fail to fully implement the Sixth Motor Insurance Directive. No final report has been forthcoming.

It is understood that a limited revision of the 1999 Agreement is planned for sometime in 2014.

European Commission investigate UK non-compliance

A detailed complaint has been made to the European Commission citing numerous infringements of Community law minimum standards within both MIB Agreements. The complaint has been accepted and is under investigation. The breaches complained of include:

(i) lack of legal certainty, due to numerous unlawful, misleading and contradictory statements and imperfectly transposed Community law requirements contained within Part VI of the RTA 1988, The EC (Rights Against Insurers) Regulations 2002 and both MIB Agreements,

(ii) wrongful exclusions of liability,

(iii) wrongful deductions to compensation,

(iv) unlawful technical restrictions on the right to compensation and certain ultra vires provisions[39].

The Commission's office has until 23 August 2014 in which to reach a determination on the complaint, unless an extension of time is granted.

PRODUCT LIABILITY AND ROME II

Kainz v Pantherwerke AG 2014 C-45/13

(Judges Bay Larsen, President of the Chamber, Safjan (Rapporteur), Malenovský, Advocate General: Jääskinen)

The facts: An Austrian man bought a German manufactured bicycle in Austria but was injured whilst riding it in Germany due to a defect in its manufacture. Which country had jurisdiction in the product liability claim?

The decision: Germany. Brussels I applied. The place of the event giving rise to the damage is the place where the product in question was manufactured. This regulation is not designed to offer the weaker party stronger protection[40].

[39] The failings of the UK compensatory protection for road accident victims is considered in detail in the author's four part series of articles published in the New Law Journal in February 2013 under the heading '*On the Right Road*'.

[40] See *Folien Fischer and Fofitec* [2012] Case C-133/11 ECR I-0000, paragraph 46.

VICARIOUS LIABILITY

Mohamud v WM Morrison Supermarkets plc [2014] EWCA Civ 116

(Lady Justice Arden, Lord Justice Treacy and Lord Justice Christopher Clarke)

The facts: A Somali national was racially abused and viciously attacked by a petrol station shop attendant. The claimant had recently checked his tyre pressures in the forecourt and then visited the shop to ask if it offered printing services. He was followed out and assaulted by the attendant. Could the attendant's employers be held vicariously liable?

The decision: No. The attendant's job description involved serving customers and the assault had nothing to do with that role. The court applied the two stage test for determining vicarious liability, as formulated in *Lister v Hesley Hall Limited* [2002] 1 AC 215 and *Dubai Aluminium Co Limited v Salaam* [2003] 2 AC 366. Whilst the employment relationship was obviously capable of giving rise to vicarious liability, it failed the second stage in that there was no clear connection between the employment and the wrongdoing: the employment did not create the risk that materialised, it was merely incidental.

MEASURE OF DAMAGES

Coles and others v Hetherton and others [2013] EWCA Civ 1704 (otherwise known as the RSA Test Cases)

Court of Appeal upholds insurer's right to inflate the cost of accident repairs

(Cooke J)

The facts: Two insurers decided to challenge the level of accident damage incurred in 13 test cases. In each case the claimants' were insured by Royal and Sun Alliance Insurance Plc (RSAI) and under the terms of their insurance policy, RSAI arranged for and indemnified the cost of repairing their vehicles. The repairs were undertaken by a wholly owned subsidiary of RSAI trading as MRNM. MRNM sub contracted some of its repairs to independent garages and due to the scale of this business it secured a discounted price from these businesses. The cost of repairs claimed by RSAI were higher than the actual amount invoiced to it by MRNM, producing a discrete profit. However the overall claim for repair costs were no higher than what an individual claimant's would have incurred had they instructed the garages themselves (without the bulk discount). D contended, inter alia, that RSAI's mark up on their repair costs should not be recoverable as damages and that the proper rate should be the lower cost to RSAI of the repairs on the open market. The issue was referred for trial as a preliminary issue. Mr Justice Cooke found for the claimants and held that the charges were recoverable.

The decision: The Court of Appeal confirmed that the proper measure of compensation for tortious damage to property is the diminution in its market value. Where the property is repairable, this equates to the reasonable cost of repair. It matters not whether the repairs are actually undertaken or even paid for, nor whether they are undertaken free of charge: the damages are assessed by reference to the open market repair cost; be it for a car, house or a vessel. Accordingly, the doctrine of mitigation has no application to the assessment of this loss. The court is not concerned with whether the claimant's insurers made a profit on the repairs.

Comment: It is worth noting that the Office of Fair Trading referred this practice to the Competition Commission last year and described this practice as 'dysfunctional' at a time of escalating insurance premiums. The Competition Commission then published an interim report in December 2013 that found various aspects of this practice anti-competitive and it is now in further discussions with the motor insurance industry.

EVIDENCE

MacLennan v Morgan Sindall (Infrastructure) plc [2013] EWHC 4044 (QB)

Curbing excesses with litigants in person

(Green J)

The facts: In an employer's liability claim that was compromised on a 75/25 basis in the claimant's favour the parties remained at odds on quantum. The claimant was a litigant in person and it was clear that there was no proper dialogue between the parties. The claimant wanted to call 43 witnesses on a variety of issues relating to his lost earnings. The defendant sought to limit their number under CPR 32.2(3).

The decision: Amazingly, he was allowed to call 14 witnesses on comparative earnings issue as well as adduce evidence from his wife and himself. He was also permitted to call expert evidence on the issue. How was this proportionate?

LIMITATION

Davidson v Aegis Defences Services (BVI) Ltd and another [2013] EWCA Civ 1586

Issuing at the last minute attracts little sympathy

(Longmore, McFarlane and Vos LJJ)

The facts: The claimant solicitors were instructed to bring a personal injury claim eight months previously and left it till seven days before its expiry to sue. Unfortunately they failed to serve the proceeding within the prescribed period so the validity of the claim form expired. Their application to extend the time for service under CPR 7.6, *ex post facto*, was refused. A second

action was issued and he applied for the limitation period to be disapplied under section 33 of the LA 1980. The judge refused and he appealed.

The decision: The appeal was dismissed. The court stated that the basic question to be asked was whether it was fair and just in all the circumstances to expect the defendant to meet the claim on the merits, notwithstanding the delay in commencement. That included consideration not just of the length of the delay but also the reasons for the delay and the prejudice to the parties. The court found that there had been prejudice to the defendant caused by the overall delay which had resulted in loss of documentation and make it impossible to trace certain important witnesses and although this occurred before the limitation expired, it was still a factor that could be taken into account. It also found that there had been further prejudice to the defendant in the six month period following the expiry of the limitation period, which is relevant to s 33(3) of the 1980 Act.

FATAL ACCIDENTS

Haxton v Philips Electronics UK Ltd [2014] EWCA Civ 4

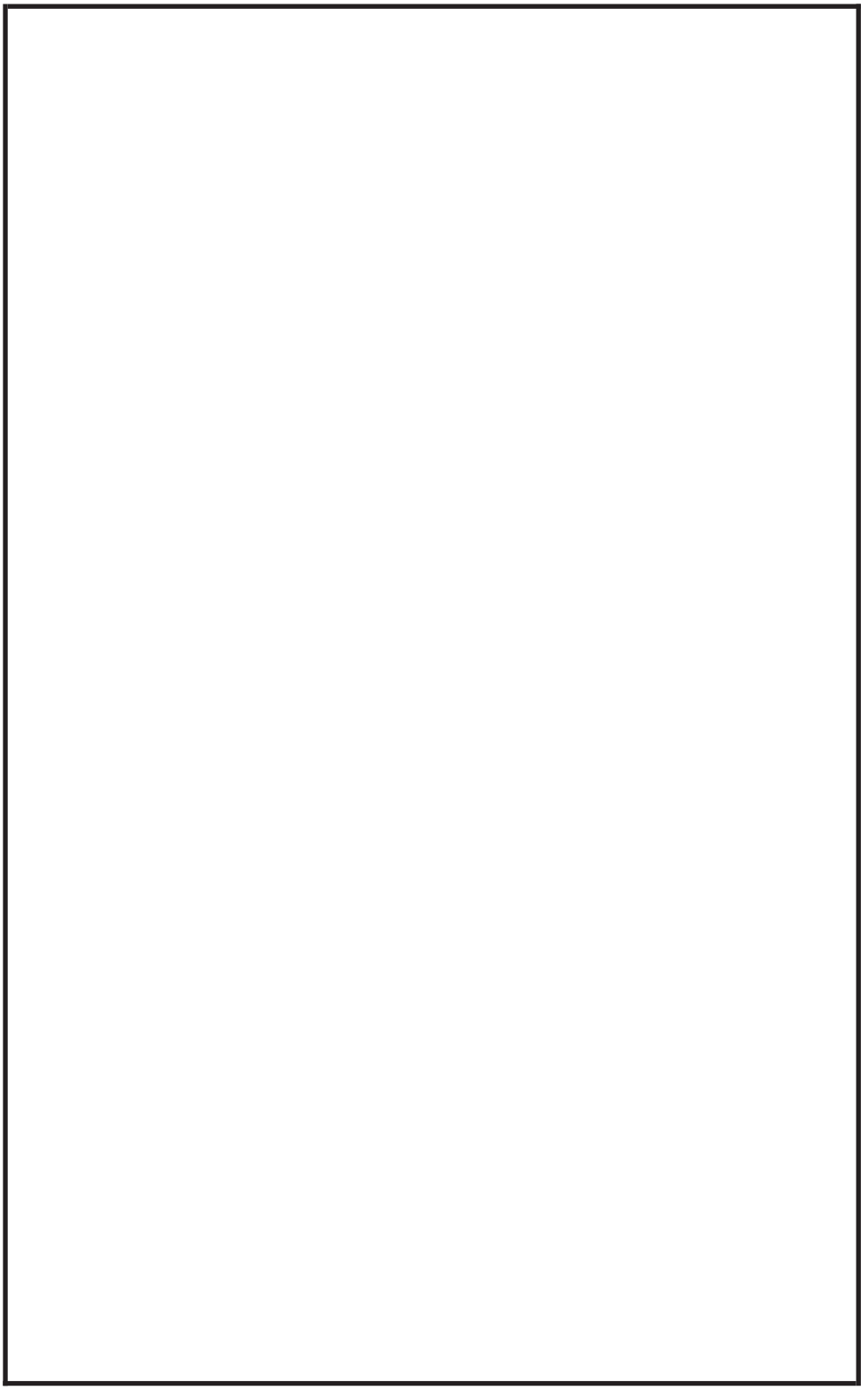
A dependency claim is a chose in action which is potentially actionable

(Lord Justice Elias, Lord Justice Beatson and Dame Janet Smith)

The facts: Philips admitted liability for exposing Mr Haxton to asbestos during the course of his employment as an electrician over many years. He died from mesothelioma within a year of diagnosis. Then, tragically, and before her Fatal Accident Act claim was settled, his wife also contracted the same fatal illness, from having hand washed her husband's overalls. Her severely diminished life expectancy was known by the time her dependency claim was quantified. It was common ground that her dependency claim was properly reduced so as to take her reduced life expectancy into account. In her own personal injury claim, she sought to recover the loss in value of her dependency claim in the first claim, assessed at £200,000. The insurers disputed her right to recover in the second action what she was not entitled to in the first.

The decision: The Court of Appeal found in Mrs Haxton's favour. An entitlement bestowed under a statutory right such as the Fatal Accident Act 1976 is a chose in action and as such any diminution in its value occasioned by the defendant's negligence is actionable.

Comment: This decision could also be relevant in multi-casualty road traffic accident claims where more than one member of a family are injured and where a dependent dies shortly after the main breadwinner.



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