

ALL CHANGE FOR FOREIGN ACCIDENTS

by Philip Mead

All change for foreign accidents: Regulation 864/2007 on the law applicable to non-contractual obligations (known as Rome II) has brought about significant change in the field of foreign accidents. Since the European Court of Justice judgment in December 2007 in Case C463/06, *Schadeverzekeringen NV v. Odenbreit*,¹ Claimants have increasingly been using the opportunity to bring proceedings direct against foreign road traffic insurers in the English courts. In such claims, it has been held that the issue of quantification is to be characterised as a matter of procedure, to be determined by the law of the forum.²

The legal landscape has changed as a consequence of Rome II. Certainly for cases issued after 10 January 2009 in respect of accidents after 19 August 2007 (and some commentators argue for all accidents after 19 August 2007 whenever proceedings were issued³), it will be necessary to take into account the applicable foreign rules governing the assessment and quantification of loss. The effect of the landmark ruling of the House of Lords in *Harding v. Wealands*⁴ will be superseded by the terms of Article 15 of the Rome II Regulation.

¹ [2008] ILPr 12; [2008] Lloyd's rep IR 354.

² See *Maher v Groupama Grand Est* [2009] 1 WLR 1752; *Knight v AXA* [2009] EWHC 1900.

³ See Dickinson, *The Rome II Regulation: the Law Applicable to Non-Contractual Obligations*, (Oxford, 2009), para 3.315.

⁴ [2007] 2 AC 1.

Claimants solicitors will need to advise their clients about foreign rules on limitation⁵ (both in respect of the duration of any relevant foreign limitation period⁶, as well as the mechanism for stopping time running⁷), liability⁸, contributory negligence⁹, entitlement to sue in relation to fatal accident claims¹⁰, the medical assessment of loss¹¹ as well as the computation of loss.¹²

European systems of compensation demonstrate significant disparities as to the methods for calculating compensation as well as outcomes in terms of final award. Further some jurisdictions which may be considered to be less advantageous in relation to general personal injury awards may take a much more generous view in relation to fatal accident claims.¹³

Foreign rules on the use of seat-belts¹⁴, or the applicable law on the deduction of insurance payouts may produce results unfamiliar to English lawyers. Some jurisdictions compensate injury by reference to judicial or statutory tables, awarding compensation for non-pecuniary loss according to percentages of incapacity. Different multipliers apply for the calculation of pecuniary loss. On the other hand, fatal accident claims may permit a broader range of dependant to claim, and levels of compensation for wrongful death may exceed by a significant margin the prescribed amount permitted under the Fatal Accidents Act 1976.¹⁵

⁵ See Article 15(h).

⁶ Jurisdictions such as Spain recognise short periods of limitation (1 year for road traffic accidents) whereas other jurisdictions such as France have a much longer period (10 years); some systems do not differentiate between the treatment of adults and minors.

⁷ Suspension or interruption of time running is a feature of some European systems which is not recognised by English law.

⁸ Article 15(a).

⁹ Article 15(b).

¹⁰ Article 15(e) and (f).

¹¹ Article 15(c).

¹² Article 15(d).

¹³ For a jurisdiction by jurisdiction overview of the differences across Europe, see Bona and Mead (eds), *Personal Injury Compensation in Europe* (2003), and Bona, Mead and Lindenbergh (eds), *Fatal Accidents & Secondary Victims* (2005).

¹⁴ A failure to wear a seatbelt which would have avoided injury may in some jurisdictions lead to a 100% reduction in compensation.

¹⁵ The southern European jurisdictions are as a general rule more generous in relation to fatal accident claims.

In such claims, it is therefore imperative that specialist advice should be taken at an early stage so that the proper choices can be made as to: who to sue; where to sue; and whether there are alternative choices of law available. Old Square Chambers are able to assist both in advising what choices are available in bringing proceedings in the English Courts and in obtaining expert foreign opinion in relation to any foreign applicable law.

A key battleground for the future will be the extent to which English courts will in practice pay attention to the awards made as a matter of the exercise of judicial discretion under the applicable foreign law. For Article 15(d) states that the scope of the applicable law extends “within the limits of powers conferred on the court by its procedural law” to “the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation”. It is clear that a system which does not, for example, recognise the award of compensation by means of periodical payments should not be required to award such a form of compensation. But where there is no rule of foreign law determining the relevant amount of compensation, will the English courts adopt a “best fit” view looking at equivalent awards from abroad, or will the domestic judge merely exercise the discretion afresh within whatever parameters are laid down by the foreign applicable law, on the basis that such matters are procedural?

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