

**PICKARD v MOTOR INSURERS' BUREAU**  
**MARSHALL v MOTOR INSURERS' BUREAU**

COURT OF APPEAL (CIVIL DIVISION)

Cranston J: 1 January 2017

[2017] EWCA Civ 17; [2017] R.T.R. 20

<sup>Ⓒ</sup> Applicable law; EU law; Fatal accident claims; Road traffic accidents; Uninsured drivers

**H1 CONFLICT OF LAWS**

**Tort**

*Applicable law—Traffic accident in France caused by uninsured French driver—British car being attended to by driver of recovery vehicle—British driver and passenger standing at side of motorway—Driver injured and passenger killed—Motor Insurers' Bureau denying liability—Liability under French law resting with British driver and insurer of recovery vehicle—Whether tort manifestly more connected with France than England—Whether applicable law French or English—Regulation 864/2007 art. 4.*

**H2 Article 4 of Regulation 864/2007 provides:**

- “(1) Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
- (2) However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
- (3) Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paras (1) or (2), the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.”

**H3 The claimant in the first action, with the husband of the claimant in the second action as his passenger, had been driving on a motorway in France when his vehicle broke down. A recovery truck attended and the two men, both British nationals,**

were standing by their vehicle when it was hit by a car, driven by an uninsured French national, shunting it into the recovery truck. The claimant suffered serious injuries and his passenger was killed. The claimant and his passenger's widow brought separate actions in the High Court against the Motor Insurers' Bureau, which denied liability on the ground that under French law liability lay, not with its French equivalent, but with the driver and insurer of the claimant's car and the insurer of the recovery vehicle. Preliminary issues were ordered to determine, *inter alia*, whether French or English law applied to the issue of liability as between the passenger's widow, as claimant, and the claimant driver, as defendant. The judge held that, although on the natural wording of art.4(2) of Regulation 864/2007 English law applied to the claims made by the widow against the driver of the car in which her husband had been a passenger, displacing French law otherwise applicable pursuant to art.4(1), the circumstances were such that the tort/delict was manifestly more closely connected to France than to England and Wales, with the result that French law became the applicable law under art.4(3). The circumstances relied on by the judge were that the victims were hit by a French car, driven by a French national on a French motorway; that that collision was as a matter of fact the cause of the injuries suffered; and that any claims the parties had against the insurer of the recovery truck were governed by the laws of France.

H4 On an application by the claimant driver for leave to appeal:

H5 **Held**, refusing the application, that the words of art.4(3) of Regulation 864/2007 demanded attention to be given to "all the circumstances of the case" to determine if the tort/delict was "manifestly more closely connected with" a country other than that indicated by the application of art.4(1) or (2); that those circumstances were not limited to circumstances exclusive to the responsible tortfeasor, since "tort" could, in the present context, refer to the road traffic accident justly as readily as it could to the cause of action applying between a particular victim and a particular tortfeasor ([14], [15]); and that the judge was right to consider that, relying on the three circumstances he outlined, the applicable law under art.4(3) was French law ([21]).

H6 **Case referred to in the judgment:**

*Lazar v Allianz SpA* (C-350/14) EU:C:2015:802; [2016] R.T.R. 7 ECJ

### **Application for permission to appeal**

H7 The claimant in the first action, Christopher Pickard, brought a claim against the Motor Insurers' Bureau for damages in respect of personal injury and damage suffered when a car driven by Cindy Bivard, an uninsured French national, hit a vehicle of which he was the driver on a French motorway on 19 August 2012. In the second action the claimant, Gillian Marshall, as the widow and administratrix of the estate of Paul Marshall, who had been a passenger in the vehicle driven by Mr Pickard and who died as a result of injuries sustained in the collision, brought an action against the Motor Insurers' Bureau, Mr Pickard and Generali France Assurances, a French company which was the insurer of a recovery truck attending to Mr Pickard's vehicle at the time of the collision. On the trial of preliminary issues relating to liability, on 27 November 2015 *Dingemans J* [2015] EWHC 3421 (QB) held that the law governing liability in the actions was French law. Mr Pickard sought permission to appeal that ruling.

H8 The facts are stated in the judgment at [2]–[4].

H9 *Robert Weir QC* for Mr Pickard.  
*Charles Dougherty QC* for Generali France Assurances.  
*Sarah Crowther* and *Gus Baker* for Mrs Marshall.  
*Marie Louise Kinsler* for the Motor Insurers' Bureau.

H10 Solicitors for Mr Pickard: DWF LLP.  
Solicitors for Generali France Assurances: Trethowans LLP, Salisbury.  
Solicitors for Mrs Marshall: Barratt Goff & Tomlinson Ltd, Nottingham.  
Solicitors for the Motor Insurers' Bureau: Weightmans LLP, Liverpool.

H11 The application was argued on 13 December 2016.

*Cur. adv. vult.*

## JUDGMENT

### CRANSTON J:

#### Introduction

- 1 This is a renewed application by Mr Christopher Pickard for permission to appeal a decision of Dingemans J after refusal on the papers by Tomlinson LJ. This is also a contingent application for permission to appeal by Generali France Assurances, should Mr Pickard be granted permission to appeal.

#### Background

- 2 The facts are described in detail in Dingemans J's judgment: [2015] EWHC 3421 (QB). In summary there had been a road traffic accident in France involving on the one hand a French driver, Ms Bivard in a Peugeot, who was uninsured and apparently asleep at the wheel, and on the other hand two British nationals, Mr Marshall and Mr Pickard, who were returning to the UK after working in France for several months. Mr Pickard had been driving a Ford Fiesta motor car and trailer. The Fiesta was registered in the UK and insured by Royal & Sun Alliance (RSA). Mr Marshall was Mr Pickard's passenger. They were standing at the side of a motorway in Paris behind the Ford and trailer, while the trailer was being repaired by the driver of a recovery truck. The recovery truck was registered in France and insured by Generali France Assurances (Generali).
- 3 The Peugeot was travelling at some 90mph, hit Mr Marshall and Mr Pickard, collided with the trailer, shunting it into the Fiesta which in turn was shunted into the recovery truck. Mr Pickard was thrown forward and landed away from the vehicles, suffering serious injuries. Mr Marshall's head hit the Peugeot's windscreen and he was thrown forward. The trailer fell on his leg. He died at the scene.
- 4 Mr Marshall's widow brought an action against the Motor Insurers' Bureau (the MIB) because Ms Bivard was uninsured. It denied liability on the basis that its equivalent in France, the Fonds de Garantie, was not liable to compensate Mrs Marshall and therefore it had no liability. Instead, it contended, under the liability principles applying under French law for road traffic accidents, that Mr Pickard and RSA, as driver and insurer of the Fiesta, and Generali, as insurer of the recovery

truck, were liable. A second action was brought by Mr Pickard against the MIB. Again, the MIB denied liability and claimed that Generali was liable.

### The issue of liability

- 5 Dingemans J's task was to determine a number of preliminary issues. The first issue, which is the subject matter of this application, is whether French or English law applies to the issue of liability as between Mrs Marshall, as claimant, and Mr Pickard, as defendant. RSA claimed that English law applies. Dingemans J held that it is French law which governs.
- 6 It was accepted that this issue was to be determined in accordance with Regulation 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations, known as Rome II. Article 4 of that Regulation provides as follows:

#### “General rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paras 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.”
- 7 After considering the recitals to the Regulation, setting out art.4, and reviewing case law (not on all fours with the present case), Dingemans J said that he appreciated that it was important not to turn first to the exception in art.4(2) to the general rule in art.4(1), and that it was also important not to use art.4(3) as a starting point: [2015] EWHC 3421 (QB) at [16]. He then rejected a submission of some text book writers that art.4(2) only applied where one person brought proceedings against another person, and both were habitually resident in the same EEA state. That would exclude the situation of a number of persons injured in coach crashes: [17]. In his judgment art.4(2) applied, on the natural wording of the article, to the claims made by Mrs Marshall against Mr Pickard: at [18]. So French law applicable under art.4(1) was replaced by English law, since Mr and Mrs Marshall and Mr Pickard were habitually resident in the UK.
- 8 Turning to art.4(3) Dingemans J rejected the view of some text book writers, not argued for by the parties in the case, that when French law is the governing law pursuant to art.4(1), but excluded (for part of the claims) under art.4(2), it could not be brought in again under art.4(3): [19]. He then said:

“20. It is also common ground that article 4(3) imposes a ‘*high hurdle*’ in the path of a party seeking to displace the law indicated by arts 4(1) or 4(2), and that it is necessary to show that the ‘*centre of gravity*’ of the case is with the suggested applicable law. In this case there are a number of circumstances

which, in my judgment, make it clear that the tort/delict is manifestly more closely connected with France than England and Wales. These are: first that both Mr Marshall and Mr Pickard were hit by the French car driven by Ms Bivard, a national of France, on a French motorway. Any claims made by Mr Marshall and Mr Pickard against Ms Bivard, her insurers (or the FdG as she had no insurers) are governed by the laws of France; secondly the collision by Ms Bivard with Mr Marshall and Mr Pickard was, as a matter of fact and regardless of issues of fault or applicable law, the cause of the accident, the injuries suffered by Mr Marshall and Mr Pickard and the subsequent collisions; and thirdly any claims that Mr Marshall and Mr Pickard have against Generali, as insurers of the vehicle recovery truck, are also governed by the laws of France.” (Emphasis in original.)

- 9 Dingemans J noted that Mr Marshall and Mr Pickard had been working together in France for some two and a half months, but said that in his judgment that factor would not have come close to avoiding the effect of art.4(2) to result in the application of art.4(3): at [21]. He also rejected a submission that that it was wrong to take so much account of the fact that Ms Bivard was a French national, because in some cases the driver in an accident may not be traced. However, he was bound to take into account “all the circumstances of the case”, and that included the known facts like that. Consequently, the law of France applied to the liability parts of the claims arising from the accident advanced before him.
- 10 On the renewed application, Mr Weir QC for Mr Pickard and RSA contended that Dingemans J was wrong to hold that French law applies. (It was common ground that if Mr Weir was correct, and English law applies, Mr Pickard is not liable to Mrs Marshall.) Mr Weir criticised the judge for taking into account the three circumstances he mentioned in [20] of his judgment, since none of these were circumstances of the case against Mr Pickard, the alleged tortfeasor.
- 11 In advancing his case, Mr Weir submitted that art.4(1) refers to the law applicable to a non-contractual obligation “arising out of a tort/delict”. Therefore in his submission its focus is on the particular tort between the responsible tortfeasor and the direct victim. However many parties may be involved in litigation, he contended, the issue is the law applying to that tort. In his submission the Court of Justice in *Lazar v Allianz SpA* (C-350/14) [2016] R.T.R. 7 supported the focus on the particular tort, in part to further the policy aim of the Regulation to make the applicable law in tortious claims more foreseeable.
- 12 In Mr Weir’s submission, art.4(2) is better seen as a specific rule, mutually exclusive to the operation of art.4(1). To achieve consistency between arts 4(1) and (2), however, the phrase “the person sustaining damage” must be read to refer to the direct victim, in this case Mr Marshall, and the phrase “the person claimed to be liable” to the tortfeasor, in this case Mr Pickard, not his insurer. Article 4(2) refers to “both”, in other words, to these two persons only and whether they share the same habitual residence.
- 13 As to art.4(3), Mr Weir submitted that as an exception to arts 4(1) and (2) it must be read restrictively so as to reduce uncertainty and to enhance predictability. In his submission, to ensure consistency with art.4(1) the word “tort” must be construed narrowly to apply only to the claims of direct and indirect victims of the specific tortfeasor. The reference to “all the circumstances of the case” is to the circumstances of the case brought by the victims against a given tortfeasor. This

interpretation furthered certainty, he submitted, since otherwise it would be difficult to limit the circumstances to which reference could be made. The judge was accordingly wrong and the three circumstances to which he referred were legally irrelevant.

- 14 The starting point in considering these submissions must be the words of the Regulation, in particular art.4(3). It demands that attention be given to “all the circumstances of the case” to determine if “the tort/delict” is “manifestly more closely connected with” a country other than that which is pinpointed by the application of art.4(1) or (2). To my mind the phrase “all the circumstances of the case” points to precisely that, all the circumstances surrounding the tort. Those circumstances are not limited by art.4(3), by a phrase such as “brought against the tortfeasor”.
- 15 Certainly all parts of art.4 must be read together, but art.4(3) is focused on the law of the country with which the tort/delict is manifestly more closely connected. Consequently, it is not on all fours with art.4(1) and (2), which are concerned with the law applicable to “a non-contractual obligation arising out of a tort”. “Tort” can refer to the road traffic accident in this context, just as readily as it can to the cause of action (to use the English approach) applying between the particular victim and particular tortfeasor. That a tort is part of a multi-party accident may be highly relevant to the country with which it is manifestly most closely connected.
- 16 As to the example in the last sentence of art.4(3), of a pre-existing relationship between the parties, it is to my mind but an example of the circumstances which may bear on identifying the country with the most manifest connection. Finally, art.4(3) is an escape clause but in my view that does not mean that its ambit should be unduly narrowed. After all, art.4(3) is part of a general rule, art.4, designed for choice of law in tort cases where the specific provisions in arts 5–12 do not apply.
- 17 Finally, I note that in *Lazar v Allianz* the Court of Justice accepted that the damage suffered by close relatives of the deceased must be regarded as the indirect consequence of an accident within art.4(1), as Mr Weir conceded, which takes the analysis beyond the immediate victims and the particular tortfeasor.
- 18 As to policy, certainty is an important value behind the Regulation, and as Mr Weir highlighted is enunciated in recital (14). But recital (14) also identifies as goals doing justice in individual cases and creating a flexible framework of conflict of laws rules. Recital (18) says simply that art.4(3) should be understood as an escape clause from art.4(1) and (2) where it is clear from all the circumstances of the case that the tort is manifestly more closely connected with another country. I do not believe it helps Mr Weir’s arguments.
- 19 The Commission’s proposal for the Regulation, COM(2003) 427 final, explained that art.4(1) (at that point art.3(1)) met the concern for certainty; that the article as a whole was a compromise between the two extremes of applying the law of the place where “the event giving rise to the damage occurs”, and giving the victim the option of choosing the applicable law; and that art.4(3) was a general exception clause which aimed to bring a degree of flexibility, enabling the court to adapt the rigid rule to an individual case so as to apply the law that reflected the centre of gravity of the situation.
- 20 In neither the recitals nor the policy background which led to the Regulation can I detect any reason for reaching a different conclusion than the one which I have found in the words of art.4 itself.

- 21 Consequently, in my judgment the judge was quite clearly correct that French law applies. The judge's approach, contrary to Mr Weir's submission, did not misunderstand the meaning and scope of art.4, in particular the import of art.4(3). The judge was accordingly right to consider the three circumstances he did in [20] of his judgment. In that regard the balance he struck was an evaluative exercise and the outcome he reached unassailable.

### **Conclusion**

- 22 I refuse Mr Pickard permission to appeal. Because Mr Pickard is refused permission, it is unnecessary to consider Generali's contingent application for permission to appeal.

*Permission to appeal refused.*

Reported by Clare Noon, Barrister.