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Case Review

Winrow v Hemphill [2014] EWHC 3164

Applicable Law and Rome II:
the interpretation of 'habitual residence', and whether a claim is 'manifestly more closely connected' to another country.

Ian Denham

www.9sjs.com
pi@9sjs.com
9 St John Street, Manchester, M3 4DN
DX Address: 14326 MANCHESTER 3
Tel: 0161 955 9000

The High Court has provided further guidance on the application of Article 4 of Rome II in the case of Gaynor Winrow v Mrs J Hemphill and Ageas Insurance Limited [2014] EWHC 3164.

The Factual Background

The case involved a road traffic accident that occurred in Germany on 16 November 2009. The claimant was a rear seat passenger in a vehicle driven by Mrs Hemphill ('the first defendant'), which collided head on with a German vehicle. The defendant admitted fault for the collision. Ageas ('the second defendant') was the road traffic insurer for first defendant.

As a result of the collision, the claimant sustained personal injury, including a prolapsed disc, for which she received some treatment in Germany and further ongoing treatment in England. She and her husband returned to live in England in June 2011, earlier than planned.

The following was agreed between the parties:

i) The claimant was a UK national.

ii) At the time of the accident the claimant was living in Germany, having moved there in January 2001 with her husband who was a member of HM Armed Services. Germany was not the preferred posting of the claimant's husband, it was his second choice. He had four separate three year postings in Germany.

iii) Since the claimant's husband was due to leave the army in February 2014 after twenty-two years' service he would have returned to England one and a half to two years before that date to undertake re-settlement training. It was always their intention to return to live in England.

iv) Whilst in Germany, the claimant and her family lived on a British Army base where schools provided an English education.

v) While in Germany, the claimant was employed on a full-time basis as an Early Years Practitioner by Service Children's Education, (UK Government Agency).

vi) The claimant claimed continuing loss and damage including care and assistance and loss of earnings. She asserted that the majority of her loss has been and will be incurred in England. The claimant alleged continuing pain, suffering and loss of amenity.

vii) The first defendant was a UK national and an army wife, with her husband serving with the Army in Germany. She had been in Germany for between eighteen months and two years before the accident. She returned to England soon afterwards.

Proceedings

Proceedings were issued in England against both first and second defendant.

In its Defence, the second defendant contended that:

"…pursuant to Article 4(1) of Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations ('Rome II'), German law is the law applicable to all issues arising out of the accident, including but not limited to the availability of a cause of action giving rise to actionable damage, identification of recoverable heads of loss or damage and mitigation."

The matter was consequently listed for a preliminary issue hearing to determine the appropriate law for the assessment of damages in the claim, namely whether German or English law applied.

The matter came before Mrs Justice Slade DBE.

The issue turned on the interpretation of article 4 of Council Regulation No 864/2007 on the law applicable to non-contractual obligation, more commonly known as Rome II.

Article 4 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 paragraphs 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."

The Claimant's Submissions

The claimant accepted that if art 4(1) was not displaced then German law would apply to the assessment of damages. However, she contended that the rule in article 4(1) was displaced by articles 4(2) and 4(3).

Article 4(2)

In respect of the arguments advanced in respect of article 4(2), the claimant submitted that both she and first defendant were habitually resident in England at the time of the accident, and, by virtue of article 23, the second defendant was also habitually resident in the UK.

Whereas there was a clear definition of the habitual residence of a corporate body, there was no such definition for an individual and thus this issue had to be determined as a matter of fact.

Reliance was placed, in particular, on M v M [2007] EWHC 2047, R v Barnet LBC ex p Shah [1983] 2 AC 309 and passages from *Dicey, Morris & Collins on the Conflict of Laws*.

Emphasis was placed on the short-term nature of claimant's residence in Germany, the fact that her husband was not there voluntarily, and that it was their intention to return to live in England. Similar points were made in respect of the first defendant.

It was further argued that the second defendant constituted "the person claimed to be liable" under article 4(2), because the insurer had a liability to meet the loss and damages caused by the first defendant's negligence.

Article 4(3)

It was contended that in applying article 4(3), over-weaning weight was not to be given to the place where the loss and damage was suffered. It was emphasised that the continuing damage and loss was and would be suffered in England and that the *current* habitual residence of the victim and the Defendants was also of importance, which was England.

It was also argued that other facts which indicated that the tort was manifestly more closely connected with England than Germany were the nationality of the claimant and the first defendant, that the first defendant was insured by an English insurance company and that her vehicle was registered in England. It was concluded that whilst the accident due to the first defendant's negligence took place in Germany all the other relevant factors pointed to a manifestly closer connection with England.

In this respect reliance was placed on Stylianou v Toyoshima and Suncorp Metway Insurance Ltd [2013] EWHC 2188, Fortress Value Recovery Fund ILLC and others v Blue Skye Special Opportunities Fund LLP and others [2013] EWHC 14 and Wall v Mutuelle de Poitiers Assurances [2014] EWCA Civ 138.

The Defendant's Submissions

The defendant submitted that article 4(1) was not displaced by either article 4(2) or article 4(3).

Article 4(2)

In respect of article 4(2) it was submitted that at the time of the accident the habitual residence of the claimant was Germany.

Further, it was argued that *the person claimed to be liable* within the meaning of article 4(2) is the first defendant not the second defendant. It was argued that this was clear from the judgment of Owen J in Jacobs v MIB [2010] EWHC 231.

It was argued that the intention as to where an individual would live in the future was irrelevant. Rather, submissions focused on the length of time spent in Germany and that she was plainly settled in the country.

Article 4(3)

With regards to the application of article 4(3) it was emphasised that the objective of Rome II was to provide legal certainty. Consequently, the circumstances to justify any departure from article 4(1) must be truly exceptional.

It was emphasised that the question to be determined under Article 4(3) is not whether *an issue* in the proceedings, here damages, was more closely connected with a different country from that mandated by article 4(1) or 4(2) but whether *the tort* was so connected. It was contended that the "centre of gravity" of the tort was clearly in Germany and that nationality alone was not a factor to allow a departure from article 4(1).

The Judgment

Mrs Justice Slade held article 4(1) was not displaced by either articles 4(2) or 4(3) and that accordingly German law applied to the case.

Slade J commenced her judgment by emphasising the need for legal certainty as recorded in Recital (6) of Rome II.

Article 4(2)

In respect of article 4(2), the first issue to be determined was the identity of "the person claimed to be liable". In that respect, it was held that it was the first defendant and not the second defendant (Jacobs v MIB).

In terms of the issue of the habitual residence of both the claimant and the first defendant, particular reference was placed on the family law case of Re LC (Children) [2014] 2 WLR 124, in which Baroness Hale stated that, "'wishes', 'views', 'intentions' and 'decisions' are not right words, whether we are considering habitual residence of a child or indeed an adult. It is better to think in terms of the reasons why a person is in a particular place and his or her perception while there – their state of mind".

Given the claimant's connection with Germany *at the time* of the accident it was held that she was habitually resident in Germany.

Article 4(3)

The burden was on the claimant to establish that article 4(1) was displaced by article 4(3).

All the circumstances of the case were to be taken into account, however those circumstances would not vary depending upon the issues to be determined and rather must be focused on the nature of the tort. In short, when considering "the centre of gravity" of the case, one must consider the centre of gravity of the *tort* and not just the damage or consequential loss.

It was for the Courts, when applying article 4(3), to undertake a balancing exercise weighing factors to determine whether there is a manifestly closer connection between the tort and one country rather than another.

In the instant case, the common British nationality of the claimant and the first defendant and that they both now resided in England was a relevant consideration. However, the significant period

of habitual residence in Germany both before and after the accident was of greater weight in determining the issue.

It was also held that one could consider where the greater part of the loss and damage was suffered: which was relevant in this case given the nature of the claimant's ongoing symptoms and treatment.

Ultimately Slade J held:

"Factors weighing against displacement of German law as the applicable law of the tort by reason of Article 4(1) are that the road traffic accident caused by the negligence of the First defendant took place in Germany. The claimant sustained her injury in Germany. At the time of the accident both the claimant and the first defendant were habitually resident there. The claimant had lived in Germany for about eight and a half years and remained living there for eighteen months after the accident.

Under Article 4(3) the court must be satisfied that the tort is manifestly more closely connected with English law than German law. Article 4(3) places a high hurdle in the path of a party seeking to displace the law indicated by Article 4(1) or 4(2). Taking into account all the circumstances, the relevant factors do not indicate a manifestly closer connection of the tort with England than with Germany. The law indicated by Article 4(1) is not displaced by Article 4(3). The law applicable to the claim in tort is therefore German law."

Comments

In assessing whether not parties are habitually resident in a particular country, for the purposes of article 4(2), the Court will have to carefully consider the circumstances as to why the individual is in the particular country and what their connection is with the place. Consideration of an individual's 'wishes', 'views', 'intentions' and 'decisions' will not be considered relevant and rather consideration of the reasons why the person is in a particular place and his or her perception while there – "their state of mind" – will be relevant.

Naturally, the outcome of this case could have differed depending on the circumstances. Had, for example, the claimant's time in Germany have been shorter or had she split her time differently between Germany and England then a different outcome may have resulted.

The case emphasises the importance to legal advisors of both claimants and defendants of carefully considering where an individual is habitually resident. The ramifications of the application of one law over another may significantly alter the outcome and value of a particular claim.

Interesting cases may well arise with individuals who lead particularly peripatetic life-styles, students, and people with split residences. Questions will also arises as to *when* an individual becomes habitually resident in a place.

With regards to the application of article 4(3), it is clear that test is a high one. The judgment emphasis that *all* the circumstances of the case need to be considered, including the place where the accident occurred and the residence of those involved. Despite considerable links between the parties and the loss sustained with England, this was not considered to be such that the claim was *manifestly more closely connected* to England, such that English law would apply.