



Welcome to Thirty Nine Essex Street's Domestic and International Personal Injury Newsletter

This is the first edition of Thirty Nine Essex Street's personal injury newsletter, intended to gather in one place a summary and discussion of recent developments in personal injury law (most cases discussed are from the last three months). As well as a review of domestic law, we intend to reflect the increasing importance to personal injury practitioners of cross-border claims by devoting part of each issue to developments in that area, and the first article is a discussion of the continuing fallout from the decision of the ECJ in *Odenbreit* and the coming into force of Rome II. In addition to our well known personal injury expertise (we are Chambers personal injury set of the year for 2009), Thirty Nine Essex Street has a large group of specialist costs practitioners, a number of whom also undertake personal injury work. Judith Ayling provides a review of recent costs decisions likely to be of significance in personal injury litigation. Incidentally, for those who would like to keep a closer eye on developments in the world of costs, the costs team maintains a regularly updated online database of cases at http://www.39essex.co.uk/cost_cases/intro.php. This newsletter also contains short summaries of important developments in a number of areas: liability, quantum, procedure and international litigation. For further information on the Thirty Nine Essex Street personal injury and clinical negligence group, see the Chambers' website at http://www.39essex.com/practice_areas/index.php?area=6. Do send any comments or suggestions for future editions which you have to the dedicated email address, pinewsletter@39essex.com.

Bernard Doherty
Editor

English courts grapple with *Odenbreit* – Bernard Doherty

The decision of the ECJ in *Odenbreit*¹ permits an injured claimant to bring a claim against the wrongdoer's insurer in the court of the claimant's domicile. The case is by now well known and much relied on. The right is subject to two conditions. First, the insurer being sued must be domiciled in a Member State of the EU. Secondly, the direct action against the insurer must be permitted by the "national law".

The second condition caused a certain amount of head scratching since the ECJ did not say which national law it had in mind. Was it the law of the court deciding the case, or was it rather the law of the underlying tort or of the insurance contract? The potential importance of the question is shown by the facts of *Thwaites v Aviva Assurances*.² An English tourist was injured in a French adventure park. Relying on *Odenbreit*, he sued the insurers of the adventure park in England. French law presumptively governed the alleged tort and the contract of insurance, and permitted a direct action against an insurer. English was the law of the forum, and of course English law does not permit a direct claim against a wrongdoer's insurer in a public liability case. The claimant, with the weighty support of *Dicey, Morris & Collins*, contended that the question of whether there was a right to sue the insurer was a substantive question and should be decided according to the substantive law governing the issues in the case. The defendant insurer argued that permitting the

¹ *FBTO Schadeverzekeringen NV v Odenbreit* (C-463/06) [2007] E.C.R. I-11321.

² His Honour Judge Matheson QC, Mayor's and City of London Court, 5 February 2010.



insurer to be named as defendant did not change the legal rights of the parties; the insurer could avoid liability by showing either that the insured was not a wrongdoer or that the policy did not cover the liability. Permitting the insurer to be sued directly was merely a procedural convenience. That is how the Louisiana direct action statute has been treated by a number of US State and Circuit courts.

The judge preferred the claimant's arguments. The right to sue an insurer if it exists is a substantive right, and whether it exists is to be tested by reference to the law governing the contract of insurance. Although decided at county court level, this is at least the second decision to the same effect,³ and the issue can probably safely be regarded as settled. In any event, it arises only in older cases. Where Rome II⁴ governs choice of law, Article 18 expressly provides that a direct action against an insurer may be brought if either the law of the tort or the law of the contract of insurance permit such an action.

Another round of skirmishing between claimants and insurers in cross-border personal injury claims came to an end with the decision of the Court of Appeal in *Maher v Groupama Grand Est*.⁵ The claimants were UK domiciliaries injured in a road traffic accident in France when their car was hit by an out of control van driven by a French domiciliary. The case pre-dated Rome II. Relying on the *Odenbreit* jurisdiction, the claimants sued the French driver's insurer in England. The defendant did not dispute jurisdiction, but contended that damages and interest should be determined according to French law as the law of the insurance contract. The usual rule in pre-Rome II tort cases, of course, is that English courts treat the assessment of damages as a procedural matter and thus governed by English law regardless of any foreign law governing substantive issues in the case.⁶ The defendant in *Maher* argued, however, that the usual rule was inapplicable in direct claims against insurers. They should be characterised as claims in contract, and since the only contractual liability which the insurer could have is to indemnify the insured wrongdoer against the judgment of a court in France (no other jurisdiction being available against the French driver) the only damages which an English court can award are the sum which a French court would have awarded. The Court of Appeal rejected the argument. While it accepted that in principle the question of whether the direct right of action was available at all was a question for the law of the insurance contract, it noted that the usual English approach to characterising claims was to do so on an issue by issue basis. The amount of money which the insurer had to pay to the claimant was properly characterised as a tortious rather than a contractual issue. Thus the usual English rule that assessment of damages is a matter for the law of the forum applies even in direct claims against insurers. No application for permission to appeal to the Supreme Court has been made.

An interesting secondary issue in *Maher* was whether statutory interest under section 35A of the Senior Courts Act 1981 or section 69 of the County Courts Act 1984 is available where the substantive issues in the case are governed by a foreign law. It was held that it is, because those sections create procedural powers in the court to award interest rather than substantive rights to interest. Any substantive right to interest under a relevant foreign law may also be relied upon, however, and an English court may adjust the sum it awards in its discretion under statute to take into account such substantive rights.

The issues in *Thwaites* and *Maher* are largely relevant only to pre-Rome II cases. The courts have just begun to grapple with that instrument and a number of questions will no doubt fall for decision over the next year or two.⁷ The convoluted commencement provisions should soon be considered. Article 15(c) makes the assessment of damage a matter for the substantive governing law. It therefore reverses the common law position re-stated in *Harding v Wealands*.⁸ Quite how broad the scope of that rule is, however, is likely to be contentious, as will the question of whether Recital (33) to Rome II and/or any of the provisions in the Motor Insurance Directives mitigate the effect of Article 15(c).

³ See also *Jones v Assurances Generales de France (AGF) SA*, His Honour Judge Birtles, Mayor's and City of London Court, 31 July 2009.

⁴ The official shorthand for Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

⁵ [2009] EWCA Civ 1191 (on appeal from the decision of Blair J at [2009] EWHC 38 (QB)). See also *Knight v Axa Assurances* [2009] EWHC 1900 (QB).

⁶ *Harding v Wealands* [2007] 2 A.C. 1.

⁷ See the discussions of *Jacobs v MIB* [2010] EWHC 231 (QB) and of the German case in the International In Short section below.

⁸ [2007] 2 A.C. 1.



A Costs Update – Judith Ayling

The Jackson review of costs in civil litigation is taking the headlines and there is much discussion of what the future may hold. As yet, of course, we do not know which recommendations will be implemented and which not, though we do know that the lobbying started almost before the report was published. Some of the recommendations at least would require primary legislation (e.g. the recommendation that success fees and ATE premiums should cease to be recoverable inter partes) which means parliamentary time, which may be at a premium in an election year. So while practitioners are justified in having one eye on the future, the other should be kept firmly on the present. The courts continue to produce a stream of significant costs decisions. Here is a review of some recent cases likely to be relevant to those engaged in personal injury litigation.

The court looked again at success fees in non-RTA cases in *McCarthy v Essex Rivers Healthcare NHS Trust*.⁹ A success fee which had been set at 100% when a clinical negligence claim was first taken on under a CFA was reduced on assessment to 80%. This decision was upheld on appeal. *Callery v Gray*¹⁰ has usually been seen as offering general support for those solicitors who sign up clients to CFAs with very little information and a high success fee. *McCarthy* is therefore significant in doubting the broad applicability of any such principle. Mackay J said that *Callery* was after all concerned with low value road traffic cases where a superficial initial consideration of the bare circumstances will usually lead to a reasonably informed risk assessment, quite unlike complex clinical negligence cases. While it was right that there was nothing in *Callery* which prevented an early CFA the court would look with care at what was agreed when considering the question of reasonableness and any doubt was to be resolved against the receiving party. In addition, significant weight was placed on the dicta in *KU v Liverpool City Council*,¹¹ which, whilst not permitting the imposition by the court of a staged success fee, did say that if a single success fee were selected it would not be possible to justify so high a success fee. In *McCarthy*, the solicitor's system allowed the manifestly hopeless cases to be discarded at an early stage. All cases left after this cull were treated as 50/50 cases. Where an early termination clause was present in the CFA – as it almost invariably is – it was open to the solicitor as time went by to discard cases which came to be seen as having worse than 50/50 prospects, and they would want to do that at as early a stage as possible because they would have to write off profit costs in those cases. That would leave them with an improved basket of cases which would include claims with prospects of 50-80%, but which would still carry a 100% uplift. 90% of those cases presented to the defendant's solicitors succeeded. 100% was too high and the reduction to 80% was warranted. *McCarthy* should be read against the earlier decision of Jack J in *Oliver v Whipps Cross University Hospital NHS Trust*¹² to restore a success fee of 100% on appeal. *Oliver* concerned the same firm of solicitors and the same CFA, entered into at a similarly early stage, but counsel in the case had provided a full note explaining and justifying the early risk assessment, and Mackay J said that he believed that Jack J had understated the effect of the absence of a staged success fee (see *KU* above).

The Court of Appeal has had cause to look again at costs decisions made under CPR 44.3 (the court's discretion and circumstances to be taken into account when exercising its discretion as to costs). There is now a welter of cases on CPR 44.3, and the courts have specifically deprecated excessive reliance on previously decided cases when the exercise of discretion often turns peculiarly on the facts of the claim. Despite that warning the following bear a careful reading.

First, two cases turning principally on "conduct" under CPR 44.3(4)(a) and 44(3)(5). In *Widlake v BAA Ltd*,¹³ the Court of Appeal held that in a case of misconduct the court was entitled to deprive a party of costs by way of punitive sanction. It has often been said that a party should not be deprived of its costs unless there is some causative link between the party's conduct and the costs which the other side wishes to see reduced, but *Widlake* goes further than this. The claimant brought a PI claim after a tripping accident and liability was admitted. There was a dispute as to the extent of the back pain caused by the accident. The judge held that the claimant had deliberately concealed the true position. She

⁹ High Court 13 November 2009 Mackay J sitting with assessors.

¹⁰ [2002] UKHL 28, [2002] 1 W.L.R. 2000.

¹¹ [2005] EWCA Civ 475.

¹² [2009] EWHC 1104 (QB).

¹³ [2009] EWCA Civ 1256.



nonetheless just beat a part 36 payment of £4,500. The claimant appealed against a decision that she should pay the defendant's costs. The first question, as ever, was who had won. The claimant had won in that she had been awarded damages and beaten the part 36 payment. Exaggeration was nonetheless conduct which the court could take into account under CPR 44.3(4), looking at the definitions of "conduct" in 44.3(5), so that the general rule that the winner was entitled to costs should be disapplied, and as above in a case of misconduct the court was also entitled to deprive a party of costs by way of punitive sanction. But there is a difference between an exaggerated claim and a concocted claim and judges must be astute to measure how reprehensible the conduct is. The correct order was no order as to costs. This case is worth noting also for its consideration of *Molloy v Shell UK Ltd*,¹⁴ which it was said must be read in the light of *Shah v Wassim Ul Haq*¹⁵: there is no general rule of law that the dishonest exaggeration of a genuine claim would result in the dismissal of the whole claim.

In *Sulaman v Axa and Direct Line*¹⁶ the Court of Appeal applied *Widlake*. The insurers argued that the Ms Sulaman had participated in a joint design to defraud. The claim against her was dismissed but she was awarded only one third of her costs of £450,000. She appealed. It was held that the judge had been entitled to express his disapproval of her lies quite apart from their effect on the trial process even though she was not found to be party to common fraudulent design.

Finally, in *Sonmez v Kebabery Wholesale Limited*¹⁷ the Court of Appeal considered the question "How does one apply the general rule that costs follow the event where the defendant in personal injury litigation admits primary liability, but then raises an issue of contributory negligence in which his part 36 offers are closer than the claimant's to the eventual apportionment of liability made at the trial?" The judge at first instance ordered the claimant to pay the defendant's costs of a preliminary issue on contributory negligence where he had been found 20% contributorily negligent but had insisted throughout that he was not to blame at all and had rejected a number of offers to settle. The defendant asserted that the claimant's failure to make any offer at all was conduct which should be penalised under CPR 44.3(4)/(5). The Court of Appeal held that the claimant had beaten such offers as the defendant had made, the best of which was 75/25, and the claimant's failure to make any offer was not such on the fact of the case as to cause the court to depart from the principle that the winner should have his costs. The correct order was that the defendant should pay the claimant's costs of the preliminary issue: *Onay v Brown*¹⁸ applied.

¹⁴ [2001] EWCA Civ 1272.

¹⁵ [2009] EWCA Civ 542.

¹⁶ [2009] EWCA Civ 1331.

¹⁷ [2009] EWCA Civ 1386.

¹⁸ [2009] EWCA Civ 772.



Liability in short - Caroline Allen

Voluntarily undertaken activities with element of risk

Two recent decisions may be seen to demonstrate an increased reluctance by the courts to impose liability in the event of injury arising from voluntary activities involving an element of risk. In *Uren v Corporate Leisure (UK) Ltd*,¹⁹ the claimant suffered serious personal injury after diving head first into an inflatable pool containing approximately 18 inches of water as part of a relay race at a fun day held by his employer, the second defendant. It was held, on the preferred evidence of the first defendant's risk management expert, that the risk of injury posed by the pool was small, and so neither the first nor second defendant had been obliged to neuter the game of much of its enjoyable challenge by prohibiting head first entry. In his ruling Field J emphasised the importance and benefit of enjoyable competitive activities, noting that they are rarely risk free and that a balance has to be struck between the level of risk involved and the benefits the activity confers on the participants and so society as a whole.

In a similar vein it was held in *Parker v TUI UK Ltd*²⁰ that there is no duty upon a tour operator to repeat simple warnings given with clarity or to point out such obvious dangers as ice on the road and the relative safety of snow at the sides when dealing with rational adults on a winter sports holiday. Longmore LJ emphasised that "so to hold would only encourage potential claimants to believe that whenever an injury occurs someone must be to blame. That is not what the law of negligence is about." The claimant had sustained injury as a result of her failure to follow clear instructions to dismount her toboggan at the end of a run and walk the last stretch of a road which she deemed to be icy, notwithstanding the fact that there was snow to the sides of the road which she could have chosen to walk on. In attempting to toboggan the last part of the road she lost control, crashed and suffered serious leg injuries. The Court of Appeal upheld the trial judge's finding that there had been no breach of duty on the part of the tour operator.

Standard of care for emergency drivers Two recent rulings concerning negligence by police drivers have provided contrasting outcomes and no very clear guidance on the standards to be expected in often difficult circumstances.

In *Craggy v Chief Constable of Cleveland Police*²¹ the Court of Appeal held that there had been no culpable want of care on the part of a police driver responding to an emergency call who had approached a junction with poor visibility at approximately 20 mph above the speed limit with a green light in his favour and had come into collision with another emergency vehicle which had entered the junction against a red light. Overturning the first instance decision of 1/3 contributory negligence, Owen J held that the police driver could not reasonably have foreseen the possibility of other traffic entering the junction against a red light, especially as, critically, he had taken the appropriate steps to warn other of his approach by displaying emergency lights and sounding his siren. Accordingly, it was held that the trial judge had erred in setting an unreasonably high standard against which to judge the police driver's driving.

One might wonder whether the Court of Appeal fell into exactly the same trap in *H v Thames Valley Police*,²² in which a police officer was held negligent for misjudging the distance the claimant needed to dismount his motorcycle in safety following a pursuit at speeds of up to 100 mph. After trying and failing to escape, the claimant injured his leg in dismounting when it became trapped under the front wheel of the police car, which was approaching at a slow speed in an unlit area. It was held, Pill LJ dissenting, that in allowing only approximately 3 feet for the dismount, the police driver had made a negligent misjudgement, albeit not one of a serious degree. There was contributory negligence of 60%, however, on the grounds that the motorcyclist's conduct had led to the events which followed and that he should therefore bear a greater share of responsibility for what occurred.

Pedestrian not negligent for standing on the pavement

Finally, a welcome decision for pedestrians in *Osei-Antwi v South East London and Kent Bus Co. Ltd*.²³ in which the Court of Appeal held that the trial judge had been wrong to find that the claimant, who had been standing several inches back from the edge of the road on a designated pavement area, was 1/3 contributorily negligent for injury sustained when the rear end of a bus mounted the pavement and collided with her.

¹⁹ [2010] EWHC 46 (QB).
²⁰ [2009] EWCA Civ 1261.

²¹ [2009] EWCA Civ 1128.

²² [2010] EWCA Civ 5.

²³ LTL 19/1/2010 Extempore.



Quantum In Short - Rebecca Drake

What conduct by claimant will break chain of causation?

In *Spencer v Wincanton Holdings Ltd*,²⁴ an employee suffered an accident at work in which his knee was injured. Though the injury seemed minor at first, it led to an amputation above the knee three years later. The employer accepted liability for both the original injury and the resulting amputation. Eight months later, the employee was filling his car with petrol. He failed to use sticks or his prosthesis and fell over as a result. He suffered further injury, and became permanently confined to a wheelchair. The Court of Appeal was faced with the question of whether the second accident amounted to a break in the chain of causation. The test laid down by the House of Lords in *McKew v Holland and Hannen & Cubitts (Scotland) Ltd*²⁵ was whether the conduct of the claimant was unreasonable. The trial judge held not, although he reduced damages attributable to the second accident by one third to reflect the claimant's contributory negligence. The problem for the Court of Appeal was that the word "unreasonable" can indicate anything from out and out irrationality to mere incaution, and before deciding whether the claimant's conduct in this case was unreasonable it was necessary to consider more closely the nature of the conduct which should prevent a claimant attributing subsequent damage to the original tort. The answer, it was held, will ultimately be guided by ideas of fairness. Has the further injury been in substance brought about by the claimant and not by the tortfeasor? The degree of unreasonableness required is very high. The Court of Appeal agreed with the trial judge that in the present case the claimant's conduct was not unreasonable in the necessary sense. The finding of contributory negligence was undisturbed.

When is credit given for care which would have been provided but for tort ?

In *Sklair v Haycock*²⁶ Edwards-Stuart J considered the care claim of a claimant with Asperger's syndrome. The claimant was injured in a RTA and suffered both psychological injuries and physical injuries affecting his mobility. At the time of the accident the claimant was 46 and his father, who was his principal carer, was 78. The claimant had, however, led a relatively independent life until the time of the accident, after which he required 24 hours of care every day. One of the issues for the court related to the care which had been provided by the claimant's father, which several family

members stated they would have carried on with in the event of claimant father's death: would the claimant have to give credit for this care? The court distinguished between care, the costs of which would have been borne by the claimant in any event, and care provided out of love and affection. In this instance, the care was provided out of love and affection and accordingly no credit was required to be given in respect of it.

Mesothelioma award

The decision in *Fleet v Fleet*²⁷ is a by now rare example of assessment by a High Court Judge of damages in a mesothelioma case. In addition to general respiratory disability the claimant had suffered brachial plexus infiltration by the tumour which caused him to lose the use of his right arm. This factor brought the case towards the upper end of the JSB bracket of £52,500 to £81,500. Mackay J assessed damages for PSLA at £77,500.

Procedure in Short - Alexis

Hearnden

Limitation after *Horton v Sadler*

In *McDonnell v Walker*,²⁸ the Court of Appeal considered applications to disapply the limitation period under section 33 of the Limitation Act 1980 in the light of the decision in *Horton v Sadler*.²⁹ The background is well known. The old rule was that if one set of proceedings were started within the limitation period but not brought to a determination on the merits (usually because they were struck out for some reason) then a claimant could not rely on section 33 to justify a second set of proceedings commenced outside the limitation period: *Walkley v Precision Forgings Ltd*.³⁰ The rule in *Walkley*, long considered wrong, was laid to rest by the House of Lords in *Horton*. That left a number of apparently dead cases, struck out before the decision in *Horton*, with at least a hope of resurrection, usually to the benefit of the claimant's solicitor's professional indemnity insurers. In *McDonnell*, the first claim was struck out when the claim form was served a day late in August 2004. The decision of the House of Lords in *Horton* was in June 2006. The second claim form was issued in April 2008. The judge disapplied the limitation period. He concentrated largely on the 22 months delay between the decision in *Horton* and the issue of the second claim form. The Court of Appeal, however,

²⁴ [2009] EWCA Civ 1404.

²⁵ [1969] 3 All ER 1621.

²⁶ [2009] EWHC 3328.

²⁷ [2009] EWHC 3166 (QB).

²⁸ [2009] EWCA Civ 1257.

²⁹ [2006] UKHL 27, [2007] 1 A.C. 307.

³⁰ [1979] 1 W.L.R. 606.



allowed the defendant's appeal. All delay was held to be potentially relevant, whether within the primary limitation period or outside it, and whether before or after the decision in *Horton*.³¹ The key question in any section 33 application was likely to be forensic prejudice. In the present case, notwithstanding an admission of liability, there was substantial prejudice. Few details of the quantum claim had been notified by the time the first claim was struck out. In the second claim, quantum was put at a high level and included claims never intimated at an earlier stage. The ability of the defendant to challenge these claims had been significantly prejudiced by the passing of time. Much of the delay on the part of the claimant was without any real excuse. In those circumstances, particularly given the claimant's professional negligence claim against his former solicitors, the balance came down in favour of the defendant.

Surveillance evidence disallowed where amounted to ambush Where a defendant disclosed surveillance footage 31 days before trial Swift J held that disclosure amounted to an "ambush" and the delays which the late disclosure would cause (and the vacation of the trial date) were contrary to the overriding objective³². The claimant complained not only of delay but of the quality of the footage, gaps in the supporting witness statements and the paucity of time with which to respond to the evidence before trial. Swift J said that the problems with the footage and the history of the case generally need not have been fatal to the application if there had been months to trial. However, any disadvantage to the defendant caused by not being permitted to rely on the footage was entirely of its own making.

Need for third party to be represented at trial of main claim In *Tantera v Moore*,³³ the third party had been joined rather late. The judge held that since, as against the claimant, the third party and the defendant had an identity of interest, the trial of the main claim could take place without the third party being represented, since the defendant would in effect represent his interests. The Court of Appeal disagreed. The trial of the main claim could result in a finding of negligence against the third party. Such a finding was as serious against a man of business as against a professional. "He cannot defend himself as he wants to defend himself; he is not on an

equal footing."³⁴ The third party had to be permitted to be represented at trial.

Effect of revised part 36 offer In *Whitstance v Valgrove Ltd*³⁵ the circuit judge held that if a claimant, having made a part 36 offer, then makes a revised part 36 offer, he is intending to rely on the latter and is implicitly giving notice that he is withdrawing the first offer. The judge commented that it would undoubtedly be better to say, for the avoidance of doubt, that the previous offer is withdrawn or amended, but the only sensible interpretation of the later offer is that it replaces the previous one. If an offeror does not make a revised offer, he must take positive steps to withdraw the offer by serving written notice pursuant to CPR 36.3(7).

International in Short - Bernard Doherty

New case on *Odenbreit* In *Vorarlberger Gebietskrankenkasse v WGV-Schwäbische Allgemeine Versicherungs AG* (C-347/08),³⁶ the ECJ considered further the scope of the *Odenbreit* jurisdiction. The claimant was an Austrian social security body ("VGKK") which had paid benefits to a person injured in a road traffic accident in Germany. Pursuant to a statutory right of subrogation, VGKK sued the insurer of the driver responsible for the road traffic accident. It started proceedings in Austria, claiming to be an injured person and thus entitled to bring the claim in its home courts. The ECJ said not. The favourable rules of jurisdiction for claims against insurers are for the benefit of those considered economically and socially the weaker party. An injured individual would fall within that class, but VGKK fell outside it. The court indicated, however, that if the assignee was itself a weaker party, the special jurisdiction may be available. The heirs of a person killed in an accident was an example given. Presumably, dependants with a claim under the Fatal Accidents Act 1976 would also fall within the category "weaker parties."

German case on Rome II commencement provisions As practitioners in the area are well aware, the commencement provisions of Rome II are

³¹ Reliance was placed on *Donovan v Gwentys* [1990] 1 W.L.R. 472.

³² *O'Leary v Tunnelcraft Ltd* [2009] EWHC 3438 (QB).

³³ [2009] EWCA Civ 1393.

³⁴ Ward LJ at paragraph 29.

³⁵ His Honour Judge Holman, Manchester County Court, 17 September 2009, reported on Lawtel on 12 October 2009.

³⁶ (C-347/08).



unclear. Article 31 applies the Regulation to events giving rise to damage after it enters into force. Ordinary European rules of interpretation suggest it entered into force on 20 August 2007. Article 32, however, provides that the Regulation applies from 11 January 2009. The majority academic opinion in this country seems to favour making the Regulation apply to accidents after 20 August 2007 but only if the claim form was issued after 11 January 2009. The Bundesgerichtshof (the German Federal Court), however, has concluded that Rome II applies only to events giving rise to damage after 11 January 2009, although it gave no detailed reasons for its conclusion.³⁷

Rome I: new choice of law rules in contract

Rome I,³⁸ the new choice of law regime in contract, entered into force on 17 December 2009, and will supersede the Rome Convention. European legislators were apparently not content with the ambiguous commencement provisions in Rome II, so included some in Rome I as well. It originally suggested at one place that it would apply to contracts made on or after 17 December 2009 and at another that it would apply only to contracts made after that date. The position has now been clarified by a corrigendum, revising Article 28 to make clear that Rome I applies to contracts made “as from” i.e. on or after 17 December 2009.³⁹

New Lugano Convention Jurisdiction and enforcement of judgments in civil and commercial matters involving an EU Member State and Iceland, Norway and/or Switzerland will now be governed by the new Lugano Convention, the terms of which are closely modelled on Brussels I (Council Regulation 44/2001).⁴⁰ The necessary amendments to the Civil Jurisdiction and Judgments Act 1982 and the CPR are contained in the Civil Jurisdiction and Judgments Regulation 2009,⁴¹ and came into force on 1 January 2010.

Rome II and MIB claims The High Court has just considered the relationship between the obligations of the Motor Insurers’ Bureaus to satisfy claims arising out of

accidents in other European Economic Area (“EEA”) countries and the choice of law rules in Rome II. The MIB is the body through which the UK government satisfies certain of its obligations under European law (chiefly under the second and fourth motor insurance directives) to ensure that the victims of cross-border road traffic accidents are properly compensated. The domestic instrument implementing the relevant obligations under the fourth directive is the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 (“the 2003 Regulations”).⁴² Regulation 13(2)(b) of the 2003 Regulations provides that where a person resident in the UK is injured in another EEA state and it is impossible to identify the vehicle or find an insurer, then the injured person may claim against the MIB and the MIB is obliged to pay compensation “as if ... the accident had occurred in Great Britain.” If the accident had occurred in Great Britain, of course, the law governing the claim would probably be the law of one or other part of Great Britain. In *Jacobs v MIB*,⁴³ the claimant was a UK resident injured by an uninsured driver in Spain. He sought a declaration that he was entitled to damages under regulation 13(2)(b) assessed in accordance with the law of England and Wales. The MIB contended, however, that the case was governed by Rome II, and that was not controversial for the purposes of the preliminary issue, and that consequently Spanish law as the law of the place where the accident happened was the applicable law. Since by article 15(c) of Rome II the applicable law governs *inter alia* the assessment of damages, the defendant contended that damages must be assessed in accordance with Spanish law. Owen J held that there was an inconsistency between the 2003 Regulations and Rome II, and that Rome II must prevail since a rule of European law will prevail over a rule of national law. The damages were therefore to be assessed according to Spanish law. As an aside, the accident happened on 19 December 2007. The point that Rome II did not apply because the accident was too early does not seem to have been taken.

³⁷ See case Case Xa ZR 19/08 at paragraph 17.

³⁸ Full title is Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6).

³⁹ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:309:0087:0087:EN:PDF> for the corrigendum.

⁴⁰ For the text of the new Lugano Convention, go to <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007D0712:EN:HTML>.

⁴¹ SI 2009/3131.

⁴² SI 2003/37.

⁴³ [2010] EWHC 231 (QB).



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Bernard Doherty undertakes all kinds of personal injury work, but has a particular speciality in international cases. He is the lead author of the recently published *Accidents Abroad: International Personal Injury Claims* (Sweet & Maxwell, 2009) and was on the winning side in *Maher* and the losing side in *Thwaites*. View Full CV at <http://www.39essex.com/members/profile.php?id=49>



Judith Ayling undertakes a wide range of personal injury work, and acts for both claimants and defendants. She also has a substantial practice in the law of costs and often advises and acts in cases which combine both areas of expertise. In addition she practices in clinical negligence. She is a member of the Attorney-General's B panel. View Full CV at <http://www.39essex.com/members/profile.php?cat=2&id=63>



Caroline Allen undertakes a wide variety of personal injury work, regularly providing advice and representation in high value actions. Workplace claims form a significant proportion of her practice in this area and have included claims involving work-related stress, industrial deafness and upper arm RSI injuries. She has represented interested parties at inquest hearings and acted for claimants before the CICAP. View Full CV at <http://www.39essex.com/members/profile.php?cat=2&id=77>



Alexis Hearnden undertakes a wide range of personal injury work. She has a particular interest in employers' liability cases and regularly acts for employers and employees. Clinical negligence now represents a growing part of Alexis' practice. View Full CV at <http://www.39essex.com/members/profile.php?cat=2&id=79>



Rebecca Drake was a pupil at Thirty Nine Essex Street from 2008-9, during which time she was awarded a distinction in her LLM, in which she specialised in insurance law. She joined Chambers as a tenant in October 2009 and now does personal injury cases for claimants and defendants and already has experience of international litigation. View Full CV at <http://www.39essex.com/members/cv.php?id=89>

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