Accidents Abroad: English Claimants, Foreign Insurers and Applicable Law

Case Note: *B v B* [2008] 29 July (QBD, Liverpool District Registry) (unreported)

Introduction

B v B arose out of a road traffic accident in Spain. The Claimants were a mother and her two children. The Second Claimant, a child, sustained very serious spinal injuries. The Claimants were passengers in a Spanish hire vehicle driven by the Defendant who was the husband of the First Claimant and the father of the Second and Third Claimants. The Claimants and Defendant were British nationals and were domiciled in England. At the time of the accident they were commencing a 7 night holiday to Spain (travelling to stay in private rental accommodation). The Defendant had a Spanish insurance policy. The Defendant drove negligently into the path of another vehicle driven by a Spanish driver. The Defendant was on the wrong side of the road at the time and there was a suggestion (albeit unsupported by any evidence) that he had believed that he had the right of way on the left hand side of the road (as he would in the United Kingdom). The Defendant conceded that he was negligent and judgment was entered against him (on a 100% basis). The Claimants argued that English law applied. The Defendant's insurers contended that Spanish law applied. At the case management stage of the proceedings it was determined that the question of applicable law should be tried as a preliminary issue. The judgment on the preliminary issue provides important guidance on the proper approach to sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995 and the relevance, if any, of a foreign insurance policy following the judgments in *Harding v Wealands* [2005] 1 WLR 1539 (CA); [2007] 2 AC 1 (HL(E)).

Legal framework

Private international law has long recognised a distinction between the substantive and the procedural. The substantive issues in any given set of proceedings are determined by reference to the applicable law (whatever it might be). The procedural issues are, by contrast, determined by the law of the forum (that is, the law of the Court seised with jurisdiction). The substantive issues will include issues of primary liability (together with issues like vicarious liability and will usually include, by reason of the Foreign Limitation Periods Act 1984, questions of limitation). Matters of evidence and procedure are procedural and are matters for the law of the forum (see, section 14(3)(b) of the Private International Law (Miscellaneous Provisions) Act 1995). The dividing line between the substantive and the procedural is not always easy to identify with respect to every issue between the parties. Historically, there have been a number of grey areas. To take an obvious example, there has been conflicting academic opinion on whether contributory negligence is a substantive or procedural matter. As a result of very recent first instance (County Court) case law it has been determined that contributory negligence is a substantive matter to be dealt with by reference to the applicable law: see, *Dawson v Broughton* (2007) 151 Sol J 1167 applying some *obiter* comments by Lord Rodger during the course of his speech in *Harding Wealands* [2007] 2 AC 1 (HL(E)).

Quantum issues have, until comparatively recently, been another grey area, although the English courts have developed an uneasy compromise to deal with this. The starting point is that the recoverability of a particular head of loss is dealt with as a substantive matter and is dealt with by the applicable law. Once it is determined, by reference to the applicable law, that a head of loss is recoverable, then the assessment or quantification of the Claimant's claim under that head of loss is regarded as procedural and, therefore, is dealt with by reference to English law (the law of the forum). An example of how this works in practice: A's claim is to be determined by reference to Spanish law, but is being litigated in the English courts. Accordingly, the applicable law is the law of Spain, whereas the law of the forum is English law. In order to prove to the satisfaction of the English court the

recoverability of the items claimed on the Schedule of Losses and Expenses A provides a copy of the Schedule to a Spanish qualified lawyer who provides a succinct (CPR compliant) report identifying all of the heads of loss on the Schedule which would be recoverable according to Spanish law. The English court then quantifies the loss under each recoverable head of claim in the usual (English law) manner (cf. the changes that will be made to this by article 15(c) of the Rome II Regulation (Regulation (EC) No 864/2007).

Applicable law was (potentially) a matter of considerable importance in *B v B*. The Second Claimant, who was nearly 4 years of age at the time of the accident, sustained a fractured pelvis and damage to his spinal cord. He had suffered extensive neurological injury and was likely to have a very significant future loss of earnings claim. Spanish law experts were instructed by the parties and there was a difference of opinion as to the recoverability of the child Claimant's future losses. In the light of this the Defendant's insurer's stance was:

a. that Spanish law should be applied; and, thereafter,

b. that its own expert's opinion as to the (ir)recoverability of future loss of earnings should be preferred; and,

c. that the Second Claimant should not, therefore, be entitled to the award of future loss of earnings to which he would be entitled if English law were applied.

It was against this background that the preliminary issue in *B v B* was fought. How was the High Court to determine the applicable law? The basic framework is set by statute. Section 11 of the Private International Law (Miscellaneous Provisions) Act 1995 is admirably clear and provides as follows:

"*Choice of applicable law: the general rule.*

11(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.

(2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being—

(a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury ... ;

(3) In this section "personal injury" includes disease or any impairment of physical or mental condition.

Accordingly, the general rule is that the law to be applied by the English Court is, "*the law of the country in which the events constituting the tort or delict in question occur*": sometimes referred to in the textbooks and case law as the *lex loci delicti*. In the light of this the statutory presumption was that Spanish law should be applied to *B v B*. The beguiling simplicity of section 11 is, however, complicated by section 12 of the 1995 Act which provides:

Choice of applicable law: displacement of general rule.

12(1) If it appears, in all the circumstances, from a comparison of—

(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and

(b) the significance of any factors connecting the tort or delict with another country,

that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the

tort or delict in question or to any of the circumstances or consequences of those events."

The presumption that Spanish law applies can be displaced under section 12 of the 1995 Act if, by comparison of the factors linking the dispute with Spain (the place where the harmful event occurred) with England (the forum) it appears that it would be "*substantially more appropriate*" to apply English law. The comparison is generally carried out with regard to: (a) the parties; (b) the events; and, (c) general circumstances. In its consideration of section 12 the Court is required to conduct a three-stage exercise:

a. Stage one: identifying the issue to which it is suggested the general (section 11) rule is not to be applied (for example, the issue of quantum);

b. Stage two: identifying the factors which connect the tort to the place where it happened and the factors which connect the tort to the forum (England);

c. Stage three: considering the significance of these factors (as they connect the tort to each jurisdiction) to determine whether section 12 should be applied.

Accordingly, the presumption under section 11 of the 1995 Act is that Spanish law is to apply, but the Court has a wide discretion to disapply this and to apply English law instead. It is usually the third stage of the exercise that proves most controversial.

Case law on sections 11 and 12

There is an abundance of English authority in which section 12 has been applied to displace the presumption that the *lex loci delicti* applies (with the result that English law has been applied instead).

Edmunds v Simmonds [2001] 1 WLR 1003 (QBD) was a claim for damages for personal injury arising out of a road traffic accident in Spain in which the Claimant suffered severe head injuries. The Claimant required constant care for the rest of her life. The Claimant and Defendant were both English and on holiday together in Spain when the accident occurred. The Defendant was also injured in the accident. The Defendant was an experienced driver and had previously lived in Spain. She was travelling with

the Claimant in the same car. The Defendant's version of events was that, as she turned into a bend, she saw a lorry straddling the centre of the road approaching head on. There was no space to pass it on her side of the road so she steered to the left to pass it on the outside and then braked. She collided with the right-hand front of the lorry. A driver who had been behind the lorry gave a statement that the lorry had been on the correct side of the road as it went around the bend and a car skidded across the road into it. The lorry driver's statement was much the same. The insurers of the vehicles involved were Spanish. The Defendant's insurer's argument on a preliminary issue as to applicable law was that both vehicles were Spanish, one driver was Spanish, both insurers were Spanish and that, therefore, the significant connection was with Spain (the section 11 presumption should not be displaced). This argument was rejected by Garland J who regarded the fact that the insurers were Spanish (as was the hire vehicle) as being of little relevance given that hirers/insurers of vehicles in tourist areas would reasonably contemplate that those hiring their vehicles would have travelled from overseas. Garland J regarded the factors connecting the dispute with England as "*overwhelmingly*" outweighing the factors which linked the dispute with Spain (given the domicile and nationality of the parties and the fact that they were only on holiday at the time of the accident and that heads of damage (the area of dispute) imported a greater connection with the country of residence).

The decision in *Edmunds v Simmonds* followed the outcome of an earlier decision in which section 12 was also displaced so that English law applied (namely, *Hamill v Hamill* [2000] 24 July (QBD) (unreported, but referred to in the judgment in *Edmunds v Simmonds*)).

Harding v Wealands [2005] 1 WLR 1539 (CA) – a case appealed to the House of Lords, albeit not on the section 11/12 issue: *Harding Wealands* [2007] 2 AC 1 (HL(E)) – concerned a road traffic accident in New South Wales. The Claimant was English. The Defendant, his former partner, was an Australian national. The Court of Appeal determined that the coincidence between the nationality of the Defendant and the location of the accident meant that the general presumption (under section 11)

should not be displaced. However, the following also appears in the judgment of Waller LJ (at p 1550D):

> "*I would fully understand, having regard to the settled relationship, that Mr Harding and Ms Wealands were in, that if they had been on holiday in France when this accident occurred England might have been found to be substantially more appropriate and to have displaced French law*."

In the period since *Harding v Wealands* the following first instance decision again resulted (after preliminary issue trial) in section 11 being displaced so that English law applied: *Dawson v Broughton* (2007) 151 Sol J 1167. In this case the Claimants' claim arose out of a fatal road traffic accident which occurred in France on 22 August 2003. The parties to the action were British nationals, but the Claimants and deceased were domiciled in France and had been living there since the beginning of June 2003. At the time of the preliminary issue hearing (to determine applicable law), the Claimants continued to live in France. The Defendant was domiciled in England. Notwithstanding the domicile of the Claimants at the time of the accident and at the time of the hearing, the Judge concluded that section 12 should be applied and that English law should, therefore, apply.

In comments made (*obiter*) in *Harding v Wealands* [2005] 1 WLR 1539, 1550C-D, Waller LJ suggested that the insurance policy might be of significance in conducting the balancing exercise pursuant to sections 11 and 12 of the 1995 Act. However, the identity of the insurer was regarded as of marginal, if any, significance in *Edmunds v Simmonds* and, post-*Harding v Wealands*, in *Dawson v Broughton* (applying the comments of Garland J in *Edmunds v Simmonds*).

The legislative framework provided by sections 11 and 12 of the 1995 Act will be affected by the Rome II Regulation (EC Regulation 864/2007) when it comes into force (in January 2009). Article 4(2) of this provides, "*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." In the light of this provision the approach that appears to have been taken by English Judges (in the cases referred to above) – achieving the same result by means of section 12 of the 1995 Act – may be regarded as prescient.

Factual considerations in *B v B*

The following facts and matters were relevant and might have been regarded as tipping the balance decisively in favour of the Claimants' argument that section 12 should be applied to displace the section 11 presumption:

a. the Claimants and Defendant lived together in a settled relationship;

b. the Claimants and Defendant were British nationals;

c. the Claimants and Defendant were domiciled in England;

d. the Claimants and Defendant were on a family holiday to Spain at the time of the accident – their residence in Spain was, strictly, temporary;

e. at the time of the accident, the Claimants and Defendant were making their way from the airport to the apartment where they were to stay for a week's holiday (the apartment was owned by the First Claimant's English employer and the Claimants and Defendant were to stay there rent-free);

f. all of the Claimants received medical treatment for their injuries in England. The Second Defendant was likely to have very significant physical and psychological needs which required ongoing medical treatment, care and assistance throughout his life and this would be provided in England;

g. the Defendant hired the index car and arranged insurance for the sum of £85 through Economy Car Hire (an English registered company) and this was done in England prior to departure on holiday.

However, there was, according to the Defendant's insurers, a wrinkle in this analysis. It was the insurer's case that the car hire company was incorporated in Spain and that

the insurers were also incorporated in Spain. The Defendant's case was that these factors – taken together with the place of the accident and the section 11 presumption – meant that Spanish law should be applied. At trial of the preliminary issue, the Defendant emphasised that the burden was on the Claimants to establish that the presumptive rule should be displaced and that section 12 should only be applied where it was "*substantially*" more appropriate to apply English law.

The judgment in *B v B*

The Judge was satisfied that most, if not all, of the factors relevant to the tort connected it more strongly to England than Spain. However, this left the twin facts that: (a) the hire car was Spanish; and (b) the insurance company was also Spanish. Observing that section 12 did not identify as a relevant factor (and in terms) the domicile of the insurer(s), he dealt with these matters in the following way:

> "*The other point which is advanced is that the other vehicle involved in the accident was a Spanish vehicle. That is true and perhaps that is a consequence of the first and main point, that the accident took place in Spain. I do not think that that is a particular consequence in so far as the issues in this case are concerned, although I do take it into account in the general scheme of things. The other factors go beyond the actual happening of the accident. They relate to the vehicle and the insurance. It is pointed out rightly that the vehicle involved was a Spanish vehicle. The contract of hire in respect of that vehicle was with a Spanish company and governed by Spanish law. That, clearly, is a relevant factor which links the whole matter to Spain but, as I think* [the Defendant] *accepted in argument, it is connected to the tort only by way of background to the tort. It is not immediately connected to tort; it is not a cause of the injury. It is merely a background circumstance to it, so it is of some but, in my judgment, of lesser importance. The next issue is that the insurers are Spanish. The defendant argues that this is an extremely important point and makes the point validly that it is important to the parties to that contract of insurance that they should know the basis of any claim that*

might be made against them under it, and which law should be applicable to it. Therefore, they should be able to anticipate confidently that were a claim made under that policy , it would be governed by Spanish law. The immediate consequence of the tort was the injury to the parties and any damage that resulted to vehicles. That is the immediate consequence. Who is liable to pay for that damage through a contract of insurance is, in my judgment, one step removed. Whilst it is of some significance, for that very reason it seems to me that it is not something which is of overwhelming importance. Therefore, I do agree with the comments of Mr Justice Garland in the Edmunds case that the question of insurance, whilst a factor, is not of overwhelming weight. It seems to me, that is an accurate description of the weight which should be attached to

it."

The Judge went on to observe that it was also a relevant consideration that, although the contracts of hire and insurance were Spanish, the arrangements for the same were made from English and they were paid for in English currency by the (English domiciled) Defendant.

The Judge concluded that the general presumption should be displaced. The consequence of this was that English law was to be applied; the preliminary issue was determined in the Claimants' favour.

Conclusion

The Defendant's case at the preliminary issue trial was that *Edmunds v Simmonds* should, in the light of *Harding v Wealands* (and, in particular, *obiter* comments by Waller LJ in his judgment in the Court of Appeal), be treated with caution where it dealt with the significance to be attached to a foreign policy of insurance in the balancing exercise under sections 11 and 12 of the 1995 Act. This argument was rejected by the Judge. *B v B* may chart the way forward for cases of this kind while we await the arrival of Article 4(2) of the Rome II Regulation (EC Regulation 864/2007). In the meantime, the Defendant's insurers in *B v B* have indicated an intention to appeal.

MATTHEW CHAPMAN

1 Chancery Lane