Scott v AIG: The scope of article 4(3) Rome II and the meaning of "the tort/delict"

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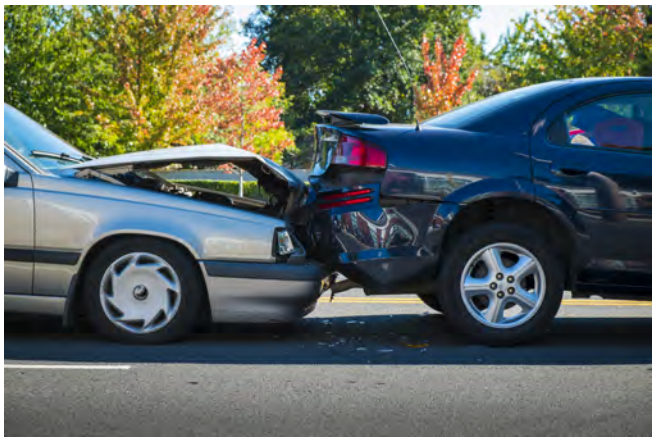
In one of his final judgments before his retirement, HHJ Platts considered the scope of the article 4(3) of Rome II 'escape clause'.

Background

The matter concerned a road traffic accident that had occurred in France in 2015. The claimants, Mr O'Loan and Ms Scott, were on holiday in France and had hired a car which was insured by AIG.



An uninsured French registered vehicle, driven by a Mr Gardare, collided with the rear of the claimant's vehicle causing both claimants to sustain injury.

The proceedings

As Mr Gardare's vehicle was uninsured, Mr O'Loan brought a claim against the MIB under the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003. It was agreed between Mr O'Loan and the MIB that, pursuant to article 4(1) of Rome II, his claim was governed by French law.

However, Ms Scott pursued a claim against AIG (the insurer of the hire vehicle) contending that, pursuant to article 4(3) of Rome II, French law applied. She sought to argue that the tort was manifestly more closely connected to France than England and sought to benefit from the provisions of *Loi Badinter*, which governs liability for road traffic collisions under French law.

This may at first blush appear unusual, however those familiar with the provisions of French law will be aware that by Loi Badinter, liability is imposed upon the drivers of vehicles '*impliqué*' (i.e. implicated or involved) in accidents to compensate the victims of those accidents on a strict liability basis and without the need for proof of fault. Thus although the First Claimant was not alleged to be *at fault* he was nonetheless alleged to be *liable* under French law.

The preliminary issue

The issue before the Court was summarised as follows:

"It is agreed between the parties that Article 4(2) applies since first claimant (in whose shoes the second defendant effectively stands as the insurer of the [hire

vehicle]) and the second claimant were both habitually resident in the England at the time of the accident. Under that provision the law of England would apply and the second claimant would have no cause of action against the first claimant or right of action against the second defendant. ***The issue therefore is whether the second claimant can rely on Article 4(3) to displace the conclusion provided for by Article 4(2)****."*[1]
(Emphasis added)

The matter first came before DJ Iyer who found that French law applied pursuant to article 4(3).

However, following AIG's application for permission to appeal it was conceded by Ms Scott *"that the reasoning of the learned district judge was wrong in certain respects."* [2] Permission to appeal was accordingly granted and it was agreed *"that his decision cannot stand and that"* HHJ Platts *"should consider the issue afresh."*[3]

The law

Article 4 of Rome II 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.

It was agreed between the parties that:

"...the burden is on a party seeking to rely upon it to establish that Article 4(3) applies in any claim to displace the otherwise applicable law. It is also agreed that, as stated by Slade J in Winrow v Hemphill [2014] EWHC 3164 at [42],:

> *"The standard required to satisfy Article 4(3) is high. The party seeking to disapply Article 4(1) or 4(2) has to show that the tort is manifestly more closely connected with a country other than that indicated by Article 4(1) or 4(2)."*[4]

HHJ Platts reminded himself that:

"Slade J also accepted that the factors in Articles 4(1) (the place where the accident occurred) and 4(2) (the common habitual residence of the parties) can be taken into account when considering all the circumstances of the case under Article 4(3) (paragraph 43); and that the link of the consequences of the tort to a particular country is also a relevant factor (paragraph 50)."[5]

He further placed weight on the following summary of the effect of article 4(3) by Linden J in Owen v Galgey [2020] EWHC 3546, at paragraph 61:

"…in my view, there is no additional test of exceptionality and it is therefore not necessary for the court to be satisfied, for example, that the facts of the case are also exceptional or unusual in nature before applying Article 4(3). What is required is the application of the words of Article 4 with an awareness

[1] Paragraph 7
[2] Paragraph 12
[3] Paragraph 13
[4] Paragraph 14
[5] Paragraph 15

of aims of Rome II. The aim of Articles 4(1) and (2) in particular, is to achieve certainty. They will provide the answer in a given case unless they can be displaced. But the Regulation also aims "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 reflects the centre of gravity of the situation." through Article 4(3), albeit this provision will only operate in a clear and obvious case."[6]

Ms Scott placed particular reliance on the judgment of Dingemans J in Marshall v MIB [2015] EWHC 3421 (QB) which shared similar facts to the instant case.

For those unfamiliar with the proceedings:

"Mr Marshall and Mr Pickard were on holiday in France and their Ford Fiesta had broken down on the side of a road. They were standing behind their Fiesta which was being attended to by a breakdown recovery truck. The Fiesta was registered in England and insured by a UK motor insurer. The breakdown recovery truck was registered in France and insured by a French motor insurer, Generali. An uninsured vehicle, driven by a French national, struck the trailer of the Fiesta, which consequently shunted the Fiesta, which then shunted the recovery truck. Mr Pickard suffered serious injuries. Mr Marshall died at the scene.

Mr Marshall's estate brought a claim against i. the MIB under the 2003 Regulations. ii. Mr Pickard (who was insured by RSA); and iii. Generali, the insurer of the breakdown recovery truck. One of the issues that arose was whether French or English law applied to the issue of liability for the claim made by the estate against Mr Pickard. RSA contended that English law applied. Dingemans J held that French law applied."[7]

Ms Scott sought to argue that given the factual similarities between the two cases the Court should apply similar reasoning to that of Dingemans J and find that French law applied.

AIG sought to argue that there *were "important factual differences between Marshall and the present case in particular:*

a. *In Marshall, the driver of the vehicle at fault was a French national. In the present case there is no evidence as to Mr Gardare's nationality;*
b. *There was no pre-existing relationship between Mr Marshall and Mr Pickford whereas here there is a strong pre-existing family relationship between the first and second claimants; and*
c. *In Marshall there was a third vehicle involved namely the breakdown truck. There was no third vehicle involved in this accident."*

The tort / delict

HHJ Platts considered that it was *"important to identify what is meant by "the tort/delict"* in Article 4(3) before considering whether that tort/delict is more closely connected with a country other than England.

Ms Scott contended that the "the tort/delict" was the event which caused the damage irrespective of the causes of action that arise from it. However, AIG contended that *"the relevant tort/delict is the second claimant's cause of action against the first claimant"*[8] however it was observed that;

"that submission involves applying French law in order to determine which law applies. It cannot be the case that in order to determine which law applies to the tort/delict, the court starts by assuming that one country's law applies. That would lead to the rather illogical result in this case that French law is applied to identify the tort/delict but having applied French law for that purpose, the conclusion is that English law applies."[9]

Thus Ms Scott's submissions were preferred and it was held that *"the focus should be on* ***the incident itself and the damage and injury that was caused by it and not the cause of action which arises from it"***

[6] Paragraph 18
[7] Paragraphs 17 and 18
[8] Paragraph 23
[9] Paragraph 23

(Emphasis added) [10]

Accordingly, the words "tort/delict" in the circumstances were found *to "essentially be a reference to the* ***event which caused the damage*** *irrespective of the causes of action that arise from it"* (Emphasis added).

HHJ Platts' judgment offers clarification as to the meaning of "the tort/delict" which had only otherwise been considered by Cranston J when refusing permission to appeal in Pickard [2017] EWCA Civ 17[11] and was thus not binding authority.

Pre-existing relationships

AIG placed considerable weight on the pre-existing relationship between the two claimants, who were in a relationship with each other, as a factor pointing towards the application of article 4(2) and English law.

Of interest HHJ Platts held that:

"In this case there is ***nothing in the relationship between first claimant and second claimant which is relevant to any rights or obligations arising from the accident****. As the respondent submits, the relationship is coincidental. Whilst it is a relevant factor that persons sharing the same habitual residence and having a strong pre-existing relationship might have their disputes governed by the law of their country – in this case, in my judgment, it does not carry the weight that the appellant argues for."*[12]
(Emphasis added)

HHJ Platts analysis appears to suggest that a pre-existing relationship is of particular relevance where that relationship may be relevant to *an obligation* owed by one party to the relationship to another.

The judgment

HHJ Platts dismissed the appeal. He held that:

"Looking at all the circumstances, it is clear that the cause of the second claimant's injury and loss was the collision in France which itself was caused by the uninsured driver of the French vehicle. The first and second claimants were both innocent parties. The only connection with a country other than France is that the parties to this action, the first and second claimants, are both English; that they shared a common habitual residence in England; and they were in a strong pre-existing relationship. Further, the second claimant continued to suffer from her injury after she returned to England.

In my judgment those factors do not amount to a close connection with the tort/delict. The appellant's argument fails to take into account the circumstances of the accident at all.

I therefore consider ***the connection with France to be manifestly closer than the connection with England: the collision was in France; it was between two vehicles registered in France; the damage was caused in France in that the initial injury was suffered in France. Further, the circumstances were such that the claim of first claimant is to be dealt with under French law.****"*[13]
(Emphasis added)

Observations

The judgment offers a useful summary of the factors a Court may consider when determining whether article 4(3) should displace the presumptive applicable law under either article 4(1) or 4(2) of Rome II.

The guidance as to what is meant by "the tort/delict" is of particular assistance to practitioners and it is clear that the focus should be on the incident itself and the damage and injury that was caused by it rather than the substantive cause of action of the presumptive applicable law.

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[10] Paragraph 24
[11] See paragraph 21
[12] Paragraph 26
[13] Paragraphs 28 - 30