Neutral Citation Number: [2010] EWCA Civ 1208

Case No: B3/2010/0635

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(Mr. Justice Owen)
[2010] EWHC 231 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 October 2010

Before :

LORD JUSTICE LAWS
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE RIMER

- -

Between :

CLINTON DAVID JACOBS	**Claimant/ Appellant**
- and -	
MOTOR INSURERS BUREAU	**Defendant/ Respondent**

- -
- -

Mr. Alexander Layton Q.C. and Mr. Philip Mead (instructed by **Russell Jones & Walker**) for the **appellant**
Mr. Dermod O'Brien Q.C. and Miss Marie Louise Kinsler (instructed by **Weightmans LLP**) **for the respondent**

Hearing dates : 7th and 8th July 2010

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Approved Judgment

Lord Justice Moore-Bick :

1. In December 2007 the appellant, Mr. Jacobs, was injured when he was struck by a car driven by a German national, Herr Bartsch, in a car park in Fuengirola, Spain. Mr. Jacobs was and still is a resident of the United Kingdom. At the time of the accident Herr Bartsch lived in an EEA State, possibly Spain or Germany; the car itself was ordinarily based in Spain.

2. The dispute in this case has arisen out of the fact that it has not been possible to identify any insurance undertaking which insured Mr Bartsch or anyone else to drive the vehicle. It is common ground that in those circumstances Mr. Jacobs is entitled to recover compensation for his injuries from the respondent, the Motor Insurers Bureau ("the MIB"), but there is a dispute about whether the amount of that compensation is to be determined by reference to the law of England (where Mr. Jacobs lives) or the law of Spain (where the accident occurred).

3. On 16th December 2008 Mr. Jacobs started proceedings against the MIB to recover compensation under the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 ("the Regulations"). The MIB said that, by reason of the application of the principles of Regulation EEC No. 864/2007 on the law applicable to non-contractual obligations, generally known as "Rome II", compensation was to be assessed in accordance with Spanish law. The material parts of Rome II for present purposes are those contained in Articles 4(1) and (2), which provide as follows:

> "Article 4
>
> *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.
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> (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."

4. On 19th June 2009 Irwin J. made an order by consent for the trial of the following preliminary issues:

> 1. Whether [the MIB] . . . is required to pay compensation to the claimant . . . assessed in accordance with the law in Spain or in accordance with the law of England:
>
> (i) because [Rome II] applies to determine the applicable law in this case; and/or

(ii) because the defendant's obligation to pay compensation is limited to the amount for which the tortfeasor against whom proceedings could not have been brought in England, would have been liable.

2. If Rome II does not apply and the defendant's obligation to compensate is not limited to the amount for which the tortfeasor would have been liable, [whether] the Private International Law (Miscellaneous Provisions) Act 1995 applies to determine the applicable law in this case.

5. The formulation of the preliminary issues no doubt reflected the manner in which the case had been pleaded, but the development of the argument, particularly before this court, leads me to think that it would have been better simply to ask whether the MIB is obliged to pay compensation to the claimant assessed in accordance with the law of England or the law of Spain. That, after all, is the only question of any consequence to which the proceedings give rise.

6. In order to explain how the issue arises it is necessary to describe briefly the position of the MIB and the steps that have been taken both in this country and in the European Union to ensure that compensation is available to persons injured in road traffic accidents.

The Motor Insurers Bureau

7. Since the passing of the Road Traffic Act 1930 it has been obligatory for the user of a motor vehicle on a road in Great Britain to be insured against liability for personal injury caused by or arising out of that use. (The legislation currently in force is that contained in sections 143-145 of the Road Traffic Act 1988.) Most users of motor vehicles could be expected to obtain insurance in compliance with the requirements of the Act, but the possibility remained that a person injured in a road accident might fail to obtain compensation because the driver was uninsured, or could not be traced or because the insurer had become insolvent. In order to avoid that consequence on 17th June 1946 the Minister of War Transport entered into an agreement with the MIB, a company limited by guarantee whose members came to include all insurers authorised to issue policies of motor insurance in the United Kingdom, under which it agreed to satisfy judgments obtained against motorists who had themselves failed to satisfy them as a result of their being uninsured or because their insurers had failed. This became known as the Uninsured Drivers Agreement. The MIB also paid compensation on an ex gratia basis to persons injured in motor accidents in cases where the driver could not be traced, a practice that was placed on a formal footing by the first Untraced Drivers Agreement dated 21st April 1969. Since that date both agreements have been modified and replaced from time to time. The agreements in force at the time of the accident in this case were the Uninsured Drivers Agreement 1999 and the Untraced Drivers Agreement 2003. The scope of the Uninsured Drivers Agreement 1999 is directly related to the obligation to obtain insurance contained in Part VI of the Road Traffic Act 1988. It therefore extends to accidents occurring in Great Britain and Member States of the European Economic Area ("EEA"). The Untraced Drivers Agreement 2003 applies only to accidents occurring in Great Britain.

EU legislation

8. Since 1949 motor insurers in a number of countries have operated what is known as the 'Green Card' scheme, under which the representatives of an insurer in one state handle claims on behalf of an insurer established in another state. The MIB was, and remains, the representative responsible for operating the 'Green Card' system in the United Kingdom. This system provided part of the foundation for legislation put in place by the European Union to ensure that compensation was available for those injured in road accidents regardless of the Member State in which the victim resided or in which the accident occurred.

(a) The First Motor Insurance Directive

9. The first step was taken in April 1972 with the issue of Directive 72/166/EEC, known as the 'First Motor Insurance Directive', the material parts of which for present purposes provided as follows:

"*Article 3*

> 1. Each Member State shall, subject to Article 4, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures.
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> 2. Each Member State shall take all appropriate measures to ensure that the contract of insurance also covers:
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> -- according to the law in force in other Member States, any loss or injury which is caused in the territory of those States;
>
> . . ."

I shall refer to this as "the First Directive".

(b) The Second Motor Insurance Directive

10. On 30th December 1983 the Council of Ministers issued Directive 84/5/EEC, known as the 'Second Motor Insurance Directive', which, among other things, provided for the establishment of guarantee bodies to provide compensation in cases where the vehicle responsible for the injury was uninsured or unidentified. The material parts of the Directive (in the form in which it existed at the date of the accident) provided as follows:

"*Article 1*

> 1. The insurance referred to in Article 3 (1) of [the First Motor Insurance Directive] shall cover compulsorily both damage to property and personal injuries.
>
> . . .

> 4. Each Member State shall set up or authorize a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied.
>
> The first subparagraph shall be without prejudice to the right of the Member States to regard compensation by that body as subsidiary or non-subsidiary and the right to make provision for the settlement of claims between that body and the person or persons responsible for the accident and other insurers or social security bodies required to compensate the victim in respect of the same accident. . . .
>
> 5. The victim may in any event apply directly to the body which, on the basis of information provided at its request by the victim, shall be obliged to give him a reasoned reply regarding the payment of any compensation.
>
> . . .
>
> 7. Each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by this body, without prejudice to any other practice which is more favourable to the victim."

I shall refer to this as "the Second Directive".

(c) The Fourth Motor Insurance Directive

11. A third Directive was issued in 1990, but its provisions are not directly relevant to the issues that arise on this appeal. On 16th May 2000 the European Parliament and the Council of Ministers issued Directive 2000/26/EC, known as the 'Fourth Motor Insurance Directive'. The Directive, which drew heavily on the Green Card system, lies at the heart of the present appeal. Its primary purpose was to make it easier for victims of road traffic accidents to recover compensation by enabling them to pursue claims in their countries of residence against a representative of the insurer. At the same time the Directive required Member States to put in place legislation to give those injured in road accidents a right to make a claim directly against the driver's insurer. In order to provide further support for the system the Directive also required each Member State to establish a compensation body against which the victim could pursue a claim if the insurer's representative failed to respond promptly to the claim or the vehicle was not covered by insurance or could not be traced. I shall refer to this as the 'Fourth Directive'.

12. Under the scheme established by the Fourth Directive the compensation body in the state where the injured person resides provides a person from whom he can recover if the driver's insurer fails to respond promptly to his claim or the driver is uninsured or a relevant insurer cannot be identified. However, the compensation body is not the person ultimately responsible for bearing the loss, having a right to recover from the

compensation body of the state in which the insurer is established (in the case of an insured vehicle) or against the guarantee fund of the state in which the vehicle is normally based (where the vehicle can be identified but there is no insurance) or of the state in which the accident took place (where the vehicle cannot be identified).

13. The following provisions of the Fourth Directive are of particular relevance to this appeal:

> "*Article 1*
>
> Scope
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> 1. The objective of this Directive is to lay down special provisions applicable to injured parties entitled to compensation in respect of any loss or injury resulting from accidents occurring in a Member State other than the Member State of residence of the injured party which are caused by the use of vehicles insured and normally based in a Member State.
>
> . . .
>
> *Article 4*
>
> Claims representatives
>
> 1. Each Member State shall take all measures necessary to ensure that all insurance undertakings . . . appoint a claims representative in each Member State other than that in which they have received their official authorisation. The claims representative shall be responsible for handling and settling claims arising from an accident in the cases referred to in Article 1. The claims representative shall be resident or established in the Member State where he is appointed.
>
> . . .
>
> *Article 6*
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> Compensation bodies
>
> 1. Each Member State shall establish or approve a compensation body responsible for providing compensation to injured parties in the cases referred to in Article 1.
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> Such injured parties may present a claim to the compensation body in their Member State of residence:
>
> . . .
>
> The compensation body shall take action within two months of the date when the injured party presents a claim for compensation to it . . .

. . . Member States may not allow the body to make the payment of compensation subject to any conditions other than those laid down in this Directive, in particular the injured party's establishing in any way that the person liable is unable or refuses to pay.

2. The compensation body which has compensated the injured party in his Member State of residence shall be entitled to claim reimbursement of the sum paid by way of compensation from the compensation body in the Member State of the insurance undertaking's establishment which issued the policy

The latter body shall then be subrogated to the injured party in his rights against the person who caused the accident or his insurance undertaking in so far as the compensation body in the Member State of residence of the injured party has provided compensation for the loss or injury suffered. Each Member State is obliged to acknowledge this subrogation as provided for by any other Member State.

3. This Article shall take effect:

(a) after an agreement has been concluded between the compensation bodies established or approved by the Member States relating to their functions and obligations and the procedures for reimbursement;

. . .

Article 7

If it is impossible to identify the vehicle or if, within two months following the accident, it is impossible to identify the insurance undertaking, the injured party may apply for compensation from the compensation body in the Member State where he resides. The compensation shall be provided in accordance with the provisions of Article 1 of [the Second Directive]. The compensation body shall then have a claim, on the conditions laid down in Article 6(2) of this Directive:

(a) where the insurance undertaking cannot be identified: against the guarantee fund provided for in Article 1(4) of [the Second Directive] in the Member State where the vehicle is normally based;

(b) in the case of an unidentified vehicle: against the guarantee fund in the Member State in which the accident took place;

. . . "

The Fourth Motor Insurance Directive Agreement

14. On 29th April 2002 the compensation bodies and guarantee funds in the Member States entered into an agreement know as the Fourth Motor Insurance Directive Agreement ("the Agreement") for the purposes of implementing the arrangements for which the Fourth Directive provided. The Agreement provided, among other things, as follows:

> "3.4 Save as herein provided, the Compensation Body shall be the sole body responsible for compensating the injured party or his/her legal beneficiaries. It shall however,
>
> — . . .
>
> — apply, when determining liability and assessing compensation, the applicable law of the country in which the accident occurred."

A similar provision is to be found in clause 7.2.

The Regulations

15. The provisions of the Fourth Directive relating to compensation bodies were implemented by the Regulations. (The provisions for direct rights of action against insurers were implemented by the European Communities (Rights against Insurers) Regulations 2002.) Regulation 10 approves the MIB as the compensation body for the United Kingdom for the purposes of the Fourth Directive. The important parts for present purposes are regulation 12(3) and (4) and regulation 13. Regulation 12 requires the compensation body to respond to a claim by a person resident in this country who has been injured in a road traffic accident abroad (for these purposes in another EEA State) involving a vehicle which is normally based abroad and insured through an establishment abroad. The material parts provide as follows:

> "12(3) If the injured party satisfies the compensation body as to the matters specified in paragraph (4), the compensation body shall indemnify the injured party in respect of the loss and damage described in paragraph (4)(b).
>
> (4) The matters referred to in paragraph (3) are—
>
> (a) that a person whose liability for the use of the vehicle is insured by the insurer referred to in regulation 11(1)(c) is liable to the injured party in respect of the accident which is the subject of the claim, and
>
> (b) the amount of loss and damage (including interest) that is properly recoverable in consequence of that accident by the injured party from that person under the laws applying in that part of the United Kingdom in which the injured party resided at the date of the accident."

16. Regulation 13 gives a person resident in this country who has been injured in a road traffic accident abroad involving a vehicle which is normally based abroad a right to obtain compensation from the compensation body if it has proved impossible to identify the vehicle or an insurance undertaking which insures it. The material parts provide as follows:

> "(1) This regulation applies where—
>
> (a) an accident, caused by or arising out of the use of a vehicle which is normally based in an EEA State, occurs on the territory of—
>
> (i) an EEA State other than the United Kingdom, or—
>
> (ii) . .
>
> and an injured party resides in the United Kingdom.
>
> (b) . . . , and
>
> (c) it has proved impossible—
>
> (i) to identify the vehicle the use of which is alleged to have been responsible for the accident, or
>
> (ii) . . . to identify an insurance undertaking which insures the use of the vehicle.
>
> (2) Where this regulation applies—
>
> (a) the injured party may make a claim for compensation from the compensation body, and
>
> (b) the compensation body shall compensate the injured party in accordance with the provisions of Article 1 of the [Second Directive] as if it were the body authorised under paragraph 4 of that Article and the accident had occurred in Great Britain."

17. The judge reached the conclusion that, taken at face value, the effect of regulation 13(2)(b) was clear: the claim had to be determined in all respects, including the assessment of damages, in accordance with English law. However, he held that the Regulation was inconsistent with the provisions of Rome II, in particular Article 4(1), and that compensation was therefore to be assessed in accordance with Spanish law, being the law of the place where the accident occurred. He rejected an argument by Mr. Alexander Layton Q.C. that, since Mr. Jacobs and the MIB are both resident in this country, article 4(2) applies and the issue is governed by English law.

18. On the appeal Mr. Layton's primary argument, as before the judge, was that when an injured person makes a claim against the MIB as the compensation body for the United Kingdom under regulation 13 no issue arises that calls for the application of conflicts of laws rules. Regulation 13(2) is quite clear in its terms: the MIB "shall compensate the injured party . . . as if . . . the accident had occurred in Great Britain".

That requires the MIB to approach the whole question of compensation on the basis that the accident occurred in this country and on that basis foreign law has no application. The paragraph does not involve a choice of law; nor does it involve applying a conflicts of law rule that is inconsistent with Rome II. The judge correctly recognised the effect of the regulation, but wrongly thought that it involved a choice of law.

19. Mr. Dermod O'Brien Q.C. accepted that Regulation 13(2)(b) does not involve a choice of law. His primary submission was that before reaching the question of compensation it is necessary to determine whether the claimant is entitled to receive compensation at all. If the accident occurred abroad, a conflict of laws question necessarily arises. In the ordinary way the issue is to be decided according to the law of the place where the accident occurred: see Article 4(1) of Rome II. In the present case neither of the exceptions provided for in Articles 4(2) and 4(3) applies, so the issue is to be decided in accordance with Spanish law, which is also the law by reference to which the amount of compensation is to be assessed.

20. Counsel on each side drew our attention to many of the recitals to the Fourth Directive and sought to pray in aid what they submitted was its main underlying policy: in Mr. Layton's case, the protection of victims and the importance of receiving adequate compensation having regard to the expectations and requirements of his state of residence; in Mr. O'Brien's case, equality of treatment, so that the existence and amount of compensation should not depend on the victim's state of residence but on where and how the accident occurred. It will become necessary to have regard to some of the recitals and to consider what light they shed on the questions that have to be resolved on this appeal, but I propose to begin by considering certain aspects of the scheme created by the Fourth Directive followed by the Regulations themselves, keeping in mind that the Regulations must be interpreted, as far as possible, in a way that gives effect to the Directive.

The scheme of the Directive

21. The scheme of the compensation arrangements established by the Fourth Directive appears clearly from Articles 6 and 7, to which I have already referred. In essence, the compensation bodies are intended to provide a safety net which will be called upon only in rare cases where the tortfeasor is unidentified or uninsured or where for some reason the insurer fails to respond to a claim within the prescribed time. Even then, however, the compensation bodies do not ultimately bear the burden of the claim, because the body that has paid compensation to an injured party has the right to obtain reimbursement from the corresponding body in the state where the insurer is established (that body in turn being subrogated to the driver's rights against the insurer) or has a claim against one of the guarantee funds: see Articles 6(2) and 7. The scheme appears to proceed on the assumption that the existence of the driver's liability and the determination of the amount of compensation payable to the injured party will be governed by the same principles at all stages of the process, but the Directive does not go so far as to provide that such questions are to be determined by reference to the law of the country in which the accident occurred.

22. When the Directive was published in May 2000 Rome II had not been introduced and complete harmony between the conflicts of laws rules applied in the Member States was lacking. It appears that under the law of some states all questions relating to

liability and damages were determined in accordance with the law of the country in which the accident occurred, whereas in others different principles applied. In England, for example, issues of liability and heads of recoverable damage were normally determined by reference to the law of the place where the accident occurred, but the assessment of damages was determined by English law as the lex fori, as subsequently confirmed by the decision of the House of Lords in *Harding v Wealands* [2006] UKHL 32, [2007] 2 A.C. 1. The position was the same in Scotland. The Directive did not address that difficulty, which may explain why the parties to the Agreement considered it necessary to do so in express terms: see clauses 3.4 and 7.2. However, the fact remains that at the time the Regulations were made there was no universal rule of law governing the question and the Regulations themselves are silent on the point.

23. Mr. Layton submitted that the right of an injured person to make a claim against the compensation body derives from the 2003 Regulations themselves. That, in my view, is correct. The Fourth Directive obliges Member States to put in place legislation to achieve the effects for which it provides. In the absence of the 2003 Regulations there would be no compensation body and no right for an injured person to recover compensation from it. It is for Member States to decide how to achieve that end and they are entitled, if they wish, to put in place legislation that goes beyond the minimum requirements, provided its effect does not conflict with the object of the Directive. When interpreting the Regulations, however, it must be borne in mind that the scheme established by the Fourth Directive provides that liabilities imposed on the compensation body in the state where the injured person resides will be passed back, usually to the driver's insurer by way of the compensation body in the state where the insurer is established, but in the case of an uninsured or unidentified vehicle to the relevant guarantee fund. The guarantee fund might have a right of recourse against the driver himself (in the case of an uninsured driver) under local law. The central concept behind the scheme, therefore, is to provide the claimant with easy access to a defendant in his own country while ensuring that the liability ultimately comes to rest with the person or body with whom it ought to reside. Moreover, the scheme does not detract from the claimant's rights against the driver himself or against the driver's insurer. An interpretation of the Regulations which allowed a claimant to recover from the compensation body in his own country more than he could have recovered from the driver's insurer or the driver himself might therefore be regarded as anomalous.

Regulation 12 – the assessment of compensation

24. Since the paradigm case with which the Regulations deal is that in which the driver of the vehicle involved in the accident is capable of being identified and is insured, it is helpful to begin by considering regulations 11 and 12. Regulations 11 and 12 oblige the MIB to indemnify an injured person who lives in England if he can satisfy it that the insured driver is liable to him in respect of the accident: regulation 12(4)(a). If he can do that, the MIB must indemnify him in respect of "the amount of loss and damage (including interest) that is properly recoverable . . . by the injured party from that person under the laws applying in [England]": regulation 12(4)(b). Since the accident must have taken place abroad, the need to demonstrate liability on the part of the driver clearly requires the court to consider what law governs that issue. In most

cases Article 4(1) of Rome II will apply and the issue will be determined by reference to the law of the country in which the accident occurred.

25. It is less easy, however, to identify the law which governs the assessment of damages because of the reference in regulation 12(4)(b) to the laws applying in England. If that had not been included, so that the paragraph referred simply to the amount of loss and damage properly recoverable by the injured party from the person liable, the position would have been straightforward. Whatever the position in 2003, Article 4 of Rome II would now apply and the issue would normally have to be determined by reference to the law of the country where the accident occurred. On the face of it, however, the inclusion of the reference to the laws applying in England and Wales obliges the MIB to pay compensation assessed in accordance with English law.

26. Mr. O'Brien sought to escape from that conclusion in two ways. First, he submitted that the reference to the law of England is to be understood as including a reference to English rules on the conflicts of laws, i.e. the doctrine of *renvoi*, which now would take one back via Rome II to the law of the country in which the accident occurred. Second, he submitted that since in accordance with Regulation 44/2001/EC Mr. Bartsch could have been sued only in Germany or Spain, the amount properly recoverable from him would be determined in accordance with the law of Spain, being the country in which the accident occurred and the country whose laws would be applied in Germany or Spain in determining the issue.

27. I am unable to accept the first of those arguments for two related reasons. References in legislation to the law of a particular country are usually intended to be understood as referring to its general rules of law and not as including a reference to its rules relating to the conflicts of laws. Unless there is some strong reason to think otherwise, therefore, the presumption is that the doctrine of *renvoi* is excluded. In the present case, however, there are strong positive reasons for thinking that approach to be correct. At the time when the Regulations were made English conflicts of laws rules would not have referred the issue of the assessment of damages to the law of the country where the accident occurred; on the contrary, they would normally have been assessed by reference to the lex fori. If the draftsman had wished to provide that recoverable loss and damage was to be assessed in accordance with the law of the country where the accident occurred, he could easily have said so. In fact, however, he used words which broadly reflect what was then generally understood to be the position in English law. The reference to "the laws applying in that part of the United Kingdom in which the injured party resided at the date of the accident" clearly recognises that different principles may apply to determine the amount of loss and damage properly recoverable by the injured party, depending on whether he resided in England and Wales, Scotland or Northern Ireland.

28. As to the second of Mr. O'Brien's arguments, it is stretching the language of the regulation too far to say that the expression "properly recoverable . . . under the laws [of England]" extends to procedural as well as substantive rules of law and, moreover, to procedural rules which require proceedings to be taken in another country.

29. Although I see the force of Mr. O'Brien's argument that the logic of the scheme established by the Fourth Directive calls for loss and damage recoverable under Regulation 12 to be assessed by reference to the law of the country in which the accident occurred, I find myself driven to the conclusion that in the case of the insured

driver the MIB is obliged to pay compensation assessed in accordance with English, Scots or Northern Irish law, as the case may be. That may reflect the fact that prior to Rome II conflicts of laws rules relating to non-contractual obligations differed as between Member States or it may, as Mr. Layton submitted, reflect a policy decision to ensure that compensation paid to a resident of the United Kingdom by the domestic compensation body is no less generous than would be payable under domestic law. (The position is mirrored in regulation 14 under which the MIB is obliged to indemnify a foreign compensation body against compensation paid to a foreign resident without regard to the law by reference to which it was assessed.) For present purposes it matters not. In fact, however, under the Agreement the compensation bodies agreed among themselves to apply the law of the country in which the accident occurred when assessing compensation, thus providing a measure of protection against more generous provision under the injured person's domestic legislation. The practical effect in a case such as the present is that an English victim of a road traffic accident can recover compensation from the MIB assessed by reference to English law and that the payment will be funded by the MIB itself insofar as it exceeds the amount recoverable in accordance with the law of the country in which the accident occurred. Conversely, where the law of the country in which the accident occurred provides more generous compensation, the injured person resident in the United Kingdom can recover from the MIB no more than the amount he would have been able to recover under English law. That reflects a broad measure of common sense and although it may at first sight appear to be inconsistent with the scheme of the Fourth Directive, the Directive itself does in fact contemplate the existence of such arrangements, since Article 10(4) provides as follows:

> "Member States may, in accordance with the Treaty, maintain or bring into force provisions which are more favourable to the injured party than the provisions necessary to comply with this Directive."

30. Perhaps the strongest argument against interpreting the regulation in that way is that the injured person may be able to recover more (or less) from the MIB in its capacity as compensation body than he could have recovered from the insurer, or, for that matter, the driver responsible for the accident. However, since a right to obtain compensation from the MIB arises only if the insurer fails to respond, it may have been thought that domestic arrangements for providing compensation should not be affected by the scope of the recovery that could have been made from the foreign insurer or driver. At all events, I do not think that this anomaly, such as it is, provides sufficient grounds for giving regulation 12 a meaning it does not naturally bear.

Regulation 13 – the assessment of compensation

31. Regulation 13(1) defines the circumstances in which a right to compensation arises, but it says nothing about how compensation is to be assessed. Regulation 12 provides an important part of the context in which Regulation 13 is to be construed, however, since one would expect the amount of compensation that can be recovered by the victim of an unidentified or uninsured driver to be neither more nor less generous that that available to the victim of an insured driver. Indeed, in *Evans v Secretary of State for the Environment, Transport and the Regions & Motor Insurers' Bureau* (Case C-63/01) [2003] ECR I-14447 the European Court held that the legislature's intention was to entitle victims of damage or injury caused by unidentified or insufficiently

insured vehicles to protection equivalent to, and as effective as, that available to persons injured by identified and insured vehicles. One of the curious features of regulation 13 is that, unlike regulation 12, it does not expressly require the injured person to satisfy the compensation body that the driver is liable to him in respect of his injury. It would be surprising, however, if that were not necessary, not only because the basis of compensation would be fundamentally different in nature, but also because, by introducing a form of no-fault compensation, it would represent a radical departure from the scheme of the Directive which provides for the liability to be borne by one of the guarantee funds. Accordingly, although for reasons given earlier I think Mr. Layton was right in saying that the claim against the MIB arises under the Regulations and to that extent may be said to be free-standing, it does not follow that the right to recover compensation is wholly independent of the existence of liability on the part of the driver said to have caused the accident. That depends on the correct interpretation of regulation 13. Nor, however, does it necessarily follow that if the right to claim compensation depends on the existence of liability on the part of the driver responsible for the accident the measure of compensation must equate to what could be recovered from him. Again, that depends on the correct interpretation of regulation 13.

32. In my view the answer to this particular question lies in the words "shall compensate the injured party in accordance with the provisions of Article 1 of the [Second Directive]". Article 1(4) of that Directive obliges each Member State to set up a body to provide compensation for damage to property or personal injuries caused by unidentified or uninsured vehicles. I think it is reasonably clear from the recitals to the Directive that its purpose was to assimilate the position of the victim of an unidentified or uninsured driver or vehicle to that of the victim of an identified and insured driver or vehicle; it is not its purpose to require the establishment of a system of no-fault compensation. It is, therefore, implicit in the scheme of the Directive that the victim must be able to establish that the driver is liable to him in respect of his injuries, but whether that requires proof of fault will depend on the law of the country in which the accident occurred. The reference in regulation 13(1)(c)(ii) to an insurance undertaking which insures the use of the vehicle assumes the existence of a liability on the part of the driver which ought to be, but is not, covered by insurance. It follows, in my view, that the obligation imposed on the MIB by regulation 13(2)(b) to compensate the injured party in accordance with the provisions of Article 1 of the Second Directive carries with it the implicit proviso that the injured party must be able to show that the driver is liable to him. As in the case of a claim under regulation 12, that is a question to be determined by reference to the applicable law identified in accordance with the appropriate conflicts of laws rules. At the time the Regulations were made the applicable rules were those of the Private International Law (Miscellaneous Provisions) Act 1995, but since the introduction of Rome II, the rules set out in that Regulation will apply and will normally lead to the application of the law of the country in which the accident occurred.

33. The judge approached the matter on the basis that the claim against the MIB, being based on a non-contractual obligation arising out of a tort, must be governed in all respects by a single system of law. However, it is well established that different systems of law may govern different questions raised by the same claim (see, for example, *Macmillan Ltd v Bishopsgate Investment Trust Plc (No. 3)* [1996] 1 W.L.R. 387, 418A-B per Aldous L.J.) and under English conflicts of laws rules the

assessment of damages gives rise to a separate issue. The difficulty in the present case lies in the words "as if it were the body authorised under paragraph 4 of that Article and the accident had occurred in Great Britain". Mr. Layton submitted that those words oblige the MIB to pay compensation assessed on the basis that the accident had occurred in Great Britain, that is, assessed in accordance with English law, and he also relied on Article 1(7) of the Second Directive which provides for each Member State to apply its own laws, regulations and administrative provisions to the payment of compensation by the guarantee fund for which it provides. Mr. O'Brien, on the other hand, submitted that the whole of the expression "as if it were the body authorised under paragraph 4 of that Article and the accident had occurred in Great Britain" simply reflects the fact that the MIB, which acts as the guarantee fund for Great Britain pursuant to Article 1(4) of the Second Directive under the terms of the Untraced Drivers Agreement and the Uninsured Drivers Agreement, has also been designated by the United Kingdom as the compensation body required by the Fourth Directive. Those words were, he said, necessary to impose on the MIB in its capacity as compensation body an obligation of the kind that it already bore as guarantee fund, including a liability in respect of accidents occurring abroad.

34. Sections 143-145 of the Road Traffic Act 1988 apply to the use of a vehicle in Great Britain and the EEA and the Uninsured Drivers Agreement is of corresponding scope. The Untraced Drivers Agreement, however, is limited in its scope to accidents occurring in Great Britain. (Separate arrangements exist for Northern Ireland.) However, not only do the Regulations designate the MIB as the compensation body for the whole of the United Kingdom, they impose on it an obligation relating to accidents occurring abroad. Accordingly, if the Untraced Drivers Agreement were to be retained for this purpose, it was necessary for the Regulations to bring a wider range of cases within its scope. In my view, therefore, Mr. O'Brien was right in saying that the somewhat complicated language of regulation 13(2)(b) was designed to achieve that result. It does not necessarily follow, however, that it does not have the effect for which Mr. Layton contended. A legal fiction may have consequences beyond its immediate purpose.

35. The mechanism by which the MIB's obligation to compensate persons injured in accidents occurring abroad involving uninsured or unidentified drivers is established is to treat the accident as having occurred in Great Britain, but in the absence of any provision limiting its scope it is difficult to see why it should not also affect the principles governing the assessment of damages, particularly in the absence at the time of complete harmonisation throughout the EEA of the conflicts of laws rules governing that issue. Nonetheless, the matter is not free from difficulty. As I have already observed, at the time the Regulations were made damages recoverable as a result of an accident occurring in Great Britain would normally have been assessed by reference to the lex fori, yet regulation 13(2)(b) does not make any provision for the application of English or Scots law as such, presumably leaving it to the court seised of any claim to apply its own law.

36. At this point it is necessary to return to the recitals to the Fourth Directive in order to see whether they point to a conclusion different from that which the language of the Regulations suggests. It is apparent from the recitals that although the European Parliament and the Council of Ministers were concerned with equality of treatment between persons injured in road accidents across the EEA, their concern was

primarily directed to the ability of injured parties to obtain compensation, not to the amount of that compensation. That concern led to the introduction of a right to make a claim directly against the wrongdoer's insurer (regarded as a logical development of the victim's right to make a claim against a representative of the insurer located in his home state), the establishment of information centres and compensation bodies. The emphasis is very much on access to information, the provision of a convenient claims procedure and the ability to obtain compensation rather than on the amount of that compensation, to which the recitals make no reference beyond recognising that it must not fall below the prescribed minimum in respect of which insurance is required. In my view nothing in the recitals lends any additional support to either party's case.

37. Having regard to the language of regulation 13(2)(b), I am persuaded that Mr. Layton is right and that compensation is to be assessed on the basis that the accident occurred in Great Britain. That has the incidental merit of ensuring that the measure of compensation recoverable under regulation 13 is likely to be broadly the same as that recoverable under regulation 12.

38. The judge considered that regulation 13(2)(b) contained a choice of proper law that was inconsistent with the provisions of Rome II. That led him to consider the doctrine of supremacy as developed in decisions such as *Amministrazione delle Finanz dello Stato v Simmenthal S.p.A.* (Case 106/77) [1978] E.C.R. 629 and thence to the conclusion that the rules of Rome II must prevail. However, as I have said, the parties agreed that regulation 13(2)(b) is not a choice of law clause, rightly, in my view, because it is concerned with defining the existence and extent of the MIB's obligation as the body appointed to provide compensation for injury suffered in road traffic accidents rather than with determining the liability of the wrongdoer. That being so, Rome II has no application to the assessment of the compensation payable by the MIB under regulation 13 and it is therefore unnecessary to consider the issues relating to the construction of Article 4 that would arise if it did so.

39. For these reasons I would allow the appeal and answer the questions posed by the preliminary issues compendiously by stating that the MIB is obliged to pay compensation to the claimant assessed in accordance with the law of England.

Lord Justice Rimer:

40. I agree.

Lord Justice Laws:

41. I also agree.