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DETERMINING THE COMPETENT COURT AND WHAT LAW TO APPLY IN  
CASES OF CIVIL WRONGS: THE CASE OF ROAD TRAFFIC ACCIDENTS

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## **Introduction: Access to Justice in relation to Road Traffic Accidents with a Trans-national Element**

1. This paper addresses the issue of the practical problems and discrepancies which arise as a consequence of a Claimant suffering personal injury in a road traffic accident in another European jurisdiction.
2. Causes of action: the injured Claimant has a choice whether to bring proceedings against the Defendant tortfeasor responsible for the accident, and/or the insurer of the Defendant's vehicle.<sup>1</sup>
3. Jurisdiction: The Claimant may sue the individual Defendant either in the courts of the place where the Defendant is domiciled, or the courts for the place of the accident (where the damage was incurred), if different, or, if there is more than one Defendant, it may be possible to join as a co-Defendant a foreign domiciled Defendant in the courts of the place where one of the Defendants is domiciled.<sup>2</sup>
4. Scope for Forum Shopping: the choices of court available to Claimants are pretty clear: the question is what are the advantages and disadvantages of bringing proceedings in one jurisdiction as opposed to another.
5. Usually, in cases where proceedings are brought against the individual tortfeasor (not the insurer), it is necessary to bring proceedings in a foreign jurisdiction: in the courts of the place of domicile of the Defendant or the place of the accident (often the same).

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<sup>1</sup> As a result of the provisions contained in the Fourth Motor Insurance Directive: Directive 2000/26.

<sup>2</sup> See Articles 2, 5(3), and 6(1) of Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

6. The only case where the Claimant is able to bring proceedings in his own jurisdiction against an individual Defendant is where the Defendant is domiciled there, most frequently in cases where a passenger sues the Defendant driver as being responsible (at least in part) for the accident. (In such a case, this may lead to cases where the clearly guilty Defendant is sued in another jurisdiction because there is also an arguable claim against another Defendant.)
7. However, the landscape has now changed in so far as the European Court of Justice has confirmed that proceedings may now be brought by an injured Claimant in the courts of the place of the Claimant's domicile against the road traffic insurer.<sup>3</sup>
8. Therefore, in any personal injury claim with a trans-national element, it is likely that an injured Claimant may bring proceedings in:
  - (1) the courts of the place of domicile of a Defendant (or the insurer);
  - (2) the courts of the place of the accident;
  - (3) the courts of the place where the Claimant is domiciled.
9. Does the exercise of choice in itself cause difficulties? Is access to justice compromised by the existence of this choice? Does the exercise of choice by a Claimant lead to increased complexity and/or cost?
10. In this paper, it will be argued (1) that Claimants, given the choice of jurisdiction, will generally choose where possible to sue in their local courts and use their local lawyers; (2) where this choice is available, the proceedings may as a result be more complex than the equivalent case with only national characteristics.

### **Differences between jurisdictions**

11. Europe-wide surveys of the approach to compensation of claims for personal injury and fatal accident claims by PEOPIL demonstrate

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<sup>3</sup> Case C-463/06, Odenbreit, judgment of the European Court of Justice of 13 December 2007.

significant differences in how jurisdictions approach the issue of compensation, as well as in the particular application of particular rules to the quantification of loss.<sup>4</sup>

12. DIFFERENCES OF APPROACH:

- **Role of the expert:** some jurisdictions defer to medical opinion or have court appointed experts who determine the degree of injury, level of disability and the band of compensation applicable
- **Role of the Judge:** this can be contrasted with those jurisdictions where the Judge has the principal role in assessing just and equitable compensation
- **Recovery of psychiatric injury, Recovery for secondary victims and Recovery in fatal accident claims:** varies from jurisdiction to jurisdiction. No hard and fast rules as to which jurisdictions are high value and low value jurisdictions; nor between families of jurisdiction: eg common law jurisdictions, Scandinavian jurisdictions; civil law jurisdictions
- **Personalisation of loss:** ie the degree to which the award of compensation reflects the individual losses of the injured Claimant, will differ from jurisdiction to jurisdiction
- **Capping of recoverable losses and use of tariffs and Use of medical tables:** those jurisdictions which use these methods of quantification rely upon a high degree of standardisation of awards of loss and the removal of discretion from the individual Judge.

13. DIFFERENCES IN QUANTIFICATION OF SPECIFIC LOSSES:

- **Multipliers and discount rates:** applicable to future earnings losses, pension losses and care claims: likely to give rise to the sharpest divergences in awards
- **Lump sums or periodical payments:** differences in approach between jurisdictions makes comparison very difficult to determine; choice of parties and policy of courts may lead to very different outcomes

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<sup>4</sup> Marco Bona and Philip Mead (eds), *Personal Injury Compensation in Europe* (Kluwer, 2003); Marco Bona, Philip Mead and Siewert Lindenbergh (eds), *Personal Injury Compensation in Europe: Fatal Accidents and Secondary Victims* (xpl law, 2005).

- **Recognition of specific heads of loss: cost of future care:** this head of loss likely to be very dependent upon the local culture of the court in awarding compensation and what is seen as the “acceptable rate” for particular heads of loss; may lead to discrepancies where foreign victim’s environment diverges significantly
  - **Recoverability of specific third party costs, for example recoupment of hospital costs, recovery of private medical costs; wages paid during disability:** some jurisdictions are not used to such heads of loss being claimed (perhaps because of the interplay between insurance cover/social security and recovery of tortious damages)
  - **Recoupment of benefits and set-off of insurance monies and taxation:** applicable rules vary from place to place
  - **Recovery of costs and lawyers’ fees:** will vary in terms of whether the injured victim is expected to bear his own costs even where successful, and what is considered reasonable remuneration to be awarded to the Claimant’s lawyers (and expert witnesses).
14. The consequences in practical terms which arise for individual Claimants are illustrated by the individual case examples provided in the Annex to this paper.
15. In summary, Claimants may suffer
- (a) disadvantage caused by different rules for notification of a claim or service of proceedings in respect of stopping limitation time;
  - (b) disadvantage caused by different substantive rules on the length of the limitation period;
  - (c) disadvantage caused by different levels (or caps) on insurance cover of the Defendant;
  - (d) significantly different levels of compensation (including the existence of statutory caps) awarded for pain and suffering and loss of amenity in respect of non-pecuniary loss;
  - (e) failure to take into account prevailing circumstances in the home State of the victim;

- (f) failure to take into account a head of loss normally compensated in the home State of the victim;
- (g) the application of caps or limits on the Claimant's claims for pecuniary loss;
- (h) difficulties proving liability because of the application of foreign law to the claim;
- (i) difficulties arising from the need to sue more than one Defendant;
- (j) difficulties arising from the existence of more than one Claimant;
- (k) difficulties arising due to a failure to recover costs normally recoverable in the home State of the victim.

**The impact of the 4<sup>th</sup> Motor Insurance Directive and the right to sue the insurer**

16. The exportation of the settlement process by the establishment of claims handlers in the State of domicile of the Claimant has made a significant contribution to access for justice in that Claimants can now instruct their home lawyers to negotiate with the insurers and insurers cannot use the barrier of geography or language to avoid having to deal with road traffic claims.
17. As the preamble to the 4<sup>th</sup> Motor Insurance Directive makes clear, the Directive does not alter the rules as to the identity of the governing law.
18. The Rome II Regulation<sup>5</sup> now establishes as a general rule that the governing law is the law of the place of the accident (Article 4), and that such a law governs both limitation and the assessment and quantification of loss (Article 15(b) and (c)).
19. In this regard, the Rome II regime is allied to that governing choice of law in relation to contractual obligations, such that there should not be any discrepancy between any choice of law in relation to a claim against an individual Defendant driver in tort and any claim against the insurer

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<sup>5</sup> Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations.

(which may be characterised as being quasi-contractual as it arises under or by reason of the contract of insurance between the insured and the insurer).

20. Prior to the Odenbreit judgment, most insurers would offer compensation by reference to the (foreign) governing law, and indicate that if the offer was unsatisfactory, then it would be necessary to issue proceedings in the foreign jurisdiction. This would leave Claimants and their lawyers at the disadvantage of not being able to know and assess what the proper value of the claim was according to the proper law without instructing further lawyers to advise on the applicable law (including costs). Secondly, and in any event, if agreement in relation to settlement was not possible, proceedings would generally be issued in that foreign jurisdiction.
21. Post the Odenbreit judgment, Claimants have available to them the jurisdiction of their home courts, and their home lawyers. The law of the forum will govern procedural matters including the availability of costs and recognised funding arrangements. Further there is no inconvenience in the fact that the place of treatment and the medical evidence and the place of the forum will not differ.
22. However, the disadvantages are significant: judges hearing claims in relation to the right to sue the insurer will have to grapple with the complexities of applying foreign law to issues such as: limitation, the obligation to indemnify; causation, the medical assessment of loss and the quantification of loss.
23. Trans-national cases become more complicated because of the need to instruct two sets of lawyers, and where there is dispute to prove the applicable rules of the governing law.
24. Because domestic Judges are more familiar with the prevailing system in domestic law, there will be a natural tendency to strain any exceptions to the general rule in order to permit the law of the forum to apply. This

factor in itself will lead to increased satellite litigation as to the identity of the proper law.

25. Differences in the applicable law, for example limitation rules, will also lead to an increase in the litigation of satellite issues.

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## ANNEX

### Case 1

English Claimant pedestrian injured by French driver. Serious injuries contracted, which left the Claimant requiring care and assistance from two professional carers. Proceedings were brought in France. Under French law damages could only be recovered for the requirement of one carer. As a result, instead of recovering annual care costs of around £200,000 per annum, £80,000 per annum was recovered. The Claimant had to pay the vast majority of his own legal costs.

**Disadvantaged due to factors e, f, g, h and k.**

### Case 2

English Claimant, involved in accident whilst residing and working abroad in the Netherlands involving a local Defendant. The Claimant was seriously injured and returned to the UK following his accident, where he required round the clock care and accommodation. The level of indemnity under the Defendant's insurance policy was limited to £1,000,000. Consequently, a claim which was worth potentially £5-6,000,000 in the UK was limited to £1,000,000. Even if there had not been indemnity issues there would have been difficulties in establishing under Dutch jurisdiction the Claimant's right to decide upon his own care regime.

**Disadvantaged due to factors c, e and g.**

### Case 3

Mother of two injured in road traffic accident in Greece. Now severely mentally and physically disabled, requiring a 24 hour care regime. Proceedings issued in Greece. The case in England would be worth over £3,000,000; the level of insurance cover was €500,000. This will not be sufficient to fund the care that she will need for life. Legal costs also not recoverable in Greece.

**Disadvantaged caused by factors c, e and k.**

### Case 4

UK female injured whilst on holiday in Malta when she was a passenger on a bus. She sustained a fractured wrist. No general damages for pain, suffering and loss of amenity available in Malta and the case was abandoned.

**Disadvantaged due to factors d and f.**

### Case 5

UK Claimant injured whilst staying in a hotel in Spain. The hotel booking was made directly, therefore a claim under Spanish jurisdiction. The Claimant suffered lacerations to his arm in an accident involving a glass window. The enquiry was received by the Claimant's UK lawyers 18 months after the accident and it was not possible to assist him due to the 12 month limitation period prevailing in Spain.

**Disadvantaged due to factor b.**

### **Case 6**

English Claimant died after contracting legionnaires disease in an Italian hotel. The claim was pursued against the Italian Defendant in the Italian courts. The claim was capped as a result of the level of cover on the Defendant's insurance policy. There was also limited costs recovery against the Italian Defendant.

**Disadvantaged due to factor c and k.**

### **Case 7**

English Claimant contracted legionnaires disease whilst working in Spain. Due to differences in heads of damage recoverable in Spain, the Claimant faces the possibility of recovering only 1/3 of the level of damages that he would recover in the UK. He will also have to pay his own legal costs.

**Disadvantaged due to factors d, f and k.**

### **Case 8**

Italian citizen died in accident as passenger in car driven by Spanish friend; car insured by Spanish insurance company. Problems with obtaining evidence and clear information about parents' rights from competent criminal court, Spanish caps on damages were opposed with regard to the secondary victims. These victims will issue proceedings in Italy, but will face problems concerning the running of limitation time (one year under Spanish law, already expired) and caps on damages. Moreover there will be incurred translation costs of the initial statement of claim which under Italian law needs to contain all details on liability and quantum. The victims will also have to pay their own legal costs; the only way to obtain such expenses is to issue judicial proceedings.

**Disadvantaged due to factors a, b, d, f, h, and k**

### **Case 9**

Italian driver road traffic accident in France while on holiday with his family. No issue of liability. Damage to the vehicle of about €4.000. Holidays ruined, and also

loss of holiday also sustained by his family. Negotiations: the Italian agent for the French insurance company refused to take into consideration: non-pecuniary damages for loss of holiday; costs and legal fees for assistance provided by Italian lawyers in dealing with this matter; interest on pecuniary damages. The insurance company sent a cheque for €3.000, including all damages and expenses (legal fees),

**Disadvantaged due to factors d, f, and k**

### **Case 10**

Road traffic accident with severe injuries sustained by an English woman while visiting Rome with her husband: the English lawyers were not properly informed by an Italian lawyer about the need to send an initial letter of claim to the Italian insurance company in order to stop the running of limitation period on behalf of the secondary victim (the husband); thus the husband lost the right to claim compensation for the pecuniary and non-pecuniary damages he sustained because the disability of his wife (including losing his job).

**Disadvantaged due to factors a and b**

### **Case 11**

Transport case: severe injuries sustained by an English victim while disembarking from a coach; under Italian law limitation period of 1 year applying to transport cases (5 years in the case where criminal proceedings were issued); nobody informed the victim of such strict limitation period and of the possibility of issuing criminal proceedings within 90 days of the accident; when the English lawyers got in contact with Italian lawyers the action was already expired.

**Disadvantaged due to factors a and b**

### **Case 12**

English client run over by a Dutch tram. Severe head injuries. High loss of earning capacity, needs case manager. Under the jurisdiction of the Court of Protection in England. Failure to take into account prevailing circumstances in her home State. As Dutch law is applicable the Defendants argue that high costs of case managers and of deputy are not in line with Dutch standards. Furthermore court cases in the Netherlands take more than two years, or even 3 years.

**Disadvantaged due to factors e and difficulties with time scales in relation to court proceedings in the Netherlands**

### **Case 13**

Three young men die in a car accident in the Netherlands. The heirs will receive compensation according to Dutch law. They live in England, but will not receive as

much compensation as an English heir. In these cases there are significantly different levels of compensation due to the way loss of dependency is calculated according to Dutch law. Under English law they would have received much greater compensation: EUR 300,000 in the Netherlands, as against EUR 500,000 in the UK. Furthermore according to Dutch law the heirs are not entitled to non-pecuniary damages (bereavement) as a result of the death of a family member. Disadvantage of EUR 15,000 Certain heads of damages which are normally compensated according to UK law will not be compensated according to Dutch law (e.g. time father usually spends on raising his children)

### **Disadvantaged due to differences in level of compensation for secondary victims**

#### **Case 14**

A Dutch man suffers from a whiplash injury due to a car accident in Scotland. Negotiation of the claim is dealt by the Dutch representative of the Scottish insurer and the legal expense insurer of the Dutch victim. After three years the Scottish insurer indicates that limitation has expired. The Dutch legal expense insurer did not know the rules of notification of the claim and the fact that it was necessary to issue proceedings within three years according to Scottish law. According to Dutch law the limitation period is stopped with every letter negotiating the claim with the insurer, until the insurer stops the negotiations in writing.

### **Disadvantaged due to factors a and b**

#### **Case 15**

Dutch family had an accident in France. The whole family was severely injured. French law was applicable. According to French law they cannot claim costs of their lawyer. They need a Dutch and a French lawyer. This means they will not be fully compensated for their losses. Furthermore they cannot claim costs of medical treatment from the date set by an expert saying that the injury is cured, even if treatment is still needed on medical grounds.

### **Disadvantaged due to factors e, f and k**

#### **Case 16**

English man suffers from severe injuries as passenger of a taxi in the Netherlands. The total of his damages (including pain and suffering) is more than EUR 2.000,000.00. The cap on damages paid by the insurer is EUR 1.000,000.00. He has to sue the cabdriver for the remaining compensation.

### **Disadvantaged due to factors c and i**

#### **Case 17**

Dutch man suffers from head injuries while on holiday in Poland. The level of compensation is far below the Dutch standards which leaves him with a large proportion of his damages unpaid for the rest of his life.

**Disadvantaged due to factors d, e**

### **Case 18**

A German resident riding his motorcycle in Italy collided with a Moroccan driver, driving an Italian registered car causing fatal injury to German motorcycle driver and serious injuries for the companion. The responsible German regulation office under the 4th MID denied compensation, indicating that German victims cannot claim compensation for the loss of a relative. Eventually, after the expiry of over two years in failed negotiations, and after criminal proceedings had been issued, the Defendant insurance company paid compensation. The dispute over the value of the dependency gave rise to a risk of a loss of Euro 120,000.

**Disadvantage due to factors (d), (h), (f).**

### **Case 19**

A German driver in June 2006 had an accident in Italy with an Italian driver and asked for compensation under the 4 MID. The regulation office declined the request and the Claimant issued proceedings in the German Amtsgericht. The Italian insurer did not intervene in the lawsuit and the German Amtsgericht ordered the Italian insurance company to pay compensation. The German lawyer sought assistance in relation to enforcement of the order in Italy. The Amtsgericht were requested to send annex 1 of the Reg. 805/04 for direct enforcement but responded by saying that they can not send the annex due to the fact that they do not understand Italian and therefore cannot approve the claim and that the order had been regularly notified to the opposing party. Enforcement proceedings are now being pursued under Regulation 44/2001. The injured party still waits to be compensated.