
LLOYD'S MARITIME AND COMMERCIAL LAW QUARTERLY

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Informa Law
(an Informa Business)
Christchurch Court,
10–15 Newgate Street,
Great Britain

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British Library Cataloguing in Publication Data
A catalogue record
for this book is available
from the British Library

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Informa Law
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Typeset by Deanta Global Publishing Services Limited
Printing managed by St Ives Management Services
Printed on paper from sustainable sources.

Lloyd's Maritime and Commercial Law Quarterly

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- (6) Further, even if these authorities had been relevant, where a single document is on its face intended to be signed by more than one person, liability will usually be conditional on signature by both or all named persons: see *Capital Allowances* at [17]. In this case, it was apparent on the face of the document that both H and W were to be parties. Therefore, if this line of authority had been relevant, it would have pointed in the opposite direction.
- (7) Marlbray's intention is not addressed until the passage beginning "Still less ...".¹⁹ But the unexplained "still less" is clearly unjustified. Marlbray's intention was far more open to question than H's. H signed knowing that he did not have W's authority. Marlbray did not know and had contracted on the basis that it had two counterparties liable for the price. Its position would be weakened if there was only one, especially if the remaining counterparty was unreliable enough to have misrepresented his authority. There is obviously "support" for the analysis that Marlbray was only contracting on the basis that W was a purchaser; it is what the contract says. It was accordingly wrong to say that "there is nothing in the factual matrix" which could lead to the conclusion that Marlbray did not intend to sell to H alone if he was not authorised by W. The Court of Appeal failed to address either the terms of the contract or the relevant features of the factual matrix, or to consider objectively how a party in Marlbray's position would have been likely to react to the potential financial disadvantage of W's non-liability. There was no sensible argument to the contrary. It is respectfully submitted that this appeal was wrongly decided.

Nicholas Strauss*

ROAD TRAFFIC ACCIDENTS AND THE ESCAPE CLAUSE UNDER THE ROME II REGULATION

Marshall v MIB

In determining the applicable law to non-contractual liability arising from cross-border traffic accidents, the Rome II Regulation, Art.4.3, provides for an "escape clause" which permits application of the law of the country to which the tort/delict is manifestly more closely connected, displacing that indicated in paras 1 (*lex loci damni*) or 2 (law of the common habitual residence of the parties when the damage occurs). In the absence of interpretation of this provision by the European Court of Justice, the High Court judgment *Marshall v Motor Insurers' Bureau*¹ is one of few discussing the escape clause in detail and provides a welcome clarification of the principles applicable to one of the central

19. At [68]. See *ante*, emphasised text following fn.5.

* QC; formerly a deputy judge of the High Court. The author was the trial judge in *Marlbray*. The point discussed in this note was conceded at trial and the appeal, on this point, was not in any real sense against the first instance decision. The issue was explicitly referred to by the Court of Appeal as a "New Contractual Issue".

1. [2015] EWHC 3421 (QB); [2016] Lloyd's Rep IR 400.

provisions of Rome II. In this judgment the High Court emphasises the exceptional nature of the “manifestly more closely connected principle” and concludes that Art.4.3 places a high hurdle in the path of a party seeking to displace the law indicated by Art.4.1 or 4.2. Nevertheless, the Court found itself able to apply Art.4.3 and override Art.4.2, so that a manifestly closer connection overrode common habitual residence.

Mr Pickard, a UK national habitually resident in England, was travelling in a Ford Fiesta vehicle with trailer attached, just south of Paris on the A86 road with Mr Marshall, also a UK national habitually resident in England, as his passenger. The vehicle was registered in the United Kingdom and was insured by Royal & Sun Alliance (“RSA”). The car broke down, so Mr Pickard stopped on the hard shoulder and telephoned the breakdown service, which arrived at the scene to repair the vehicle. The recovery truck was registered in France and insured by Generali France Assurances (“Generali”). While Mr Pickard’s car was being repaired, an uninsured Peugeot motor vehicle registered in France, driven by Ms Bivard, a French national habitually resident in France, collided with the trailer, hitting Mr Pickard and Mr Marshall. Ms Bivard’s vehicle, that of the victims Messrs Marshall and Pickard, and also the recovery truck were all involved in the collision. As a result, Mr Pickard suffered fractures to his right leg and other injuries to his neck and head, while Mr Marshall died as a result of multiple injuries.

Following the accident, two court actions were filed in England. In the first, Mr Marshall’s widow filed a claim against the Motor Insurers’ Bureau (“MIB”), with Mr Pickard and the RSA (his vehicle insurance company) as second defendant, and as a third defendant, Generali (the recovery truck company’s insurers). Mrs Marshall claimed compensation for her husband’s death. In a preliminary ruling, the court deliberated on the applicable law in a case of non-contractual liability and the need to apply the Rome II Regulation. In this regard, RSA alleged that the direct damage had taken place in England, as this was where Mrs Marshall had suffered her *loss of dependency*. However, the court considered that the direct damage had occurred in France, where the accident occurred, contrasting with Arden LJ’s view in *Brownlie v Four Seasons Holding Inc*² and agreeing with the Advocate General, N Wahl, in *Florin Lazar v Allianz SpA*,³ stating that the expression “country in which the damage occurs” contained in Art.4.1 refers to the place of direct damage, and in this case that would be the place where the victim died following the crash, because all the damages incurred arose from the same incident.

As the court had rejected the contention that English law was applicable through the *lex loci damni*, RSA went on to allege that it would still be applicable, on the grounds that England was the place where, not only the person claimed to be liable (in this case Mr Pickard and RSA) but also the person sustaining damage (Mrs Marshall), were resident at the time when the damage occurred. Conversely, Mrs Marshall as claimant and the other two respondents (the MIB compensation body and the insurance company Generali) held that Art.4.2 was applicable only as an exception to the general rule of the *lex loci damni* in cases in which the action involved two parties, citing the singular nature of the wording of the precept “where the person claimed to be liable and the person sustaining damage” and clearly, as there were several respondents in *Marshall*, this was not the case. However, the

2. [2015] EWCA Civ 665; [2016] 1 WLR 1814, [85–87].

3. (Case C-350/14) [2016] 1 WLR 835 (ECJ).

High Court considered this reasoning to be unsustainable, as it would preclude application of Art.4.2 in cases where there were several claimants. Instead, it considered that the exception should be based on the legitimate expectations of the parties, and therefore should not be interpreted in the light of there being a single party only. Furthermore, the precept cannot be interpreted in the sense of considering a single claimant and a single respondent, because that would restrict application of the exception as understood by English law, thus omitting the consideration that this is a European Union Regulation and its provisions should be interpreted in an autonomous manner. Thus, the fact that all the parties lived in England at the time of the accident led the court to apply English law, to the detriment of French law, as the *lex loci damni*.

On this basis, the court had to examine the possibility of applying the escape clause and addressing how the concept “manifestly more closely connected with a country other than that indicated in paras 1 or 2” should be interpreted. In addition to the difficulty of identifying the relevant circumstances for confirming the closer connection with another country, the court was also required to address the rather complex relation between para.3 and paras 1 and 2 of Art.4, as the wording of para.3 was clearly ambiguous. Scholarly literature holds that interpretation of this precept should enable the escape clause to be cited, which would make the law relating to the common habitual residence of the parties inapplicable, to the benefit of the *lex loci damni*, as this is a general exception clause and the link should be with a country other than that designated, according to either para.1 or 2.⁴

This makes application of this concept more flexible, as may be seen from a reading of recital 14 of the Regulation. Therefore, the court had to decide whether compliance with that condition should be made cumulatively, that is, that the designated law should be different from French and English law, or, conversely, it would be sufficient to comply individually, and the result could be either of these laws, French or English, because it has been justified as being the law more closely connected to the tort/delict. Use of the disjunctive conjunction “or” in the text should leave no doubt, as it proposes alternative options; and in this case it would be sufficient for there to be a law other than French law (*lex loci damni*) or English law (habitual residence in common).

Finally, the High Court takes a view similar to that in *Winrow v Hemphill*,⁵ confirming that the exceptional application of Art.4.3 of the Regulation is a considerable obstacle for the party claiming application of the escape clause, to the detriment of the designated law according to the first and second paras of Art.4, and that it is necessary to show that the “centre of gravity” of the case is with the suggested applicable law. Furthermore, the court was aware that it must take all the circumstances of the case into consideration when determining whether it is appropriate to apply the escape clause and, having enumerated and analysed the circumstances of the case in this matter, it confirmed that the tort/delict was manifestly more closely connected with France, basing its decision on the following

4. See generally, CS Adesina Okoli and G Omoshemime Arishe, “The operation of the escape clauses in the Rome Convention, Rome I Regulation and Rome II Regulation” (2012) 8(3) JPIL 542; A Dickinson, *The Rome II Regulation: The law applicable to non-contractual obligations* (Oxford University Press, Oxford, 2008), 343; and J von Hein, “Of older siblings and distant cousins: The contribution of the Rome II Regulation to the Communitarisation of Private International Law” (2009) 73 *Rabel JI of Comparative and International Private Law* 461.

5. [2014] EWHC 3164 (QB), [63].

proven facts: (a) Messrs Marshall and Pickard were run over on a French motorway by a French vehicle, registered in France and driven by Ms Bivard, a French national whose habitual residence was in France; (b) the legal action taken by Messrs Marshall (or his wife on his behalf) and Pickard against Ms Bivard and his insurance company (in this case Fonds de Garantie as the vehicle was not insured) are governed by French law; (c) Ms Bivard's collision with Messrs Marshall and Pickard was the cause of the accident and the injuries that they both suffered; and (d) the claims brought by Mr Marshall's widow and Mr Pickard against the company Generali as insurer of the recovery truck would also be subject to French law.

In short, the High Court applies the escape clause, thus applying French law to the issue of liability of the claims made by Mr Marshall's widow, and rendering inapplicable the law designated by virtue of the parties' habitual residence in common when the damage occurs, namely English law.

Raúl Lafuente Sánchez*

STATUTORY INTERPRETATION AND BREACH OF STATUTORY DUTY

Campbell v Gordon

In *Campbell v Gordon*,¹ the Supreme Court held, by a majority of three to two, that breach by the corporate employer of its obligation to arrange adequate insurance under the Employers' Liability (Compulsory Insurance) Act 1969 does not give rise to civil liability on the part of the director. In practice, this means that an aggrieved employee who suffers from her corporate employer's failure to arrange insurance does not have an alternative course for redress if the corporate employer is insolvent or is not worth suing. The Supreme Court decision is significant for settling any lingering uncertainty left by the much-criticised Court of Appeal decision in *Richardson v Pitt-Stanley*² (which had reached the same conclusion as the Supreme Court) and its discussion of the circumstances in which a court will infer parliamentary intention to permit civil liability where a penal statute is silent. This comment argues that the majority's decision is to be supported, but that it is regrettable that the court did not address the inconsistencies in the authorities on causes of action arising from breach of statutory duty.

The background

The Employers' Liability (Compulsory Insurance) Act 1969 provides, by s.1(1), that:

"Except as otherwise provided by this Act, every employer carrying on any business in Great Britain shall insure, and maintain insurance, under one or more approved policies with an authorized insurer

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1. [2016] UKSC 38; [2016] Lloyd's Rep IR 591.
2. [1995] QB 123.