39 ESSEX STREET

Accidents Abroad: Applicable Law, Jurisdiction, and European Directives

BERNARD DOHERTY
39 ESSEX STREET

Introduction

1. In 1974, shortly after the accession of the UK to the Common Market by the Treaty of Rome, Lord Denning said in *H.P. Bulmer Ltd v J. Bollinger SA* [1974] Ch 401 at 418.

> The Treaty [of Rome] does not touch any of the matters which concern solely England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.

2. Most personal injury lawyers, I suspect, were content with the first part of that: personal injury cases in England were by and large the concern of English plaintiffs and English defendants applying English law.

3. By 1991, European law had developed, and so had the view from Lord Denning's window. Having retired some years from the bench, he said:

> No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses to the dismay of all.

4. Even by 1991, most lawyers practising in the field of personal injury probably felt themselves at a reasonably safe distance from this raging torrent. In general European law was a problem for others.

5. The last decade has changed all that. In part, this is by the formal process of legislation. More and more areas relevant to personal injury cases come under a

European umbrella: 1 January 1993 brought in the six pack regulations; the MIB now exists by virtue of a European directive, and the agreement has to be interpreted in that light.

6. Perhaps to a greater extent, however, the real motors are social and economic: growths in real income and cheap air fares mean that millions are travelling overseas each year; increased cross border trade means more English employees working abroad and the inevitability of accidents and litigation.

7. There is no longer anywhere to hide. Like it or not, we are all Europeans now, and all international lawyers.

8. I shall take 3 areas which may arise for an English lawyer faced with advising a client (claimant or defendant) in relation to litigation arising from an accident abroad.

   a. Will the case be tried according to English law, or some other law?
   b. Can and should the case be tried in England, or should it be tried abroad?
   c. If the accident was a motor accident, what is the role of the European Motor Directives?

<u>Which country's law governs the case?</u>

9. Most cases brought in England will be governed by English law, and that will be the default position. If one party pleads and establishes that the issues in the case are governed by foreign law, then the English court will decide the issues applying that foreign law.

10. Why does it matter? In principle, a decision on the applicable law could affect the outcome of the case in relation to:

a. Liability. Clearly, different countries may apply different tests for the establishment of liability for personal injuries. Some may have no fault compensation schemes for certain classes of accident; some may permit employers to use laxer standards than others. It is not possible here to develop this question, which will depend on the nature of the accident and the country in which it happened. Of course, most countries have a fault based system for road traffic accidents. And if it is an accident at work, the various directives underlying the now familiar UK regulations ought to be in force in all EC countries, with a resulting harmonisation of standards. Note, however, that those directives are concerned with standards in the workplace rather than with a unified system for compensation for injured workers, and that even where the directives have effect rules as to entitlement to compensation may differ.
b. Quantum. The rules relating to the quantification of personal injury claims vary greatly from one country to another. Some have no award of general damages for pain, suffering and loss of amenity. Others deduct state benefits in full for life. Others do not observe any principle of *restitutio in integrum*, and only a proportion of what we would consider obviously recoverable heads of damage would be recovered. In practice, this proves to be the area of most dispute over which country's law is applicable.
c. Limitation. The period for bringing claims varies from a few months to many years.

11. The starting point for consideration of the appropriate law is Part II of the Private International Law (Miscellaneous Provisions) Act 1995 ("the 1995 Act"), which governs the choice of law "for determining issues relating to tort" (section 9(1)). Of course, personal injury claims can also be based on contract, in which case choice of law is governed by the Rome Convention, brought into English law by the Contracts (Applicable Law) Act 1990. Time does not permit consideration of that statute here.

12. The essential provisions of the 1995 Act are these:

> **9.**— (1) The rules in this Part apply for choosing the law (in this Part referred to as "the applicable law") to be used for determining issues relating to tort . . .
>
> (4) The applicable law shall be used for determining the issues arising in a claim, including in particular the question whether an actionable tort or delict has occurred.
>
> . . .
>
> **11.**— (1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.
>
> (2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being—
>
> (a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;
>
> (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and
>
> (c) in any other case, the law of the country in which the

most significant element or elements of those events occurred.

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

. . .

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

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

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

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

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

13. The *prima facie* position, therefore, is that if the accident happens abroad, the applicable law will be the law of the country in which the accident happens.

14. While the general rule is plain and usually easy enough to apply, it is not so straightforward to ascertain whether the general rule may be displaced by the exceptions under section 12. The decision under that section involves a consideration of all the factors connecting the tort to one country and to another.

15. There are recent examples showing the approach of the courts to when the general rule will be displaced by particular factors.

16. In *Edmunds v Simmonds* [2001] 1 WLR 1003 (Garland J), the claimant (claiming by her mother and litigation friend) was on holiday with the defendant in Spain when the claimant was injured by the defendant's negligent driving. Both were English, and the claimant returned to be cared for in England, and would suffer her losses in England. These were held overwhelming factors leading to the application of English law under section 12.

17. Note that section 12(1) speaks of whether it is more appropriate for some law other than that of the place of the tort to be used in deciding the issues in the case "or any of those issues". It may therefore be possible to displace the general rule in relation to some issues in the case only.

18. The question arose in *Roerig v Valiant* [2002] 1 WLR 2304. A Dutch widow brought a claim in England under the Fatal Accidents Act 1976 following the death of her husband, who was a crew member on an English registered trawler. Liability was not in dispute. Nor was it seriously in dispute that, following the general rule in section 11(1) of the 1995 Act, the applicable law was English. The accident had happened on an English registered trawler, making England the place where "the events constituting the tort" happened. The defendants, however, relied on section 12 to displace the general rule on the basis of significant factors connecting the tort with Holland. They did not suggest that the whole matter was governed by Dutch law, but only the issue of the assessment of

damages. The reason for so arguing was that section 4 of the Fatal Accidents Act prohibits the deduction from the damages awarded of benefits arising to the dependants from the death. The dependants in this case received a number of valuable death related benefits, social security benefits and pensions, as well as sums under a personal accidents policy. Under Dutch law, all would be deducted from the award of damages. Under English law none would.

19. Waller LJ, delivering the lead judgment, found that the factors connecting the tort with England were essentially that the accident happened on an English registered boat, and that the defendant was an English company. There were more factors connecting the tort with Holland. The deceased was Dutch, employed on the ship by a Dutch company, paying his taxes in Holland. His family would suffer their loss of dependency in Holland. While Waller LJ accepted that in one sense these factors could be said to make it “appropriate” for damages to be assessed under Dutch law, he did not accept that they made it “substantially more appropriate”, as the section required before the general rule is displaced. To find otherwise would mean that in almost every case where the claimant was from another country, it would be appropriate to assess damages for personal injuries according to the law of that other country, and Waller LJ did not think the section was intended to have this effect.

20. Another limb of the decision in *Roerig* also deals with a difficult issue, namely the distinction between matters of substantive law and matters of procedural law. The distinction is often extremely difficult to draw, at least at the margins. The significance in conflict of law cases is that substantive matters are to be decided by “the applicable law” (or *lex loci delicti*), whereas merely procedural matters are to be decided according to the law of the court deciding the issue (or *lex fori*). It is sometimes said that rules relating to the recoverability of a head of damages are rules of substantive law, as are rules relating to eg mitigation of loss, remoteness of damage, and whether exemplary damages are available. However, it is also said that the quantification of a head of claim is merely procedural.

21. In *Roerig* the specific question was whether or not the statutory rule against deduction of benefits arising as a result of death was procedural or substantive. The Court of Appeal held that whereas the question of whether or not dependency damages were recoverable or not was a matter of substantive law, the question of whether or not benefits were deductible from those damages was a matter of procedural law. So even if the law applicable to the assessment of damages had been Dutch, once it was established that dependency damages were known to the Dutch law, they would still be calculated on English principles.

22. Doubt was cast on that limb of *Roerig* in the subsequent Court of Appeal decision of *Harding v Wealands* [2005] 1 WLR 1539. In that case, a road traffic accident happened in New South Wales rendering the claimant tetraplegic. The claim was brought in England. The attempt to have it sent for trial in Australia was unsuccessful. Liability was admitted, so the only issues between the parties related to the quantification of damages. The defendants averred that New South Wales law applied to the assessment of damages, and in particular relied on the Motor Accidents Compensation Act 1999 of New South Wales which imposed restrictions on the amount of damages which could be recovered.

23. The judge held that although New South Wales was the place of the tort and so *prima facie* provided the governing law, the factors connecting the case with England rendered it substantially more appropriate to apply English law. He said:

In this case the factors connecting the tort with New South Wales are that the accident occurred there, the defendant is an Australian national from New South Wales; she was driving on a New South Wales driving licence with New South Wales insurance; and the injuries were suffered there. By contrast, the factors connecting the tort with England are that the claimant was British, he had always lived and worked in England, he was domiciled in England at the relevant time, he and the defendant were both resident in England and living together in a settled manner; and they were only in Australia for the purposes of a holiday. The consequences of the injury would be suffered by the claimant in England and the cost of dealing with the cost of special care required in the future would have to be borne in England.

24. The judge also held that in any event, the quantification of the damages was a procedural matter, as decided by *Roerig*, and that the limits set down in the Motor Accidents Compensation Act 1999 of New South Wales would in any event have been inapplicable.

25. On the first question, the Court of Appeal unanimously overturned the judge. Waller LJ at paragraph 20 said:

> I accept, accordingly, that this court should be very cautious in differing from the judge's evaluation made in this case. But even acting cautiously I simply cannot accept a conclusion that the defendant's link at the material time with England and with Mr Harding was far more significant than her Australian connection, or that the strongest factor favouring New South Wales was the fact that Ms Wealands was insured there. I would fully understand, having regard to the settled relationship, that Mr Harding and Ms Wealands were in, that if they had been on holiday in France when this accident occurred England might have been found to be substantially more appropriate and to have displaced French law. But where the general law, by virtue of section 11 being the law where the tort occurred, is also the national law of one of the parties, it will, I suggest, be very difficult to envisage circumstances that will render it *substantially* more appropriate that any issue could be tried by reference to some other law. In this case all that the judge relied on, as Mr Haddon-Cave emphasised, was the

parties' "settled relationship", but however settled that relationship, Ms Wealands had left her car in New South Wales, was still a citizen of Australia driving on a New South Wales driving licence, and the accident occurred in New South Wales.

26. This suggests that the position for defendants seeking to apply foreign law when accidents happened abroad to English claimants might not be so difficult as appeared for a time after *Edmunds*. However, unless the Court of Appeal also overturned the judge on the question of whether the limits imposed by the Motor Accidents Compensation Act 1999 of New South Wales were substantive or procedural matters, the success on the first issue would have been academic for the defendant.

27. In the event, the Court of Appeal did overturn the judge on this question, by a majority of 2-1, with Waller LJ dissenting. Waller LJ was of course the judge who gave the leading speech in *Roerig*, and he essentially restated his reasoning in that case.

28. The majority, however, felt that it was artificial to put under the "merely procedural" heading matters of such fundamental importance as a statutory cap on damages, and were of the view that *Roerig* overstated the position in asserting that all matters going merely to the assessment of a particular head of damage were procedural. Arden LJ followed previous Australian authority in holding that "laws that bear on the existence, extent or enforceability of remedies, rights and obligations should be characterised as substantive and not as procedural laws" (para 54). It is worth setting out her reasoning at greater length (paras 52 and 54).

> How then is the distinction between substance and procedure to be ascertained in any particular case? In my judgment, the first step is to have regard to the context. The meaning of substance and procedure for the purposes of section 14 of the 1995 Act must be sought in the context of the 1995 Act and not, for instance, in those cases where the matter has arisen for other purposes, for instance, for determining whether the

> presumption against retrospectivity in legislation applies. In the context of section 14, a principled approach requires the court to start from the position that it has already decided that the proper law of the tort is not the law of the forum, ie that some other law applies to the tort, either because it is the lex loci delicti or because it is substantially more appropriate than the lex loci delicti. On this basis, a reference to the law of the forum must be the exception, and it must be justified by some imperative which, relative to the imperative of applying the proper law, has priority. It may, for instance, be appropriate to apply the law of the forum where the court cannot put itself into the shoes of the foreign court. This would arise where it has no power to award damages on a structured basis, even though such a power exists in the court of the jurisdiction which is the proper law. It would also arise where the court cannot put itself into the shoes of the foreign court of the lex loci delicti in the sense that it cannot do justice unless it applies its own law. As I see it, this is the reason for treating the assessment of damages as a matter for the law of the forum.
>
> . . .
>
> In my judgment, when the court seeks to ascertain whether a matter is one of substance or procedure, it has to ask whether the restrictions imposed by MACA are restrictions on the right to recover damages conferred by the foreign law. This test is in line with the second of the guiding principles identified by the majority in the *John Pfeiffer Pty Ltd* case 203 CLR 503, para 99, which is set out in para 90 of the judgment of Sir William Aldous. That guiding principle led the majority in the *Pfeiffer* case to conclude, at para 102, that "laws that bear on the existence, extent or enforceability of remedies, rights and obligations should be characterised as substantive and not as procedural laws".

29. Sir William Aldous agreed with Arden LJ.

30. The effect of *Harding* is that the law on the substance/procedure distinction has been brought more into line with the way most lawyers would tend to think of those terms. It is not natural to think of such important matters as whether or not damages for a tetraplegic are capped or not as merely procedural. On the other hand, it has increased uncertainty. Under *Roerig*, it was fairly straightforward to advise that the recoverability of a particular head of claim (eg damages for pain, suffering and loss of amenity) was a matter of substantive law, whereas quantification of that head was a matter of procedural law. Now it is necessary to

look more closely at the precise questions of quantification which arise before forming a view on whether they are substantive or procedural.

31. For defendants, however, the decision is on balance welcome. The risk of *Roerig* was that defendants could successfully argue that the law governing a case was foreign law, but lose the benefit of that success by having the damages assessed according to English principles. That should be less common now.

32. These are cases in which the defendant has argued that foreign law applied to the assessment of damages because in the three examples given, the award would have been smaller if the assessment were carried out according to the foreign law. Similar advantages might exist in relation to limitation periods, either because they are shorter or because there is no discretion to extend them.

33. At common law, the courts had great difficulty in establishing clear rules in conflict of law cases as to when the English limitation period applied and when the foreign limitation applied. The matter was clarified by statute, but not made free of doubt.

34. The statute is the Foreign Limitation Periods Act 1984. Section 1 provides that where foreign law is to be taken into account in the determination of a matter, then the limitation period prescribed by the relevant foreign law applies, unless English law is also relevant to the determination of the matter, in which case English limitation law applies. Section 2, however, reintroduces uncertainty. It provides:

> **2.** —(1) In any case in which the application of section 1 above would to any extent conflict (whether under subsection (2) below or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict.

(2) The application of section 1 above in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings.

35. A detailed analysis of when a conflict with public policy will exist was carried out by Moses J in *The City of Gotha v Sothebys,* Moses J, The Times, 8 October 1998 (not a personal injury case). The (mostly unreported) cases on the statute are cited in his analysis. It is clear that such public policy exclusion of a foreign limitation period will be exceptional. The statute exists in order to fulfil foreign rights, not to destroy them. The fact that the period is shorter, even much shorter, than under English law will not be enough.

36. However, it may be easier to have a foreign limitation period disapplied in personal injury cases than in, for example, commercial cases. In *Durham v T&N plc* CA 1/5/96 unreported at page 12 Sir Thomas Bingham MR said that if a foreign limitation period for personal injury took no account of the claimant's state of knowledge (ie if there was nothing generally equivalent to section 14 and/or section 33 of the Limitation Act 1980) then it might be contrary to public policy.

37. In a case where the foreign limitation period was only 12 months and where the Claimant had spent some time in hospital and had been led to believe that her claim would be met, it was held that it would cause undue hardship to her to lose her claim: see *Jones v Trollope Colls Cementation Overseas Limited* (The Times 26/1/90, Court of Appeal).

<u>Should the case be tried in England or abroad?</u>

38. If an action is commenced in England and the English court has jurisdiction, it might nonetheless stay the claim if another, foreign, court would be the proper

place to have the case tried: the power to stay on grounds of *forum non conveniens*.

39. The leading discussion of when and how the power should be exercised is in the speech of Lord Goff in *Spiliada Maritime Court v Cansulex Limited* [1987] AC 460. At 476 he says:

> The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum having competent jurisdiction which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interest of all the parties and the ends of justice.

40. It is a broad general discretion taking into account all factors. Relevant factors are likely to include the law applicable to the dispute (ie if the law of Australia governed a dispute, it might all other things being equal be more appropriate to have the case tried in Australia), the domicile of the parties (if 9 parties out of 10 are resident in Australia that would be significant), where witnesses are, and so forth.

41. The most important limitation on this discretion is in relation to cases where the possible competing forum is in another EC country. In such cases, the allocation of jurisdiction is governed by the provisions formerly found in the Brussels Convention, now contained in Council Regulation (EC) 44/2001. The central jurisdictional articles for our purposes are:

> Article 2
>
> 1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.
>
> . . .

Article 5

A person domiciled in a Member State may, in another Member State, be sued:

> 1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
>
> . . .
>
> 3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

. . .

Article 6

A person domiciled in a Member State may also be sued:

> 1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
>
> 2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

42. There are also specific jurisdictional provisions relating to insurance disputes, consumer contracts, and employment contracts providing rules of jurisdiction more favourable to claimants. There are further a number of articles providing for exclusive jurisdiction, eg where the dispute is about real property, only the court of the Member State in which the property is situated will have jurisdiction.

43. Comparison of the English law of forum non conveniens and the Brussels Convention shows a fundamental difference of approach. The English law places

much discretion in the hands of its judges. Most continental systems prefer to proceed by mandatory rules, which increase certainty, albeit at the potential expense of anomaly or even injustice in any particular case. The Brussels Convention is continental in its approach. Where it applies, the English court either has jurisdiction, and no discretion to refuse a case, or has no jurisdiction.

44. The potential application of the Brussels Convention, therefore, must always be kept in mind when one or more of the parties to a proposed action is connected to another Member State of the EC. The perils of failing to do so are shown by *Watson v First Choice, Aparta Hotels* [2001] EWCA Civ 972.

45. Mr Watson went to Spain on a package tour bought from First Choice. While there, he visited an accommodation block called Caledonia Park which was owned and managed by Aparta Hotels. He was refused entry, and chased away by a baton wielding security guard. In making his escape, he jumped over a low wall. On the other side of the wall was a 20 metre drop, and he suffered serious injuries. He claimed against both defendants in an action in England. Against First Choice, he sued under the contract for the package tour, a contract made with an English company and under English law. First Choice's liability was said to arise under the Package Tour Regulations, First Choice being effectively vicariously liable for the acts of Aparta. As against Aparta, the claim was based in tort.

46. One might think that these facts were precisely what Article 6.1 of the Convention was designed to cover, claims so closely connected that it was expedient to determine them in a single forum, and that therefore the English courts had jurisdiction. However, the European Court of Justice had already considered the use of Article 6.1 in the *Réunion Européene* case, C-51/97 [1998] ECR 1-6511, and had said the following:

> Two claims in one action for compensation, directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict cannot be regarded as connected.

47. On the basis of that dictum, the judge set aside service against Aparta, leaving Mr Watson to his perhaps uncertain remedy against First Choice. The result is to English eyes absurd. To answer the question by reference to the way in which each of two claims is framed, in tort or contract, rather than by reference to broader considerations of practical justice, seems to be formalism of a high degree. The Court of Appeal, perhaps unable quite to believe that *Réunion Européene* meant what it said, referred the case to the ECJ for an answer.

48. *Owusu v Jackson* [2002] EWCA Civ 877 shows the creative possibilities and the pitfalls of the Brussels Convention. Mr Owusu booked a holiday villa in Jamaica from Mr Jackson. While there, he swam in the sea. Diving into the water, he struck his head on a sand bank and suffered a C5 tetraplegia. He sued Mr Jackson and 5 other defendants, who were all involved in one way or another with the control and management of the beach off which the accident happened. The claim was brought in England. Mr Owusu and Mr Jackson were both domiciled in England. The other 5 defendants were all domiciled in Jamaica, and had carried out no relevant activities outside that country. They were all involved in one way or another with the control and management of the beach off which the accident happened.

49. Mr Jackson had insurance cover for his villa, but only in respect of judgments obtained in Jamaica, and in any event with a cover limit which would be wholly inadequate for a tetraplegia claim. At least some of the other defendants had effectively unlimited insurance cover. It would not be unfair to think that the real reason for joining Mr Jackson into the claim was to give justification for bringing it in England. That is not a criticism of the conduct of the claimant’s advisers,

who are obliged to conduct litigation for the best interests of their client, and were perfectly entitled to seek tactical advantage in this way.

50. Mr Jackson applied to have the claim in England stayed on grounds of *forum non conveniens* and all the Jamaican defendants applied to have service against them set aside. Almost all the relevant acts or omissions happened in Jamaica, and Jamaican law was clearly the law of the torts and arguably the law of the contract between Mr Owusu and Mr Jackson. The claimant, however, contended that there was no power to stay the claim against Mr Jackson at all. To do so would be inconsistent with the Brussels Convention (which was in force at the relevant time), since Article 2.1 provides a mandatory requirement that (unless other articles override) a person be sued in the state of his domicile. Mr Jackson was domiciled in England, and Mr Owusu had an indefeasible right to sue him here. The same argument did not apply to the other 5 defendants, of course. But how could the court say, the case against Mr Jackson should be tried in England, whereas as against the other defendants it should be tried in Jamaica? Practical difficulties are obvious. There might be different outcomes to trials of what should be essentially the same issues. How would one deal with the inevitable claims for contribution or indemnity between defendants?

51. The defendants argued that the Brussels Convention was concerned with regulating jurisdiction between Member States, not between a Member and a non-Member State, which was not a matter of legitimate Community interest. That was consistent with previous English authority: *In re Harrods* [1992] Ch 72.

52. The judge accepted the argument of the defendants that Jamaica was the appropriate forum. However, he agreed with Mr Owusu's contention that the Brussels Convention precluded a stay against Mr Jackson, and so refused to stay the claim against any defendant. The Court of Appeal did not appear entirely to support the judge's reasoning, but thought the matter needed to be referred to the European Court of Justice.

53. In spite of the support of the UK Government, the ECJ in its decision of 1 March 2005 (Case C-281/02) supported the claimant's position, and held that since Mr Jackson was domiciled in England, Mr Owusu had an absolute right to sue him here. The position of the other defendants was nothing to the point, nor were the difficulties and complications which might follow if the claim against Mr Jackson proceeded in England while the claims against the other defendants were remitted to Jamaica (eg inconsistent judgments, impossibility of contribution proceedings, enforcement problems).

54. Cases such as Owusu show how far the waters of European law have indeed advanced up the English estuaries. That in a dispute between an English claimant and a variety of English and Jamaican defendants jurisdiction could be allocated by the Brussels Convention rather than the rules of common law would come as the greatest surprise to many common lawyers.

The Fourth European Motor Directive

55. I finish briefly with the Fourth European Motor Directive (2000/26/EC).

56. In a series of four motor directives, the EC has increased protection for victims of motor accidents. Among other things, it has:

    a. Provided for minimum levels of compulsory insurance throughout the EC.
    b. Provided simplified mechanisms for claiming against European drivers from outside the UK, with the MIB acting as claims handling agent for the foreign driver.
    c. Provided the legal underpinning for the 1988 MIB agreement for uninsured drivers.

57. That protection has been extended by the Fourth Directive, which is particularly concerned with easing the difficulties faced by victims of road traffic accidents who are claiming in respect of accidents in other European countries. It recognises that the green card scheme does not solve all problems for a claimant having to claim in a foreign country, and refers particularly to the difficulties arising from having to deal with a foreign legal system, foreign language, unfamiliar claims settlement procedures, and unreasonable delay (preamble paragraph 6). It raises the possibility that a satisfactory solution "might be for the injured parties suffering loss or injury as a result of a motor vehicle accident falling within the scope of this Directive and occurring in a state other than that of their residence to be entitled to claim in their Member State of residence". (preamble paragraph 11).

58. That step has not yet been taken, but would be facilitated by the requirement that "claims representatives" be appointed by motor insurers in each state (apart from their "authorised" state, where they will effectively have their seat of business anyway) (see Article 4.1). These representatives should have all powers to settle claims on behalf of insurers. This requirement has been met in English law by the Financial Services and Markets Act 2000 (Variations of Threshold Conditions) Order 2002 (SI 2002/2707).

59. Perhaps the most significant step under the Directive is the creation of a direct right of action against the insurer when the accident happens in a State other than the state of residence of the injured party (Article 3). Such a right is in addition to the right of action against the (allegedly) negligent driver and the liability of the insurer is co-extensive with the liability of the driver. This has been brought into English law by the European Communities (Rights against Insurers) Regulations 2002.

60. The insurer would probably, under the Brussels Convention, have to be sued in its domicile, the place where the policy was written, or the place where the accident

happened. From the point of view of the claimant, the last 2 are very likely to be "abroad". However, in days of insurers with international reach, it is worth checking the domicile of the insurer (as defined in Article 60 of the Brussels Convention). If it is England, there should be no reason why a claim against the insurer cannot not brought in the English courts even where the accident happened in another Member State.

61. Plans are already afoot for a fifth directive, with the purpose of improving further the legal position of accident victims. It may be that the fifth directive will permit injured claimants to sue in their country of residence, no matter which member state the road traffic accident occurred.

29 June 2005

39 Essex Street
London WC2R 3AT

Bernard Doherty