Claimants involved in accidents overseas can have claims heard in English courts

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Personal Injury analysis: What are the practical implications of the Court of Appeal decision in Keefe? Olivia Wybraniec of 3 Hare Court comments on the judgment which confirmed that, under Brussels I, art 11(3), a foreign tortfeasor can be joined to proceedings issued against a foreign tortfeasor in the courts of the place where the injured person is domiciled.

Original news

Keefe (by his litigation friend Eyton) v Mapfre Mutualidad Compania De Seguros Y Reaseguros SA and another [2015] EWCA Civ 598, [2015] All ER (D) 213 (Jun)

The issue for determination was whether the claimant was entitled to rely on Council Regulation (EC) 44/2001, art 11(3) (Brussels I) to sue an alleged foreign-domiciled tortfeasor in the same proceedings as a direct claim brought against such tortfeasor's foreign-domiciled liability insurer in the English court. The Court of Appeal, Civil Division, held that art 11(3) applied to the claim which the claimant wished to pursue against the second defendant tortfeasor, notwithstanding that the claimant had been seeking the procedural advantage of the higher quantum of damages that would be awarded by an English court.

What issues did this case raise and why is it significant?

This is the first time the Court of Appeal has considered as part of its judgment the Brussels I, art 11(3) (Brussels I (recast) (EC) No 1215/2012, art 13(3)--Brussels I (recast) entered into force on 10 January 2015 and applies to all proceedings instituted from that date). The Court of Appeal held that where an English-domiciled claimant brings a direct action for personal injury in the English court against a foreign-domiciled insurer pursuant to Brussels I, arts 9(1)(b) and 11(2), the claimant may join the foreign-domiciled tortfeasor to the English proceedings under art 11(3).

Article 11(3) provides that:

> 'If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.'

Giving the leading judgment, Gloster LJ looked to *Odenbreit v FBTO Schadeverzekeringen NV:* C-463/06 [2008] 2 All ER (Comm) 733 to determine that the 'governing' law which must permit the direct action or joinder is the law of the court (lex fori), including its private international law rules. The private international law rules of the English court classify the issue of a direct right of action against an insurer as a substantive matter, and therefore governed either by the law of the place where the damage occurred, as Moore-Bick LJ concluded (lex causae), or by the law of the insurance contract (Gloster LJ did not feel it necessary to express a concluded view). In both cases this was Spanish law. Spanish law provides that an insured may be joined to an action against an insurer, and therefore the English court had jurisdiction over the tortfeasor hotel under Brussels I, art 11(3).

The decision is significant because it confirms that the English court can have jurisdiction over an insured tortfeasor, where otherwise the only court with jurisdiction would be the court of the place where the harm occurred, pursuant to Brussels I, art 5(3) (Brussels I (recast), art 7(2)). This decision is really important for claimants involved in accidents overseas, because where it is necessary to bring a claim against both the insurer and the insured, and the applicable law permits a direct action and joinder of the insured, that claim can be heard in the English court, avoiding the cost and stress of pursuing the tortfeasor in a foreign jurisdiction and the very real risk of irreconcilable judgments.

How helpful is this judgment in clarifying the law in this area? Are there any remaining grey areas?

The clarification is extremely helpful. The issue had only previously been considered obiter, in the case of *Maher v Groupama Grand Est* [2009] EWCA Civ 1191, [2010] 2 All ER 455. Moore-Bick LJ, who gave the leading judgment in *Maher*, took the opportunity in *Keefe* to clarify what he had said on art 11(3), confirming his position that art 11(3) is not restricted to insurance policy disputes. However, in *Keefe* he changed his view as to the law which determines the existence of a direct right of action against the insurer, stating it to be the law of the place where the wrongful act occurred (as opposed to the proper law of the insurance contract, suggested in *Maher*).

As to uncertainty, while the Court of Appeal's decision is of course binding, it is understood that the hotel has applied for permission to appeal, so in due course the issue may be re-considered by the Supreme Court and the Court of Justice of the European Union (CJEU).

What does all this mean for lawyers and their clients? What should they do next?

Gloster LJ stated in her post-script that few cases like this would arise in the future due to the provisions of the Rome II Regulation (EC) No 864/2007 (not in force at the time of Mr Keefe's accident), under which damages are assessed in accordance with the lex causae. However, this judgment is still very important as, even under Rome II, the English court will still apply its own rules of evidence and procedure, which may result in a higher award than the court of the lex causae would give, as per *Wall v Mutuelle De Poitiers Assurances* [2014] EWCA Civ 138, [2014] 3 All ER 340. Further, a claimant may simply want to pursue a defendant in their home court for the convenience and accessibility of the proceedings.

Although the decision in *Keefe* is useful for claimants, their representatives should not rush to add tortfeasors to proceedings brought directly against insurers unless there is good reason for doing so. In many cases a claimant will be able to recover full damages directly against the insurer alone, and it will only be necessary or desirable to add the tortfeasor to such claims in certain circumstances--for example where the value of the insurance policy is inadequate to cover the damages claimed.

How does this fit in with other developments in this area?

The decisions in both *Keefe* and *Odenbreit* provide interpretations of Brussels I which favour the interests of the injured party. This furthers the objective stated at Brussels I, recital 13 (Brussels I (recast), recital 18), that in certain matters, including insurance, the weaker party should be protected by more favourable rules of jurisdiction. However, the CJEU in *Vorarlberger Gebietskrankenkasse v WGV-Schwäbische Allgemeine Versicherungs AG:* C-347/08 [2010] 1 All ER (Comm) 603 confirmed that only the injured party should benefit from the protective application of Brussels I seen in *Odenbreit*, and not a statutory assignee of the injured party's claim. The same rationale most likely applies to claims under art 11(3), restricting the pro-claimant interpretation of art 11(3) in *Keefe* only to claims brought by the injured party themselves.

3 Hare Court's Katherine Deal acted successfully for the claimant in Keefe.

Interviewed by Barbara Bergin.

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