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Which is the Applicable Law in Recovery of Losses from an Uninsured Driver? *Moreno v The Motor Insurers' Bureau* [2016] UKSC 52

Katy Ferris* and James Marson**

BACKGROUND TO THE APPEAL

Ms Tiffany Moreno, a UK national, was on holiday in Greece in May 2011 when she was struck by a car whilst walking along a road, and suffered serious injury. The car was registered in Greece, however the driver, who was at fault, had no driving licence and was uninsured. Under motor insurance law, victims of accidents involving motor vehicles would normally seek compensation through the driver/owner's insurers (on a contractual basis). It is also possible that national law can make the contractual insurer fulfil the role of insurer where some error has occurred which would have otherwise allowed it to avoid having to satisfy claims on the policy (establishing it as a statutorily-imposed insurer). Finally, in the event that the tortfeasor holds no insurance, the victim has no insurer from which to claim, and the driver who caused the accident is unable to satisfy the award of damages, a state guarantee-fund (as required by the Motor Vehicle Insurance Directives¹ (the MVID), the latest being the sixth directive 2009/103/EC, exists to act as insurer of last resort for the victims of accidents caused by uninsured and untraced drivers.

The Motor Insurers' Bureau (MIB) undertakes the central guarantee fund role in the UK and each member state of the European Union (EU) is required to operate such a body to ensure that victims of motor accidents can be assisted with their claims for recovery of compensation. The MVID and the UK transposing Regulations (the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003² (the 2003 Regulations)) facilitate a scheme where, among other elements, the victim of a motor vehicle accident in a member state of the EU may, in certain circumstances, claim compensation directly from the guarantee fund body (i.e. the MIB in the UK) in their country of residence.

THE ISSUE AT APPEAL

The issue for Moreno was, following her return home, her claim for compensation was made to the MIB, which concluded that the damages award be made in accordance with Greek, not English law. Moreno was concerned that Greek law would lead to a lesser measure of compensation than that available under English law. At first instance, Gilbart J in the High Court applied the reasoning of the Court of Appeal in *Jacobs v Motor Insurers' Bureau* [2010]³ to hold that the damages were to be determined by English law. The MIB appealed and the High Court allowed the appeal directly to the Supreme Court through the granting of a 'leapfrog' certificate under s. 12 Administration of Justice Act 1969.

JUDGMENT

The Supreme Court allowed the MIB's appeal and held the award of damages be determined according to the law of Greece. The 2003 Regulations are subject to consistent interpretation with the parent EU directive (the MVID) and the case law of the Court of Justice of the European Union (including *Marleasing v La Comercial*

Internacional de Alimentación).⁴ The MVID aimed to facilitate the protection of the victims of motor accidents throughout the EU and to make their recovery of compensation easier than would be the case through, for example, private actions for recovery of damages. The first question the Supreme Court had to answer was whether the MVID proscribes a particular approach to the scope or measure of the recovery of damages. The MVID do not allow member states discretion as to a choice of which law of the member states it wishes to use in the calculation of an award (if for no other reason than to ensure consistency of approach). The compensation body in the victim's country of residence is required to 'apply, in evaluating liability and assessing compensation, the law of the country in which the accident occurred' (cl 7.2 and 8.2). The second question was whether the 2003 Regulations comply with the MIVID. This question was answered in the affirmative. The 2003 Regulations were held as being consistent with the scheme of the MVID.⁵

IMPLICATIONS

Moreno makes it clear that the recovery of damages for the victims of motor vehicle accidents should be consistent, regardless of whether the claimant is insured or uninsured.⁶ Further, the Supreme Court sought to clarify the meaning of Reg. 12(2)(b) where the loss and damage recoverable from the MIB is said to be that

'properly recoverable in consequence of that accident by the injured party from [the insured] person under the laws applying in that part of the United Kingdom in which the injured party resided at the date of the accident.'

This regulation referred to which of the UK's three legal systems was to apply in the circumstances, not to prescribing a measure of the recovery of damages in the proceedings. This overruled the inconsistent judgments of *Jacobs v Motor Insurers' Bureau* [2010] and *Bloy v Motor Insurers' Bureau* [2013]⁷ in relation to the meaning of regulation 13(2)(b).⁸ *Moreno* follows the judgment provided by the CJEU in *Ergo Insurance SE v PZU Lietuva UAB DK* [2016]⁹ regarding the lack of any specific conflict-of-law rule intended to determine the law applicable to the action for indemnity between insurers. There was, thus, no scope for the independent provision of which law was to apply in the circumstances of the case. If the accident and losses occurred in Greece, the law of Greece was to be applied – even where the victim of the uninsured driver brought her claim in the UK and to the UK's guarantee-fund body (the MIB).

With the clarity of the applicable law issue comes the unfortunate consequence. As the regulation and quantum of damages awards differs between jurisdictions, victims of accidents in some states within the EU will receive more generous awards, and others less generous. Divergent practices exist throughout the member states regarding, for instance, the determining of economic and non-economic losses, and there is no uniform compensation practice across Europe.

Ultimately, where a person is visiting an EU country and driving as part of the visit, either as the driver or a passenger, it would be advisable to obtain additional cover. When driving in another EU country, a UK motor insurance policy will generally extend that cover automatically to include the member state in which the driver is operating the vehicle. However, this will be on a basic, third-party/liability only basis.

For higher levels of protection, it is advisable to upgrade the policy to ensure comprehensive cover is applied. This will avoid the potential 'lottery' of having to rely on protection afforded in the relevant member state (which may be less generous than that offered under national law).

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¹ (The First Directive) Council Directive 72/166/EEC on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability [1972] OJ L103/1; (the) Second Council Directive 84/5/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1984] OJ LL8/17; (the) Third Council Directive 90/232/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1990] OJ L129/33; Directive 2000/26/EC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (the Fourth Motor Insurance Directive) [2000] OJ L181/65; (the Fifth Directive) Directive 2005/14/EC amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles [2005] OJ L149/14; and (the Sixth Directive) Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11.

² SI 2003 No 37.

³ *Jacobs v Motor Insurers' Bureau* [2010] EWCA Civ 1208.

⁴ Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

⁵ at [40-41].

⁶ at [31].

⁷ *Bloy v Motor Insurers' Bureau* [2013] EWCA Civ 1543.

⁸ at [43].

⁹ Cases 359/14, C-475/14 *Ergo Insurance SE v PZU Lietuva UAB DK* ECLI:EU:C:2016:40 of 21 January 2016.