

UK Supreme Court Rules on Law Governing Damages

On 2 April 2014, the Supreme Court of the United Kingdom delivered its judgment in *Cox v Ergo Versicherung AG*.

In this pre-Rome II case, the issue before the court was whether issues of damages were substantive or procedural in character for choice of law purposes.

The court issued the following press summary.

BACKGROUND TO THE APPEALS

These proceedings arise out of a fatal accident in Germany. On 21 May 2004 Major Cox, an officer serving with H.M. Forces in Germany, was riding his bicycle on the verge of a road near his base when a car left the road and hit him, causing injuries from which he died. The driver was Mr Kretschmer, a German national resident and domiciled in Germany. He was insured by the respondent, a German insurance company, under a contract governed by German law. The appellant, Major Cox's widow, was living with him in Germany at the time of the accident. After the accident, she returned to England where she has at all relevant times been domiciled. She has since entered into a new relationship and has had two children with her new partner.

Liability is not in dispute, but there are a number of issues relating to damages. Their resolution depends on whether they are governed by German or English law, and, if by English law, whether by the provisions of the Fatal Accidents Act 1976 ("the 1976 Act") or on some other basis. The question which law applies was ordered to be tried as a preliminary issue.

There are two relevant respects in which an award under English Law, specifically the 1976 Act, may differ from an award under the relevant German Law, "the BGB". First, damages awarded to a widow under the BGB will take account of any legal right to maintenance by virtue of a subsequent remarriage or a subsequent non-marital relationship following the birth of a child. Section 3(3) of the 1976 Act expressly excludes remarriage or the prospect of remarriage as a relevant consideration in English law. Secondly, Section 844 of the BGB confers

no right to a solatium for bereavement. Under section 823 of the BGB the widow may in principle be entitled to compensation for her own pain and suffering, but this would require proof of suffering going beyond normal grief and amounting to a psychological disturbance comparable to physical injury.

English rules of private international law distinguish between questions of procedure, governed by the law of the forum i.e. in this case England, and questions of substance, governed by the local laws, in this case Germany. The issue in the present case is whether Mrs Cox is entitled to rely on the provisions of sections 3 and 4 of the 1976 Act. They provide for a measure of damages substantially more favourable to her than the corresponding provisions of German law, mainly because of the more favourable rule concerning the exclusion of her current partner's payments of maintenance. This issue depends on whether the damages rules in sections 1A and 3 of the 1976 Act fall to be applied (i) on ordinary principles of private international law as procedural rules of the forum, or (ii) as rules applicable irrespective of the ordinary principles of private international law.

The Court of Appeal held that English law should adopt the German damages rules as its own and apply them not directly but by analogy.

JUDGMENT

The Supreme Court unanimously dismisses the appeal and finds that the German damages rules apply. Lord Sumption writes the leading judgment and Lord Mance writes a concurring judgment [37].

REASONS FOR THE JUDGMENT

- The Court finds that the relevant sections of the 1976 Act do not apply as they do not lay down general rules of English law, but only rules applicable to actions under the Act itself. An action to enforce a liability whose applicable substantive law is German law is not an action under section 1 of the 1976 Act to which the damages provisions of the Act can apply [20].
- As the particular rules of assessment in the 1976 Act do not apply, then the answer must be sought in the rules of assessment which apply generally in English law in the absence of any statute displacing them.

The relevant English law principle of assessment, which applies in the absence of any statute to the contrary, is that Mrs Cox must be put in the same financial position, neither better nor worse, as she would have been in if her husband had not been fatally injured. It follows that, in principle, credit must be given for maintenance from her subsequent partner during the period since the birth of their child [21].

- A further issue concerns Mrs Cox's receipt of maintenance from her current partner during the period before they had a child, when he was under no legal obligation to maintain her either in German or in English law [22]. The findings at first instance about the relevant German law indicate that it is not just the maintenance that the appellant would have received from Major Cox that must have been received by virtue of a legal obligation, but also the maintenance from her current partner for which she can be required to give credit. Lord Sumption notes that the classification of a damages rule regulating the receipts for which credit must be given in an award of damages is a difficult question which admits of no universal answer but that, in the present case, the rule in question is one of substance, rather than procedure [22] (Lord Mance [39]).
- Lord Sumption rejects the argument that the 1976 Act should be applied notwithstanding the ordinary rules of private international law. As a matter of construction the Act does not have extraterritorial effect [32 – 34]. Nor do the principles enacted in the 1976 Act represent 'mandatory rules' of English law, applicable irrespective of ordinary rules of private international law [35].
- Lord Mance explains that it makes no difference to the outcome of the appeal whether or not the dependency claims under the 1976 Act and German law are categorised as broadly similar or whether the relevant provisions of the 1976 Act are treated as substantive or procedural [47]. Assuming that the dependency claims are categorised as broadly similar, the provisions of ss. 3 and 4 of the 1976 Act are, if substantive, irrelevant to a tort subject to German substantive law. If on the other hand, the provisions of ss. 3 and 4 were to be treated as procedural, their application could have no effect on the outcome. There is no basis on which an English procedural provision can expand a defendant's liability under the substantive principles of the relevant governing law [48].