OUTER HOUSE, COURT OF SESSION

[2025] CSOH 119

PD348/24

OPINION OF LORD UIST

In the cause

LACRAMIOARA POPA AND OTHERS

Pursuers

against

XDP LIMITED

Defenders

Pursuers: Ronald Conway, sol-adv; Conway Accident Law Practice
Defenders: Murray KC; Clyde & Co (Scotland) LLP

18 December 2025

Introduction

[1] The late Bogdan-George Popa ("Mr Popa") was born in Romania on 18 August 1989 and died in a tragic road traffic accident on the M74 northbound carriageway approximately 1.5 miles north of Junction 11 Lesmahagow, South Lanarkshire on 29 January 2022. He was a Romanian national until his death. The first pursuer is his wife, to whom he was married in Romania on 8 October 2010. They, along with their son, the second pursuer, who was born in Romania on 16 October 2009, moved from Romania to an address in Liverpool in December 2019. The third and fourth pursuers are the parents of Mr Popa. They are Romanian nationals and live in Romania. This action is brought against XDP Limited

("XDP"), his employers at the time of his death, based on their alleged negligence in causing or substantially contributing to the accident.

[2] Mr Popa obtained a Romanian driving licence on 15 May 2008 and the Romanian equivalent to the CPC, a professional HGV driver's qualification, on 31 January 2017. He began working as an agency worker for the defenders in about December 2019. The defenders are a private limited company which was incorporated on 3 February with a registered office at Tamworth in Staffordshire. On 27 January 1999 their registered office was changed to Curdworth House, Kingsbury Road, Curdworth, Sutton Coldfield, which remained their registered office on 29 January 2022. They are a transport and logistics company with a fleet of vans and lorries. On 29 January 2022 they had a place of business at Gillibrands Road, Skelmersdale, Lancashire ("the Skelmersdale depot") and a delivery depot at Unit 1, Biggar Road Industrial Estate, Biggar Road, Cleland, Motherwell ("the Cleland depot"). XDP wrote to Mr Popa offering him a contract of employment and specifying that his usual place of work was the Skelmersdale depot. His wage slips also recorded his place of employment as the Skelmersdale depot. His contract of employment stated that he would be based at the Skelmersdale depot and required to work at various locations as directed by the company to meet the needs of the business. His contract of employment, his new starter form and his HMRC form all recorded his home address in Liverpool. On 11 October 2021 he completed his Atlas training and Fire Marshall training in Cheshire. On 27 October 2021 XDP wrote to Mr Popa at his home address to acknowledge his successful completion of his probationary period of employment. In the course of his employment with XDP he drove heavy goods vehicles from the Skelmersdale depot to the Cleland depot and then made the return journey. He worked Tuesday to Saturday from 4.00am each day and not drive other routes.

Circumstances of the accident

[3] At 10:24 hours on 28 January 2022 the National Severe Weather Warning Service of the UK Meteorological Service ("the Met Office") issued a yellow warning for wind, with strong westerly winds crossing Scotland for the period from 04:00 hours to 15:00 hours on 29 January 2022 and predicted that the winds would ease by the afternoon of 29 January 2022. Mr Popa reported for work at XDP's Skelmersdale depot in the early hours of the morning of 29 January 2022. At around 0400 hours he drove a laden Renault Premium Comfort 460 HGV registered number BV19 KXF ("the HGV") north towards XDP's depot in Cleland. The HGV was a 2-axle articulated motor lorry towing a 3-axle double decker trailer with a gross weight of approximately 18,000kgs, under the maximum permissible weight of 34,000kgs. It contained a load of flat pack furniture weighing approximately 4,765kgs, rendering the trailer lightly loaded and liable to be affected by high winds. Mr Popa was expected to arrive at Cleland at about 0830 hours. In the course of his journey on the M74 he noted that his vehicle was being affected by high winds and slowed down to between 50 and 55 miles per hour. At about 07:45 hours the HGV was increasingly affected by the wind and lost control of it in strong crosswinds. The curtain-sided HGV was struck by a strong gust from an already strong side wind which caused the HGV to roll onto its offside and tip fully onto its offside before crossing the metal barrier into the southbound carriageway, where it struck an oncoming vehicle. Officers of Police Scotland, and personnel of the Scottish Ambulance Service and the Scottish Fire and Rescue Service attended the scene of the accident. Mr Popa sustained a serious and unsurvivable head injury in the accident. His life was formally pronounced extinct at 08:15 hours. The cause of death was certified as "head injuries following road traffic collision (driver)" at a post-mortem examination carried out at the Queen Elizabeth University Hospital in

Glasgow on 9 February 2022. The accident was investigated by officers of Police Scotland. There were several crosswind warning signs on the M74 northbound near to the locus of the accident. The tachograph installed in the HGV was damaged beyond repair and no data are therefore available from it.

Alleged negligence

[4] The case against XDP is based on common law negligence consisting in their failure to take reasonable care for the safety of their employees, including Mr Popa. It is averred that on Friday 28 January 2022 he was allocated a delivery from the Skelmersdale depot to the Cleland depot and that he reported for work in the early hours of the following morning. There was no transport manager on site at the time he left. His route was subject to the Met Office yellow weather warning. Conditions were extremely windy. XDP did not communicate the weather warning to him. A suitable and sufficient risk assessment should have been carried out by XDP at their Skelmersdale depot. Such an assessment should have identified risks both to employees and also to persons liable to be affected by their undertaking, in particular to other road users. They should have implemented control measures as a result of a suitable and sufficient risk assessment. The driving of high-sided vehicles in conditions of high winds is dangerous. They should have put in place and implemented measures to control or eliminate that risk, in particular they should have:

(a) Monitored weather conditions and taken care to inform drivers of these conditions.

(b) Aborted the delivery of a light load of flat pack furniture from Skelmersdale to Cleland during conditions of high winds until such time as those winds subsided.

(c) Communicated with drivers en route and reminded them to slow down in conditions of high wind.

(d) Communicated to drivers the importance of safety first and that drivers should pause their journey and park up if they felt that their vehicle was being affected by high winds.

(e) Set up a system of work whereby drivers could pause their journey and park up until adverse weather conditions abated.

(f) Communicated to drivers that if they chose to pause and park up they would not suffer any penalty, financial or otherwise.

It is averred that the defenders had a risk assessment dated 18 March 2020 which was extant at the time but not suitable and sufficient. Whilst it identified the hazard of "adverse weather" by pictograms it did not contain advice on communication or control measures. Following the accident they carried out a further risk assessment dated 26 April 2023 which identified the danger of adverse weather and high winds. It confirmed that drivers would be supported if they did not travel because of adverse weather. This advice was not communicated to Mr Popa at the material time, nor to their employee James Foreman who was driving north to the Dundee hub on the M74 on Saturday 29 September 2022 and who was so concerned about the effect of the wind that he aborted his journey to Dundee, stopping instead at the Cleland hub. He was required by the defender to resume his journey on Monday 1 October, losing his day off. The pursuers rely on the Management of Health and Safety at Work Regulations 1999 as evidence of the defenders' duty of care at common law. They failed to take reasonable care for the safety of Mr Popa and their failure caused or materially contributed to the accident which caused his death. He took reasonable care for his own safety. The "centre of gravity" of the present action is in Scotland.

[5] XDP plead a case of contributory negligence against Mr Popa. They say that he was an experienced HGV driver who had completed a Driver Certificate of Professional Competence ("DCPC") in the week of the accident. On his approach to the locus of the accident he could have stopped or slowed his speed. He was aware that there was a roadside area in which he could have stopped. He did not significantly reduce his speed to compensate for the side-winds. Had he reduced his speed to 20mph to 30mph the accident is likely to have been avoided. He was appropriately trained and qualified to drive the HGV on the day of the accident. He had been issued with XDP's handbook which contained advice on driving in winds. He was an experienced HGV driver, having driven in continental Europe before he moved to the UK in 2019. He was aware of the weather conditions.

Procedural history of the action

[6] The action called before me in what was technically described as a preliminary proof on choice of law. It was accepted that the Court of Session had jurisdiction to deal with the action. As all the relevant facts were agreed in the terms set out above it was not necessary for me to hear any oral evidence from witnesses. The hearing therefore consisted only of submissions on the issue of choice of law based on the agreed facts. It was agreed that the issue of choice of law fell to be determined by interpretation and application of Article 4 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), as amended by The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019 (SI No834/2019).

Article 4 of Rome II

[7] Certain recitals in Rome II which were referred to and founded on are in the following terms:

> "Whereas:
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> (1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with cross-border impact to the extent necessary for the proper functioning of the internal market.
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> (6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of -law rules in the Member States to designate the same national law irrespective of the country of the court in which the action is brought.
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> (14) The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for a general rule but also for specific rules, and, in certain provisions, for an 'escape clause' which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner.
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> (16) Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred *(lex loci damni)* strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.
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> (17) The law applicable should be determined on the basis of where the damage occurs, regardless of the /country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the image was sustained or the property was damaged respectively.
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> (18) The general rule in this Regulation should be the *lex loci damni* provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual

residence in the same country. Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country."

[8] Article 4 of Rome II provides as follows:

"**General rule**

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining the damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

[9] Article 23 provides:

"**Habitual residence**

For the purposes of this Regulation the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

Where the event giving rise to the damage occurs, or the damage arises, in course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence."

[10] Article 25 provides:

"**States with more than one legal system**

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation."

Articles 4(1) and (2) therefore apply as between Scotland and England.

[11] There is no definition of habitual residence of natural persons in the Regulation but in the recent case of *Yordanov* v *Vasilev* [2024] EWHC 1496 at paragraph 36 Judge Annabel Darlow KC summarised the legal propositions on habitual residence as follows:

> "My attention has helpfully been drawn to a number of authorities in which the concept of habitual residence has been considered by the European court of Justice and to decisions of the courts of England and Wales. From these authorities the following key propositions may be distilled:
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> (i) 'Habitual' denotes a residence that has a certain permanence or regularity (*Mercredi*, ibid [44]).
> (ii) Habitual residence must be established on the basis of all the circumstances specific to each individual case (*A (Case C-523-07), (2010) Fam 42* at paragraph 37). Factors to be taken into account include duration, regularity, conditions and reasons for the stay; nationality, linguistic knowledge and manifestation of an intention to settle permanently through the purchase or lease of a residence or application for social housing (*A*, ibid, [38-40]).
> (iii) A peripatetic life over a short period was liable to constitute an indication that the individual in question did not habitually reside in the state in question (A ibid, [41]).
> (iv) The mere fact of residence in a particular country is insufficient; habitual residence is the location where the person has established his permanent or habitual centre of interests, with all relevant factors being taken into account (*M* v *M* (2007) EWHC 2047, as cited in the judgment in *Winrow* v *Hemphill and another* (2014) EWHC 3164 (QB) [12]).
> (v) The intention of the parties as to future residence is not a determinative factor; in *Re LC (Children)* (2014) 2 WLR 124 Baroness Hale, with whom Lord Sumption agreed, held:
> *59. The first principle is that habitual residence is a question of fact: has the residence of a particular person in a particular place acquired the necessary degree of stability (permanent is the word used in the English versions of the two CJEU judgments) to become habitual? It is not a matter of intention: one does not acquire a habitual residence merely by intending to do so …*"

[12] It has not been necessary for me to decide the question of habitual residence in this action because ultimately it was a matter of agreement between the parties that Mr Popa and XDP were both habitually resident in England at the time of his death. It is the habitual residence of Mr Popa which is relevant, not that of any of the pursuers: *Lazar* v *Allianz*

SpA [2016] 1 WLR 835 at paras [24] to [30]. In any event, even if there had not been such an agreement, I would have reached the conclusion, on the basis of the agreed facts and the submissions made, that they were both habitually resident in England. Mr Popa had lived with his wife and son in England since 2019 and they had a settled home there. He was employed by an English company in England, his usual place of work being at the Skelmersdale depot. The habitual residence of XDP was in England by virtue of Article 23 of the Regulation. As Mr Popa and XDP both had their habitual residence in England at the time of his death it follows that Article 4(2) of the Regulation applies with the consequence that English law applies unless Article 4(3) can be successfully invoked on behalf of the pursuers. The burden of establishing that Article 4(3) applies lies upon the pursuers.

Applicability of Article 4(3)

[13] Judicial comments in certain English decisions provide some assistance in how to approach the applicability of Article 4(3).

[14] Judge Annabel Darlow KC, in a passage in *Yordanov* which is worth repeating at length, went on to analyse Article 4(3) as follows:

> "38. In the Explanatory Memorandum to Rome II, Article 4(3) was explained as follows:
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> *Like Article 4(5) of the Rome Convention, paragraph 3 is a general exception clause which aims to bring a degree of flexibility, enabling the court to adapt the rigid rule to an individual case so as to apply the law that reflects the centre of gravity of the situation.*
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> *Since this clause generates a degree of unforeseeability as to the law that will be applicable, it must remain exceptional. Experience with the Rome Convention, which begins by setting out presumptions, has shown that the courts in some Member States tend to begin in fact with the exception clause and seek the law that best meets the proximity criterion, rather than starting from these presumptions. That is why the rules in Article 4(1) and (2) of the proposed Regulation are drafted in the form of rules and not of mere presumptions. To make clear that the exception clause really must be exceptional, paragraph 3 requires the obligation to be 'manifestly more closely connected' with another country.*

39. In order to displace the law indicated by Articles 4(1) or (2), it is thus necessary to show that the *'centre of gravity'* of the case is with the suggested applicable law (*Marshall,* ibid at para 20). The test under Article 4(3) has been described as '*stringent*'; it requires that it be clear from all the circumstances of the case that the entire tort and not just a specific issue arising from it, is manifestly more closely connected with a country other than that indicated by Article 4(1) or (2). There must be a *clear preponderance of factors* pointing to the country in question . It is not, however, necessary to demonstrate the absence of any 'real' or 'genuine' connection with the country whose law is otherwise applicable.

40. Whereas on the plain wording of Article 4(3), it might be suggested that Article 4(3) may only point to the law of a country other than that indicated by Article 4(1) or (2), this is accepted not to be the correct reading of the Article as a whole. It is accepted that the burden of establishing that Article 4(3) applies rests on the party also seeking to disapply Article 4(1) or (2) and the standard required to satisfy the test is high (see *Winrow* ibid at paragraph 42, *Marshall* ibid at paragraph 20).

41. The circumstances to be taken into account in determining whether Article 4(3) displaces either of Article 4(1) or (2) were considered by Slade J in *Winrow*:

(i) The country in which the accident and damage occurred and the habitual residence of the parties remained to be taken into account, notwithstanding that each was the determinative factor for the purposes of Articles 4(1) and (2) respectively (paragraph 43).
(ii) The habitual residence of the claimant at the time that any consequential loss is suffered may also be relevant.
(iii) The *'centre of gravity'* referred to that of the tort, not that of the damage and consequential loss caused by the tort (at paragraph 45) but the link between the consequences of the tort and a particular country remained to be considered as a relevant factor (paragraph 50).
(iv) the nationality of the claimant and defendant (at paragraph 54).
(v) Place of residence after the accident, although this is to be viewed in the context of residence and length of residence at the time of the accident (at paragraph 56).
(vi) The country in which the greater part of the loss and damage are suffered (at paragraph 59).
(vii) The country in which the vehicle driven by the defendant was insured and registered, albeit that neither were *(sic)* deemed strong connecting factors (at paragraph 60).
(viii) The pursuit of proceedings before an English court was to be taken into account but was not a strong connecting factor (at paragraph 61).

42. Article 4(3) was considered by Dingemans J (as he then was) in *Marshall*, a case which concerned a road traffic accident in France in which two individuals habitually resident in England had been seriously injured, one fatally. The factors

indicating that the tort was manifestly more closely connected with France than with England or Wales included the fact those injured or killed in the accident were struck by a French car, driven by a French national, on a French motorway. The fact that the parties had a pre-existing relationship in or with a particular country was noted but would not suffice if considered on its own. Any claims against the driver and another vehicle involved would be governed by French law [21].

43. Dingemans J observed that many of the potential problems associated with multi-party claims might be addressed by a proper approach to Article 4(3). In this context he noted that *'it would be an unusual result of choice of law provisions if at the moment that Mr Marshall was hit by the Peugeot motor car his claims against Ms Bivard and Mr Pickard were subject to two different governing laws'*. [18]

44. In *Owen v Galgey* [2020] EWHC 3546 (QB); [2021] I.L.Pr.7, a dispute arose as to the law applicable to a claim for damages for personal injury sustained by a British citizen during a holiday in France, in a swimming pool at a property owned by two British citizens who were, like the claimant, habitually resident in England. Linden J distilled the text of Article 4(3) as calling for '*a consideration of factors which are relevant to an assessment of the degree of connection with the alternative country contended for. Convenience or the risk of complexity in the proceedings, of itself, is unlikely to be a directly relevant factor in assessing this question, one way or the other*' (at paragraph 37). The court is called upon to compare the factors connecting the tort with country A and those which connect it with Country B and consider, as required by Article 4(3) '*all the circumstances of the case*' [39-41]. The strength of connection to one country in a case in which a particular claimant and defendant in a dispute shared the same habitual country of residence might be undermined where some of the other parties to the dispute had their habitual residence in a different country.

45. Linden J adverted to potential issues falling to be considered for the purposes of Article 4(3) in *Winrow* and *Marshall*. He observed, however, that with regards *(sic)* to the relevance of habitual residence at the time of the consequences of the tort, he preferred the view that the decision should be taken instead with reference to the circumstances at the time of the tort. The place where any indirect damage was suffered was a less weighty consideration [49].

46. Additional factors indicated by Linden J as potentially relevant to the Article 4(2) determination, included the country in which any insurer defendants were registered at the time of the tort and damage [48]; the fact that the first and second defendant had a significant and long-standing connection to France and owned the property where the damage occurred, and that works on the swimming pool were being carried out by a French company, governed by French law. Conversely, the only significant connections with England were the nationality and habitual place of residence of the claimant and the first and second defendants [75-77]. The tort/delict in the case was closely connected with the state of the swimming pool, which was part of a property in France and resulted from the French law contract between the defendants."

[15] In *Pickard* v *Motor Insurers' Bureau* [2017] RTR 20 there had been a road traffic accident in France involving on the one hand a French driver, Ms Bivard in a Peugeot, who was uninsured and apparently asleep at the wheel, and on the other hand two British nationals, Mr Marshall and Mr Pickard, who were returning to the UK after working in France for several months. Mr Pickard had been driving a Ford Fiesta motor car and trailer. The Fiesta was registered in the UK and insured by Royal and Sun Alliance (RSA). Mr Marshall was Mr Pickard's passenger. They were standing at the side of a motorway in Paris behind the Ford and trailer while the trailer was being repaired by the driver of a recovery truck which was registered in France and insured by Generali France Assurances (Generali). The Peugeot was travelling at some 90mph, hit Mr Marshall and Mr Pickard, collided with the trailer, shunting it into the Fiesta which in turn was shunted into the recovery truck. Mr Pickard was thrown forward and landed away from the vehicles, suffering serious injuries. Mr Marshall's head hit the Peugeot windscreen and he was thrown forward. The trailer fell on his leg and he died at the scene. His widow brought an action against the Motor Insurers' Bureau (the MIB) because Ms Bivar was uninsured. It denied liability on the basis that its equivalent in France, the Fonds de Garantie, was not liable to compensate Mrs Marshall and therefore it had no liability. It contended instead that under the liability principles applying under and claimed that Generali was liable. French law for road traffic accidents directed that Mr Pickard and RSA, as driver and insurer of the Fiesta, and Generali, as insurer of the recovery truck, were liable. A second action was brought by Mr Pickard against the MIB. Again, the MIB denied liability and claimed that Generali was liable.

[16] Dingemans J (as he then was) had to determine at first instance whether French or English law applied to the issue of liability as between Mrs Marshall, as claimant, and

Mr Pickard, as defendant. RSA claimed that English law applied. He held that it was French law which governed as, under Article 4(3), there were a number of circumstances which made it clear that the tort was manifestly more connected with France than England and Wales. He stated:

> "These are: first that both Mr Marshall and Mr Pickard were hit by the French car driven by Ms Bivard, a national of France, on a French motorway. Any claims made by Mr Marshall and Mr Pickard against Ms Bivard, her insurers (or the FdG as she had no insurers) are governed by the laws of France; secondly the collision by Ms Bivard with Mr Marshall and Mr Pickard was, as a matter of fact and regardless of issues of fault or applicable law, the cause of the accident, the injuries suffered by Mr Marshall and Mr Pickard and the subsequent collisions; and thirdly any claims that Mr Marshall and Mr Pickard have against Generali, as insurers of the vehicle recovery truck, are also governed by the laws of France."

Dingemans J noted that Mr Marshall and Mr Pickard had been working together in France for some 2½ months, but said that in his judgment that factor would not have come close to avoiding the effect of Article 4(2) to result in the application of Article 4(3). He also rejected a submission that it was wrong to take so much account of the fact that Ms Bivard was a French national because in some cases the driver in an accident may not be traced. He held that he was bound to take into account "all the circumstances of the case", and that included the known facts like that. Consequently, the law of France applied to the liability parts of the claims arising from the accident advanced before him. An application for leave to appeal against the judgment of Dingemans J was refused by the Court of Appeal.

[17] In *Owen* v *Galgey* Linden J made the following comments on Article 4(3):

> "58. I note that at paragraph 35-032 the authors of Dicey, Morris and Collins say:
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> '*… the requirement that the tort be <u>manifestly</u> more closely connected with the law of another country (which must be 'clear from the circumstances of the case') emphasises that the court must be satisfied that the threshold of closer connection has been clearly demonstrated. Nevertheless, the approach of the European Court and the English courts to the similarly (although not identically) worded rule of displacement in Article 4(5) of the Rome Convention suggests that it should not be necessary to demonstrate the absence of any 'real' or 'genuine' connection with the country whose law is otherwise applicable, and that a clear*

preponderance of factors pointing to a country other than that whose law applies under Article 4(1) or (2) is all that is required.'

59. These observations are consistent with what was said in the Explanatory Memorandum.

60. Mr Doherty emphasised the statements in the Explanatory Memorandum … that a key aim of the Rome II Regulation was to improve the foreseeability of outcomes, and that because Regulation 4(3) generates a degree of uncertainty '*it must remain exceptional*'. However, I note that the relevant passage went on to explain that experience with the approach under the Rome Convention had been that the courts in some Member States started with the exception rather than the presumptions. The aim of ensuring that Article 4(3) was truly applied as an exception was therefore to be achieved by providing that Articles 4(1) and (2) create rules rather than presumptions and by requiring that it be '*clear*' that there is a '*manifestly*' or obviously closer connection with the country other than that which is indicated by Articles 4(1) and (2).

61. Article 4(3) is an exception/exceptional in these senses but in my view there is no additional test of exceptionality and it is therefore not necessary for the court to be satisfied, for example, that the facts of the case are also exceptional or unusual in nature before applying Article 4(3). What is required is the application of the words of Article 4 with an awareness of the aims of Rome II. The aim of Articles 4(1) and (2) in particular, is to achieve certainty. They will provide the answer in a given case unless they can be displaced. But the Regulation also aims '*to bring a degree of flexibility, enabling the court to adapt the rigid rule to an individual case so as to apply the law that reflects the centre of gravity of the situation*' through Article 4(3), albeit this particular provision will only operate in a clear and obvious case."

Submissions

[18] In support of their case that Article 4(3) applied to the circumstances of this case it was submitted on behalf of the pursuers that the following were the "pull factors" which connected the centre of gravity of the delict to Scotland:

1. The accident occurred on the M74, a road wholly located in Scotland.

2. Mr Popa was travelling in Scotland on a journey which he made every day of his employment. This case was not the kind of road traffic accident where the parties were unknown to each other and the place of the accident was mere happenstance.

3. Mr Popa's death occurred 14 miles from XDP's delivery depot and place of business in Cleland, to which Mr Popa was travelling.
4. The emergency services, consisting of Police Scotland, the Scottish ambulance Service and the Scottish Fire and Rescue Service attended at the scene of the accident.
5. The post-mortem examination of the body of Mr Popa was carried out at the Queen Elizabeth University Hospital in Glasgow.
6. The cause of the accident related to Scottish weather conditions at a particular location in Scotland which was known to be subject to crosswinds.
7. A weather warning particular to Scotland had been issued.
8. XDP make allegations of contributory negligence, which relate to the specific location, against Mr Popa, namely, that he should have aborted his journey or alternatively reduced his speed at or near the locus.
9. This action has been raised against XDP in Scotland and some of the issues have already been considered at a Fatal Accident Inquiry in the Sheriff Court.
10. Indirect consequences have been suffered by Mr Popa's parents in Romania.

[19] On behalf of XDP it was accepted that the locus of the accident was in Scotland, that the assessment of the local climactic conditions which caused or contributed to the accident would take place there, that the attending police officers and eye witnesses are likely to be resident in Scotland. These factors supported the application of Scots law but they were of limited weight in considering the pursuers' case of how the accident came about and why the pursuers say that XDP are liable for a breach of duty. On the other hand, the monitoring of the weather conditions, the decision to proceed with the delivery, the loading of the HGV, the instructions given to Mr Popa on the route to be taken and all the other decision-making

and preparation for the journey occurred in England. It was those decisions which were criticised by the pursuers, and which formed the basis of their case on liability. Communication to drivers, as part of their training, preparation for the journey and issuing instructions in the course of the journey all occurred or originated at Skelmersdale. Mr Popa's habitual residence and the location of his workplace were further circumstances which should be taken into account. Moreover, the first pursuer lived in England. There was a clear preponderance of factors in favour of the application of English law under Article 4(3). Article 4(2) required that English law be applied to the pursuers' claims. There were no exceptional circumstances requiring the application of Article 4(3), but if that provision did apply the factual circumstances established that the centre of gravity of the claim was in England.

Decision

[20] It is accepted in this case that the person claimed to be liable (XDP) and the person sustaining damage (Mr Popa) both had their habitual residence in England at the time when the damage occurred. It follows that, in terms of Article 4(2), English law shall apply unless the pursuers can successfully invoke the provisions of Article 4(3) by showing that it is clear from all the circumstances of the case that the tort/delict is, in this case, more closely connected with Scotland than England with the result that Scots law applies. The factors upon which the pursuers rely in seeking to do this are set out in para [18] above. In my opinion factors 1 to 9 are really saying nothing more than that the accident occurred in Scotland and the usual consequences flowing from such an occurrence occurred in Scotland. There are not, for example, the unusual factors that were present in the case of *Pickard* so as to justify the application of French law under Article 4(3). This is an area in which each case

must depend on its own facts and there can be no binding authorities under Article 4(3), but the case of *Pickard* is in my opinion a good example of the sort of circumstances which are required for Article 4(3) to apply, the tort being more closely connected with France than with England. French law reflected the centre of gravity of the situation.

[21] In this case both Mr Popa and XDP were habitually resident in England and his workplace was in England (although his work involved much driving to Scotland). The acts and omissions which the pursuers claim amounted to negligence on the part of XDP were all committed by them in England.

[22] In my opinion it cannot be said that there is a preponderance of factors connecting the accident with Scotland rather than England. I think that the submission for XDP was confused when it stated that there was a clear preponderance of factors in favour of the application of English law under Article 4(3) as it is not necessary for XDP to show a clear preponderance of factors in favour of the application of English law: it is for the pursuers to establish a clear preponderance of factors in favour of the application of Scots law and so override the application of Article 4(2).

[23] For the above reasons I have concluded that the pursuers have failed to establish that Scots law applies in this case under Article 4(3). It follows that English law applies by virtue of Article 4(2). As the present action proceeds under Chapter 43 of the Rules of Court there are no pleas-in-law which can be sustained or repelled to give effect to my decision. I shall therefore find and declare that English law applies to the issues of liability and damages and continue the case to a proof on a date to be fixed by the Keeper of the Rolls, reserving meantime the question of expenses of the preliminary proof.