Roerig v Valiant Trawlers Ltd

[2002] EWCA Civ 21

COURT OF APPEAL, CIVIL DIVISION

SIMON BROWN, WALLER AND SEDLEY LJJ

17 DECEMBER 2001, 28 JANUARY 2002

Conflict of Laws – Tort – Damages – Assessment – Dutch national employed by Dutch company and living in Holland killed in accident while working on English-registered trawler – Deceased's partner bringing action in England on behalf of Dutch dependants for loss of dependency – Whether substantially more appropriate for damages to be assessed under Dutch law rather than English law – Fatal Accidents Act 1976, s 4 – Private International Law (Miscellaneous Provisions) Act 1995, s 12.

The claimant was a Dutch woman whose partner, another Dutch national, had been killed in an accident on a trawler which was registered in England and owned by the defendant, an English-registered company. That company was the subsidiary of a Dutch company, and the deceased had been on board the trawler as an employee of another Dutch company in the same group. Since, however, the accident had occurred on an English-registered trawler, English law was the applicable law governing the tort under the general rule prescribed by s 11 of the Private International Law (Miscellaneous Provisions) Act 1995. Though living in Holland, the claimant brought an action in England against the defendant under the Fatal Accidents Act 1976, on behalf of herself and her children, for loss of dependency. Section 4[a] of the 1976 Act provided that, in assessing damages in respect of a person's death in an action 'under this Act', benefits which had accrued or would or might accrue to any person from his estate or otherwise as a result of his death were to be disregarded. The defendant nevertheless contended that the claimant would have to give credit for benefits arising from her partner's death since such benefits would be taken into account under Dutch law and it was that law which governed the assessment of damages in the case. The defendant relied on s 12(1)[b] of the 1995 Act which displaced the general rule under s 11 if it appeared, in all the circumstances, from a comparison of (a) the significance of the factors which connected a tort with the country whose law would be the applicable law under the general rule, and (b) the significance of any factors connecting the tort with another country, that it was '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 defendant accordingly contended that when a comparison was made of the significant factors connecting the tort with England, and the significant factors connecting it with Holland, it was substantially more appropriate for the applicable law relating to the issue of damages to be the law of Holland. That contention was rejected by the judge on the determination of preliminary issues. The defendant appealed, relying on the fact that the deceased was Dutch, that he was employed by a Dutch company paying Dutch taxes and making contributions to obtain Dutch benefits, and that the dependants would suffer the loss of their dependency in Holland.

a Section 4 is set out at [2], below

b Section 12 is set out at [7], below

Held – Where the defendant was English and the tort had taken place in England, it could not be said that it was substantially more appropriate, within the meaning of s 12 of the 1995 Act, for damages to be assessed by the law of another country simply because the deceased had been a national of that country, and had been living and employed in that country. The key word was 'substantially', and the general rule was not to be dislodged easily. It followed in the instant case that the judge had been correct to conclude that the defendant had failed in its attempt to dislodge that rule. Accordingly, the appeal would be dismissed (see [12], [48], [49], below).

Per curiam. (1) The question whether deductions are to be made for benefits in assessing damages for loss of dependency is a matter of procedural rather than substantive law, and is therefore subject to the lex fori. In any event, once an action has been brought under the 1976 Act, s 4 must apply simply as a matter of construction since it refers to the assessment of damages in an action under 'this Act' (see [23], [25], [28]–[30], [48], [49], below); *Chaplin v Boys* [1969] 2 All ER 1085 considered.

(2) In determining whether a decision made at the conclusion of the hearing of a preliminary issue constitutes a 'final decision' for the purposes of para 2A.2 of CPR PD 52, which provides that an appeal from such a decision in a claim allocated to the multi-track lies to the Court of Appeal, the court should apply a broad commonsense test, asking whether (if not tried separately) the issue would have formed a substantive part of the final trial. The fact that an issue has sensibly been taken separately should not deprive a party of their right to go to the Court of Appeal. If it does, that will be an active discouragement to parties to support the trial of preliminary issues (see [45], [46], [48], [49], below).

Notes

For displacement of the general choice of law rule and for assessment of damages for loss of dependency, see respectively 8(1) *Halsbury's Laws* (4th edn reissue) para 899 and 12(1) *Halsbury's Laws* (4th edn reissue) para 935.

For the Fatal Accidents Act 1976, s 4, see 31 *Halsbury's Statutes* (4th edn) (2000 reissue) 485.

For the Private International Law (Miscellaneous Provisions) Act 1995, s 12, see 45 *Halsbury's Statutes* (4th edn) (1999 reissue) 1027.

Cases referred to in judgments

Breavington v Godleman (1988) 169 CLR 41, Aust HC.
Caltex Singapore Pte Ltd v BP Shipping Ltd [1996] 1 Lloyd's Rep 286.
Chaplin v Boys [1969] 2 All ER 1085, [1971] AC 356, [1969] 3 WLR 322, HL.
Coupland v Arabian Gulf Petroleum Co [1983] 2 All ER 434, [1983] 1 WLR 1136; *affd* [1983] 3 All ER 226, [1983] 1 WLR 1136, CA.
Edmunds v Simmonds [2001] 1 WLR 1003.
Esso Malaysia, The, Cox v Owners of the Esso Malaysia [1974] 2 All ER 705, [1975] QB 198, [1974] 3WLR 341.
Holmes v Bangladesh Biman Corp [1988] 2 Lloyd's Rep 120, CA; *rvsd* [1989] 1 All ER 852, [1989] AC 1112, [1989] 2 WLR 481, HL.
McKain v R W Miller & Co (South Australia) Pty Ltd (1991) 174 CLR 1, Aust HC.
Parry v Cleaver [1969] 1 All ER 555, [1970] AC 1, [1969] 2 WLR 821, HL.
Perrett v Robinson (1988) 169 CLR 172, Aust HC.
Stevens v Head (1993) 176 CLR 433, Aust HC.
Tanfern Ltd v Cameron-MacDonald [2000] 2 All ER 801, [2000] 1 WLR 1311, CA.
White v Brunton [1984] 2 All ER 606, [1984] QB 570, [1984] 3 WLR 105, CA.

Appeal

The defendants, Valiant Trawlers Ltd, appealed with permission of May LJ granted on 24 August 2001 from the decision of Judge Reddihough at Grimsby County Court on 15 March 2001 whereby he determined in favour of the claimant, Alexandra Marie Roerig, certain preliminary issues relating to the assessment of damages in an action under the Fatal Accidents Act 1976 brought by her against the defendants on her own behalf and on behalf of her children for loss of dependency arising from the death of her partner. The facts are set out in the judgment of Waller LJ.

Robert Leonard (instructed by *Ince & Co*) for the defendants.

Robert Weir (instructed by *Bridge McFarland*, Grimsby) for the claimant.

Cur adv vult

28 January 2002. The following judgments were delivered.

WALLER LJ (giving the first judgment at the invitation of Simon Brown LJ).

Introduction

[**1**] This is an appeal from the judgment of Judge Reddihough dated 15 March 2001. He decided certain preliminary issues in relation to the assessment of damages in favour of the claimant. Although the judge was asked to answer four issues summarised at para 5 of his judgment, the issues were drafted in order to enable the court to answer one question, namely in assessing damages for loss of dependency should benefits resulting from the loss be deducted from the damages?

[**2**] The claimant is a Dutch lady and brings the action as a dependant of a Dutchman. She does so on her own behalf and on behalf of their Dutch children in the English courts under the Fatal Accidents Act 1976, the Dutchman having been tragically killed on a trawler registered in England and owned by the defendants, an English-registered company. There is no dispute about liability or about the claimant's entitlement to bring the action under the above Act. It is furthermore not in issue that under s 4 of the 1976 Act it is provided that in relation to actions brought under that Act:

> '*Assessment of damages: disregard of benefits*.—In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded.'

[**3**] The defendants (appellants in this court) however contend, and for the present it must be assumed, accurately, that under Dutch law the position is different. In the witness statement of Mr Van der Zwan, para 23 which is the limit of the evidence that has been obtained on Dutch law, the position is put in this way:

> 'Compensation is also paid to accident victims and their dependants through civil court proceedings. However, under Dutch law the level of compensation is determined by the financial requirements of the claimant. All benefits received by the claimant—whether emanating from social security or from a collective labour agreement's provision—will be taken into account and deducted from compensation. The reasoning behind this

is that society provides for its victims and their dependants to an acceptable and reasonably high minimum, which is usually elevated by provisions arranged by the industry they are/were working in. In Ms Roerig's and her children's case this social security system works out as follows …'

[4] There then follows a full explanation of the various benefits which have been paid, or will be payable to the claimant and her children following the death of Mr Van der Plas. From preceding paragraphs of Mr Van der Zwan's statement it seems that the benefits are accrued as a result of substantial contributions deducted from the deceased's earnings, as well as substantial contributions by the deceased's employers in Holland. The benefits include (i) a payment under Dutch labour law; (ii) a payment made without legal obligation covered by a personal accident insurance; (iii) a state surviving relatives' pension including amounts for the children; (iv) a widow and orphans' pension from the workers' pension fund for the Offshore Fishing Industry. It is further said that in relation to this last pension, the deceased's employers after his death negotiated with the relevant authorities to ensure the benefits were available to the claimant and her children despite the fact that she and the deceased were not married. The preliminary issues are thus designed to find the answer to the one question—does s 4 of the 1976 Act apply to the claimant's claim, or must she give credit for the benefits which she and her children would have to give if the damages were being assessed under Dutch law?

[5] To succeed on this issue in the Court of Appeal the defendants must establish that the judge was wrong in relation to all, or practically all, the issues he decided.

[6] The first issue he decided related to the proper law of the tort. Section 11 of the Private International Law (Miscellaneous Provisions) Act 1995 (the Private International Law Act) provides as follows:

'*Choice of applicable law: the general rule.*—(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.'

[7] It is not in dispute that under the general rule there laid down the applicable law is English law because the accident to the deceased occurred on an English-registered trawler, and thus that is the law 'in which the events constituting the tort or delict in question' occurred, or at the very least, the law of the country 'where the individual was when he sustained the injury'. But the defendants rely on s 12 of the same Act which provides as follows:

'*Choice of applicable law: displacement of general rule.*—(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.'

[**8**] They contended accordingly that when a comparison is made of the significant factors connecting the tort with England, and the significant factors connecting the tort with Holland, it is substantially more appropriate for the applicable law relating to the issue of damages to be the law of Holland. The judge found against the defendants on that issue.

[**9**] As regards the second issue it seems that after liability was admitted, and one presumes in case the judge were to be against the claimant on the first issue, the claimant amended her claim to allege a claim in contract as between the deceased and the defendants. The claim as pleaded alleged a contract of employment. It also alleged that the proper law of the contract was English. There thus were two aspects of this issue. The contract relied on was a contract in writing which on its face purported to be such. It was (indeed is) in English and purports to be made between the defendants and the deceased (see p 208A of the bundle). On the trial of the preliminary issue the judge found (contrary to the claimant's argument), that the deceased had a contract of employment with a Dutch company (Diepzee) not with the defendants, and that the arrangement was that Diepzee provided its employees to the defendants. Those findings are not challenged. But the judge, by virtue of the document at p 208A, spelt out another form of contract, and he further found that that contract was governed by English law. He thus decided both aspects of this issue in favour of the claimant.

[**10**] The final issue, which the judge resolved on the basis that he might be wrong about both the previous issues, was whether s 4 of the 1976 Act was substantive or procedural. If it was procedural, then (as was common ground) even if the proper law of the tort was Dutch and/or even if the proper law of any relevant contract was Dutch, the English court would apply s 4. The judge found that s 4 was procedural, and thus ruled against the defendants on this aspect also.

[**11**] We have been very much assisted by a full and comprehensive judgment, and by full and comprehensive skeleton arguments, all of a high standard. At the oral hearing we heard full submissions from Mr Leonard for the defendants on all issues. At the invitation of the court Mr Weir concentrated his submissions entirely on issues 1 (proper law of the tort) and 3 (procedural or substantive), success on either of which would be enough for his client to succeed. The court further suggested to Mr Weir that if he did not succeed on one or other of those issues he was in fact unlikely to be able to uphold the judge on issue 2 (the contract issue). It would not have been possible to complete the oral hearing on the day allotted for the appeal if issue 2 had been further developed. Mr Weir was offered the opportunity of considering whether he wanted to address further oral argument to the court on some other day on issue 2 with (as was made clear) possible costs consequences if that issue were to be determined against his client.

Since there also remained at the conclusion of the oral hearing a further point on the procedure adopted by the defendants in seeking permission to appeal and the costs consequences of adopting that procedure on which both sides were content to put in written submissions, we invited Mr Weir to make clear by those written submissions what his position was in relation to issue 2. In the result Mr Weir has confirmed that his client does not seek to be allowed further oral argument on issue 2 and relies simply on the full skeleton argument previously lodged. Mr Weir has also put in written submissions on the appeal procedure point.

Issue 1—Proper law of the tort

[12] (i) At first sight s 12 of the Private International Law Act seems less than clear when the question is whether some other law should be applied in relation to an issue such as damages or a head of damage. It requires comparison of the significance of the factors which connect a *tort* (not the issue) with the *country* whose law would be the applicable law under the general rule, and the significance of any factors connecting the *tort* (*not* the issue) with another *country*, and from that comparison to decide in all the circumstances whether it is *substantially* more appropriate for the law of that other country to be the law to determine the *issue*. It may be that the words 'or any of those issues' were inserted in the section as an amendment without further amendment of para (a) or (b) of sub-s (1) (that seems possible since those words were apparently not in the Bill originally put forward by the Law Commission and not in the Bill originally placed before Parliament (see *Dicey and Morris on the Conflict of Laws* (13th edn, 2000) vol 2, para 35-095)). It may also be that it was a deliberate decision to draft the section in a way which forced concentration primarily on factors which connected the tort generally to a particular country, even in considering whether there should be an exception for a particular issue. For our purposes it matters not how it happened, the section requires an approach by reference to factors that connect the tort generally to a particular country, and an assessment by reference to those factors as to whether it is substantially more appropriate that an issue be tried by some law other than the law which governs the tort generally.

(ii) The first exercise is to identify the issue in relation to which it might be suggested that the general rule should not be applicable. It is not I think seriously argued that in relation to issues giving rise to liability the general rule should not have applied. The argument relates to the assessment of damages, and in particular to the assessment of a particular head of damage accepted as recoverable under both Dutch and English law, 'dependency', and ultimately to the question whether benefits accruing from the death of the deceased should be deducted when making that assessment. The characterisation for the purposes of private international law of issues arising in a claim as issues relating to tort or delict is a matter for the courts of the forum (see s 9(2) of the Private International Law Act). This will be relevant again when considering issue 3 (procedural or substantive). The question is whether the issue in the instant case should be defined as damages generally, or that head of damage 'dependency' or even more refined to the issue whether benefits should be deducted. In *Chaplin v Boys* [1969] 2 All ER 1085, [1971] AC 356 the House of Lords wrestled with the question whether damages for pain and suffering which were irrecoverable under Maltese law, Malta being the country where the motor accident took place, but recoverable under English law, the law of the country of both parties, and of the forum, should be decided under English law or Maltese law. That points the way

as it seems to me to defining and refining the issue in this case at least to that relating to recoverability of damages for loss of dependency. I would however limit the refinement of the issue to 'loss of dependency' as opposed to further refining the issue as to whether 'benefits should be deducted in assessing loss of dependency'. This may not be so important when considering this issue, but it is at this stage that there seems to me to be an overlap between issue 3 and issue 1. The question whether a head of damage is recoverable is clearly a matter of substantive law which could be decided by reference to a law other than the law of the forum. An issue of what should be deducted in calculating the damages under a specific head should be for the law of the forum. For reasons which I shall develop when considering issue 3, the deduction of benefits seems to me a matter of calculation and thus for the forum. Under s 12 of the Private International Law Act the law of the forum is not an option unless that law is also a law of a country with which the tort has significant connecting factors. Thus an issue which is for the law of the forum cannot be a relevant issue under s 12. I accept that at this stage in the context of this case in any event that distinction may be unimportant.

(iii) The next task is to identify the factors that connect the tort with England and those that connect the tort with Holland. The factors that connect with England seem to me to be that the events occurred on a boat registered in England, and that the defendants are an English company. What then are the factors that connect with Holland? The deceased was a Dutchman, and his death would lead to damage being suffered by his dependants, who are Dutch, in Holland where they live. The incident occurred when the deceased was under the supervision of the Dutch fishing master albeit the skipper of the boat was English. In real terms the vessel was on a Dutch fishing expedition in that the boat set off from a Dutch port and would return with its catch to a Dutch port. The defendants were a subsidiary of a Dutch company, and the deceased was on board the trawler as an employee of a Dutch company also a member of the same group.

(iv) What then is the significance of the Dutch factors when compared to the significance of the English factors which might make it substantially more appropriate for Dutch law to determine the loss of dependency issue? Mr Leonard submits that it is the fact that the deceased was Dutch, employed by a Dutch company paying Dutch taxes and making contributions to obtain Dutch security benefits, and the fact that the dependants will suffer their loss of dependency in Holland as Dutch citizens, which are the most significant factors. That, he submits, makes it logical to assess this aspect of the damages by Dutch law. But it seems to me that the logic of that argument leads almost inevitably to the consequence that where a claimant, injured in England, is a foreigner living and employed in that foreign country, any head of damage should be assessed in accordance with the law of his or her country. Indeed in one sense I suppose it could be said to be 'appropriate' that that should be so since the injured party or the dependants thereof are likely to feel their loss only in that foreign country. But it seems to me that it was not intended that the general rule should be dislodged so easily. Where the defendant is English, and the tort took place in England, it cannot surely be said that it is *substantially* more appropriate for damages to be assessed by Dutch law simply because the claimant or the deceased is Dutch. One can entirely understand that if fortuitously two English persons are in a foreign country on holiday and one tortiously injures the other, the significant factors in favour of England being the place by reference to which the damages should be assessed may make it *substantially* more appropriate that

damages should be assessed by English law. But say the position were that an English defendant under English principles relevant to assessment of damage would have to pay aggravated damages to a claimant, and would thus have to pay English plaintiffs such damages, why should a foreigner not be entitled to have such damages awarded in his or her favour simply because by the law of where they reside those damages would be unavailable?

(v) In my view the word 'substantially' is the key word. The general rule is not to be dislodged easily. I thus think the judge was right in the view he formed that the defendants had failed in their attempt to do so.

Issue 3—Substantive or procedural

[13] This issue only arises on the assumption that the above view on issue 1 is wrong, ie on the basis that Dutch law must be taken to be the appropriate law by reference to which the loss of dependency should be assessed. As already indicated, if Dutch law were the appropriate law by which to decide the benefits which will accrue to the claimant and her children in Holland as a result of the deceased's death, then a deduction would have to be made in assessing the loss of dependency. But the claimant argues that even if Dutch law was the appropriate law for determining what heads of damage were recoverable including loss of dependency, English law as the lex fori should still apply to the issue whether benefits should be deducted. It is common ground that all matters of procedure are governed by the law of the country to which the court wherein any legal proceedings are taken belongs (see *Dicey and Morris*, vol 1, rule 17 (para 7R-001)). What is argued on behalf of the claimant is that although 'heads of damage' are substantive (see *Dicey and Morris*, para 7-036), quantification and assessment of damages are procedural and thus a matter for the lex fori, English law. The question whether benefits should be deducted is argued to be a matter of quantification or assessment and thus procedural.

[14] Mr Weir would further suggest that such authority as there is relating expressly to the deduction of benefits is in his favour. In *Coupland v Arabian Gulf Petroleum Co* [1983] 2 All ER 434 at 446, [1983] 1 WLR 1136 at 1149 in the judgment of Hodgson J at first instance appears the following passage:

> 'It is clear that the ordinary rule in tort is that the law of the place where the action is being brought (the lex fori) is the law to be applied. To find an exception to that rule one has to find an issue, which is decided differently by the two jurisprudences, which is capable of being segregated and which can then be decided by an application of what, in effect by the back door, is the proper law of that issue. But before one can do that one has to have some substantial difference between the two systems of law. In this case (as I have demonstrated) the only possible candidate for segregation would be the rule in Libyan law that social security benefits are not deductible from an award of general damages. But that contention is not advanced by counsel for the plaintiff (and properly so, it seems to me), for that rule is, in my judgment, a rule for the quantification of damage and not a rule dealing with a head of damage. And, if it is a rule dealing with the quantification of damage, then it is for the law of this country to prevail.'

[15] Further, more recently, Garland J in a dictum not necessary for his decision in *Edmunds v Simmonds* [2001] 1 WLR 1003 at 1011 said:

> 'Even if I had not decided the section 12 point in the claimant's favour, I would, unless persuaded that Spanish law did not recognise any head of damage recoverable by the claimant, have decided that quantification was purely procedural and should be carried out according to English law in any event.'

[**16**] The above passage from Hodgson J's judgment in *Coupland*'s case is clearly the basis for the following passage in *Dicey and Morris* (vol 2, para 35-053):

> 'It has also been said that whether social security benefits are deductible from an award of general damages is a rule for the quantification of damages and not a rule dealing with a head of damage. The question will, accordingly, be referred to English law.'

[**17**] Mr Leonard suggested that the language in the above quote from *Dicey and Morris* is not a strong endorsement of what was a concession in *Coupland*'s case. He further argued that to suggest in general terms that 'quantification' or 'calculation' is for the lex fori is misleading. He quoted a further passage from *Dicey and Morris* (para 35-055):

> 'On the other hand, questions such as whether loss of earning capacity or pain and suffering or (in fatal accident claims) solatium or loss of society are admissible heads of damage, all questions of remoteness of damage, the existence and extent of the claimant's duty to mitigate damage, whether exemplary damages are recoverable, the existence and extent of financial ceilings on recoverable damages, and whether recovery can be had for any head of damage unknown to English law are questions of substantive law.'

[**18**] If mitigation is a matter of substantive law then he submitted that the question whether a deduction should be made for benefits received as a result of death should also be substantive. Indeed he suggested that the common law rule that the claimant should give credit for benefits received, subject to the exceptions in personal injury cases—no credit for the proceeds of insurance policies and the like, and no credit for charitable donations (see *Parry v Cleaver* [1969] 1 All ER 555, [1970] AC 1), are matters of substantive law. Thus he submitted that the Dutch rule relating to the deduction of benefits and s 4 of the 1976 Act are also substantive. He suggested that he gains some support from passages in the speeches in *Chaplin v Boys* and from the way in which the court has treated financial limits (see *Caltex Singapore Pte Ltd v BP Shipping Ltd* [1996] 1 Lloyd's Rep 286). Ultimately his submission was that the assessment of damages should be regarded as an exercise in calculating and reconciling a balance sheet consisting of debit and credit entries. He submitted that the law governing what type of debit and what type of credit goes into the balance sheet is substantive, the calculation and quantification thereafter being procedural.

[**19**] There is a marked absence of evidence as to the true nature of the law in Holland. The view expressed in the statement of Mr Van der Zwan (see [3], above) provides very little clue as to whether the rule relating to deductions is a statutory provision equivalent to our 1976 Act or is simply an equivalent to our common law rule. The best the court can do is to presume that there is nothing in the nature of the rule as applied in Holland which indicates that any different approach should be taken to it as compared to the approach to be taken to the rule in England whether at common law or by statute.

[**20**] The claimant brings these proceedings under the 1976 Act. She does not rely on any provision of Dutch law or on any appointment as administrator under Dutch law nor could she do so. Procedurally an action on behalf of a person killed in an accident is only available in the English courts by virtue of what is now ss 1 and 2 of the 1976 Act. The defendants asserted by their defence that it was more appropriate for the applicable law for determining the issues that arose in the proceedings including at that stage liability to be determined by the law of the Netherlands. But no application was made to stay the proceedings nor would such an application have succeeded. Thus it must be accepted that the proceedings were properly brought under the Act.

[**21**] It is perhaps also right to bear in mind that we do not know precisely how the law in Holland in relation to deducting benefits has developed in personal injury actions generally or how interconnected that development is with the way in which damages for dependency generally are assessed in Holland. Nor do we know whether in Holland, as in England, public policy considerations have come into play. In relation to the question whether benefits should be deducted in assessing damages for personal injury (not fatal accident cases) English common law has developed not without difficulty to the stage where in principle credit must be given for benefits received as a result of personal injuries, but there are identified exceptions. The exceptions at common law are insurance proceeds and the like and charitable gifts, which have been made exceptions on the grounds of public policy. As Lord Reid said in *Parry v Cleaver* [1969] 1 All ER 555 at 557, [1970] AC 1 at 13: 'The common law has treated this matter as one depending on justice, reasonableness and public policy.' (See also Lord Reid's reliance on public policy as reflected by what was then s 2(1) of the Fatal Accidents Act 1959 ([1969] 1 All ER 555 at 563 [1970] AC 1 at 19–20).)

[**22**] Mr Leonard would suggest that s 4 of the 1976 Act simply provides another example of an exception to the common law rule, and would seek to argue that the common law rule and its exceptions are part of the substantive law, and that the rule in Holland must thus be presumed to be substantive. If Dutch law were the proper law to be applied in deciding the issue of loss of dependency he concludes that deductions must be made as per the Dutch rule. I reject Mr Leonard's submission in relation to the deduction of benefits at common law and in relation to s 4 in particular.

[**23**] It seems to me that the question whether or not deductions should be made for benefits in assessing damages for the loss of dependency should be a matter for the lex fori. That seems to me so looking at the matter as if the common law and s 4 had to be approached in the same way, which was how the matter was argued before us and was how the matter was approached by the judge. I accept that the courts have struggled to define the difference between procedural and substantive. As Lord Pearson said in *Chaplin v Boys* [1969] 2 All ER 1085 at 1106, [1971] AC 356 at 395: 'I do not think there is any exact and authoritative definition of the boundary between substantive and procedural (or adjectival or non-substantive) law.' The Australian decision *Stevens v Head* (1993) 176 CLR 433, which by a majority of four to three decided that a New South Wales statute was procedural and not substantive, bears testament to the difficulties in this area. *Dicey and Morris* had this to say about that decision and the decision of Clarke J in the *Caltex* case to which we were also referred:

> '**7-038** Statutory provisions limiting a defendant's liability are prima facie substantive; but the true construction of the statute may negative this view.

The proper classification of rules which limit the amount of damages recoverable was considered by the High Court of Australia in *Stevens v. Head*, a case involving an action arising out of a road accident in New South Wales brought by the plaintiff in Queensland. One of the questions facing the court was whether or not a provision in the Motor Accidents Act 1988 of New South Wales which limited the amount of damages which could be recovered in respect of non-economic loss was a substantive rule to be applied as part of the *lex causae*. Although a minority took the view that a rule which imposes a ceiling on damages is substantive—because it is not directed to governing or regulating the mode or conduct of court proceedings—the majority held that the statutory provision in question was procedural as it did not touch the heads of liability in respect of which damages might be awarded, but simply related to the quantification of damages. In *Caltex Singapore Pte Ltd. v. BP Shipping Ltd.* ([1996] 1 Lloyd's Rep 286) Clarke J., while accepting that rules limiting liability are prima facie substantive, relied on *Stevens v. Head* and held that section 272 of the Singapore Merchant Shipping Act 1970 (and the equivalent English provision), under which the defendant in a collision action has the right to limit liability, is not a substantive rule.

7-039 It may be questioned whether the approach adopted in these cases is either desirable in terms of policy or entirely consistent with the authorities. The primary purpose of classifying a rule as substantive or procedural is "to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of [the] parties." From this perspective provisions or rules dealing with the measure of damages should not be seen as procedural in nature. Furthermore, a close reading of the leading authorities (in particular *Boys v. Chaplin* ([1969] 2 All ER 1085, [1971] AC 356)) suggests that the scope of the choice of law rule that the quantification of damages is governed by the *lex fori* should be restricted to rules relating to the method whereby damages are assessed (e.g. the English rule that damages are assessed once and for all) and should not encompass rules which fix or limit the extent of the defendant's liability.'

[**24**] In my view however the judgment of the majority in *Stevens v Head* (1993) 176 CLR 433 is compelling. Furthermore the passages in *Chaplin v Boys* relied on by the majority lend full support for the view expressed. I will quote what seems to me to be the core passage (at 456–457) so far as principle is concerned:

'In determining whether, by the lex loci, the relevant facts give rise to a civil liability of the kind which the plaintiff seeks to enforce, the courts of the forum distinguish between substantive and procedural laws. Procedure is governed exclusively by the laws of the forum, but the substantive laws of the place of the tort determine whether, by those laws, there exists a civil liability of the kind which the plaintiff seeks to enforce. In [*McKain v R W Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1], it was held that a South Australian law which imposed a limitation on the time within which to bring an action in the courts of that State for damages for a tort committed within that State but which did not extinguish the cause of action was not a substantive law which precluded the bringing of an action in the courts of New South Wales for damages for a tort committed in South Australia. The majority followed a line of authority which distinguished between a statute

of limitation which does no more than cut off resort to the courts for the enforcement of a claim and a statute which extinguishes civil liability and destroys a cause of action. The former is classified as a procedural law, the latter as substantive. A similar distinction has been drawn between a law which denies a remedy in respect of a particular head of damage in negligence (a substantive law) and a law which affects the quantification of damages in respect of a particular head of damage (a procedural law). That distinction was drawn by a majority in *Chaplin v. Boys* ([1969] 2 All ER 1085, [1971] AC 356) and by Brennan J. and Dawson J. in *Breavington v. Godleman* ((1988) 169 CLR 41), followed in *Perrett v. Robinson* ((1988) 169 CLR 172). In *McKain*, the Chief Justice accepted that "the question of what heads of damage are recoverable is now treated as a substantive issue" and that a matter concerning quantification of damage, "on traditional analysis, has been treated as a procedural consideration." But his Honour's preferred view was that the measure of damages for personal injury is a question of substantive law, as he held in *Breavington v. Godleman*. We are respectfully unable to accept that view.'

[25] The passages in the speeches of the majority in *Chaplin v Boys* relied on are at [1969] 2 All ER 1085 at 1093, 1095, 1105, [1971] AC 356 at 378–379, 381–382, 393 per Lords Hodson, Guest and Wilberforce respectively (see (1993) 176 CLR 433 at 457, footnote 94). The passages referred to support the view that so far as damages are concerned it is a question for the substantive law whether a head of damage is recoverable, but quantification of the actual head is procedural. If one poses the question whether the issue in this case is about the right to recover certain benefits or whether it is about the quantification of the damages for loss of dependency the answer seems to me to be that it is about the quantification of the damages. The concern of the court in considering a tortious claim should be as to liability including liability for particular heads of damage without the existence of which liability might not be complete. The question whether deductions should be made for benefits is not a question which goes to liability; it is a question going to assessment.

[26] It also seems to me that there is good reason why once it is established that a particular head of damage is recoverable by whatever is the appropriate law, the assessment of the appropriate figure for that head of damage should be for the forum, including in particular what deductions should be made according to the public policy of the forum. As *Dicey and Morris* (vol 1, para 7-004) says: 'The primary object of this Rule [i e that procedure should be governed by the lex fori] is to obviate the inconvenience of conducting the trial of a case concerning foreign elements in a manner with which the court is unfamiliar'. They add (I accept) that 'If, therefore, it is possible to apply a foreign rule … without causing any such inconvenience, those rules should not necessarily … be classified as procedural'. In my view the question whether deductions of benefits should be made is likely to be bound up both with policy considerations and with the way in which damages under the particular head are to be assessed overall.

[27] In this case the judge records that although he had not heard an expert on Dutch law—

'it appears that the dependants' claim for damages under Dutch law is assessed on a similar basis to English law, save that the dependants would have to give credit against such damages for various insurance, pension,

social security and inherited benefits accruing to them as a result of the deceased's death.'

I am unclear on what basis one can draw any inference that that would be so save on a presumption that without evidence of Dutch law, it must be presumed to be the same as English law. However to make that presumption in this case seems to me to be rather unreal, because one knows that the approach of the Dutch court, at least in one respect, is radically different. The truth seems to me to be that we simply do not know on what basis a dependant can bring an action in Holland, nor the basis on which damages are assessed, nor what precisely has led the Dutch courts to apply the rule it does. What we do know is that under the Fatal Accidents Acts dependants, even foreign dependants, can bring their proceedings, and that as a matter of policy in the framework of the Act as a whole, it has been provided by s 4 of the 1976 Act that no benefits of any kind shall be deducted. We also know that in ordinary personal injury actions the courts in England have developed rules and exceptions so far as the deduction of benefits are concerned by reference to English public policy, and in the context of making general assessments of loss. If s 4 was to be disapplied, or if the English common law rules were to be disapplied, it would seem to me that it might be said with some force that it was also necessary to investigate how damages for dependency would be assessed in Holland generally, in order to make sure that by making the relevant deduction the Dutch claimant was not being deprived in some way. To make that assessment would involve the court examining how general damages for loss of dependency were quantified in Holland, an exercise which should not be undertaken by the English court and which in any event it would be very inconvenient to undertake.

[**28**] I now turn to a point which was not argued but which seems to me possibly to provide a short answer to this particular case. As I have already said we are concerned with an action which can only be brought in this country by virtue of the 1976 Act. The Act is available for the benefit of foreigners (see *The Esso Malaysia, Cox v Owners of the Esso Malaysia* [1974] 2 All ER 705, [1975] QB 198), provided proceedings can be properly issued and served. Surely then, simply as a matter of statutory construction, once an action is brought in reliance on the provisions of that Act then the sections which refer to assessments 'under the Act' or refer to assessment of damages 'in the action' (clearly referring to actions brought 'under the Act') simply apply. Thus I would in fact suggest that if damages for bereavement were a head of damage recoverable under Dutch law with a limit in excess of that provided for by s 1A, s 1A would still apply so as to impose a limit; I would suggest that if bereavement were not a head of damage recoverable under Dutch law, then since by virtue of s 1A 'An action under this Act may consist of or include a claim for damages for bereavement', damages for bereavement would be recoverable in the sum provided for by s 1A. Furthermore since s 3(1) of the 1976 Act provides that 'In the action' i e an action under the Act, 'such damages … may be awarded as are proportioned' etc, and s 3(3) for example provides for the prospect of remarriage not to be taken into account 'In an action under this Act', clearly it is s 3 which provides the basis on which damages are to be 'assessed' in relation to actions brought under the Act and not some provision of Dutch law.

[**29**] Section 4 is in the same vein—it provides that 'In assessing damages in respect of a person's death in an action *under* this Act … benefits … shall be disregarded'. Since the action is under 'this Act', it follows, I would suggest, that simply as a matter of construction of the statute s 4 must apply. That seems to

me to make s 4 'procedural' or 'adjectival or non-substantive' in the sense that it is a part of the law which the English court must apply to actions brought under this particular statute. That would provide a short answer to this particular case concerned with the application of s 4 to a 1976 Act claim.

[30] Thus I would uphold the judge's decision on this issue both on the basis relied by him and on the narrower basis of statutory construction.

Issue 2—Contract

[31] As already indicated since in my view the claimant should succeed on issues 1 and 3, it is strictly unnecessary to consider either aspect of this issue in great detail. The contract point was only raised after admission of liability, and the claimant does not need to succeed on this point unless she fails on the other issues. When pleaded it should be said that what was alleged was that there was a contract of employment between the defendants and the deceased, and there was no suggestion of two contracts one with Diepzee and one with the defendants. I do not however understand Mr Leonard to take a pleading point other than forensically.

[32] The contract point, as it has become in this court, arises in the following way. The deceased was employed on any view by Diepzee and the arrangement between the defendants and Diepzee was that Diepzee provided the deceased to the defendants in return for payment. Diepzee paid all wages, and made all social security deductions etc. The documents support the above (see p 174 of the bundle for the contract of employment and p 110 for an example of an invoice from Diepzee to the defendants). As the judge put it 'there is overwhelming evidence that the deceased's contract of employment was with Diepzee', and there is no appeal from that finding.

[33] However when boarding the Atlantic Princess the deceased was asked to sign a further document headed 'List of crew and signatures of seamen who are parties to the crew agreement'. The relevant terms of that document provided for 'employment' by cl 1 'at the rate of wages expressed'; for the parts of the local port industrial agreement to be incorporated without so specifying, simply putting in the words 'shares'.

[34] When the deceased signed the same there appeared in the column next to his signature under the heading rate of wages 'as agreed'.

[35] It will be seen that the deceased was purporting to agree to be employed by the defendants even though he had a contract of employment with Diepzee. The clause relating to the applicable terms and conditions does not specify an appropriate local port industrial agreement, but refers to 'shares'. It would seem that it was the British crewmen and not the Dutch who were on a sharing arrangement, though even in the British crewmen's case the agreement does not accurately describe the arrangement (see para 4 of Mr Harper's statement (p 116)).

[36] The reason why the deceased was asked to sign this particular form is not in issue. By s 25 of the Merchant Shipping Act 1995 it is provided:

> '*Crew agreements.*—(1) Except as provided under subsection (5) below, an agreement in writing shall be made between each person employed as a seaman in a United Kingdom ship and the persons employing him and shall be signed both by him and by or on behalf of them.
>
> (2) The agreements made under this section with the several persons employed in a ship shall be contained in one document (in this Part referred to as a crew agreement) except that in such cases as the Secretary of State

may approve—(a) the agreements to be made under this section with the persons employed in a ship may be contained in more than one crew agreement; and (b) one crew agreement may relate to more than one ship.

(3) The provisions and form of a crew agreement must be of a kind approved by the Secretary of State; and different provisions and forms may be so approved for different circumstances.

(4) Subject to the following provisions of this section, a crew agreement shall be carried in the ship to which it relates whenever the ship goes to sea.

(5) The Secretary of State may make regulations providing for exemptions from the requirements of this section—(a) with respect to such descriptions of ship as may be specified in the regulations or with respect to voyages in such areas or such description of voyages as may be so specified; or (b) with respect to such descriptions of seamen as may be specified in the regulations; and the Secretary of State may grant other exemptions from those requirements (whether with respect to particular seamen or with respect to seamen employed by a specified person or in a specified ship or in the ships of a specified person) in cases where the Secretary of State is satisfied that the seamen to be employed otherwise than under a crew agreement will be adequately protected.

(6) Where, but for an exemption granted by the Secretary of State, a crew agreement would be required to be carried in a ship or a crew agreement carried in the ship would be required to contain an agreement with a person employed in a ship, the ship shall carry such document evidencing the exemption as the Secretary of State may direct.

(7) Regulations under this section may enable ships required under this section to carry a crew agreement to comply with the requirement by carrying a copy thereof, certified in such manner as may be provided by the regulations.

(8) If a ship goes to sea or attempts to go to sea in contravention of the requirements of this section the master or the person employing the crew shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale and the ship, if in the United Kingdom, may be detained.'

[**37**] Furthermore, by regulations made from time to time, the requirement of what was to be contained in such an agreement was laid down, and certain standard forms of agreement were approved. This particular standard form was approved under Merchant Shipping Notice No M 1425 (see p 122), and it seems that it was out of date at the time when the voyage with which this action is concerned took place, since in July 1992 Merchant Shipping Notice No M 1498 superseded M 1425. So far as I can see nothing in the regulations or in the memorandum providing for standard forms would approve a crew agreement under which the ship pays a company for the supply of labour. Such an arrangement would seem to need to have specific approval.

[**38**] What then is the answer to the question whether the document signed by the deceased gave rise to a contract? One possible answer is that it should be rejected in toto as a document signed without any intention to create legal relations, that argument being founded on the inconsistency between its terms and the terms of the deceased's actual contract of employment plus the absence of any reference to appropriate terms, and the absence of any consideration at least in financial terms. An alternative is to construe it as a contract under which independently of the deceased's contract of employment with the defendants, the

defendants undertook contractual obligations vis-à-vis the deceased. In considering those alternatives I would suggest that albeit we are not concerned with whether there has been some breach of the regulations or a breach of the Merchant Shipping Act, it is relevant that the purpose that lay behind s 25 was to protect seamen employed on ships by providing that there should be a contract between the ship and its crew in one document.

[**39**] I have not found the resolution of this question easy. Rejection of the document as being inconsistent with the contract of employment already entered into at first sight seems attractive. But although in most circumstances it would be very surprising for someone to enter into two contracts overlapping so far as his or her employment was concerned, unless one contract is inconsistent with the other I cannot see any reason why two such contracts should not be signed. Furthermore, there is no reason to think that both the defendants and the deceased did not intend to enter into legal relations when they signed the document. Why, it might be asked, if the defendant chooses to sign a document of a contractual nature performing as it believes its statutory obligation to do so, should there not be imposed on that defendant implied contractual duties in addition to the duties in tort? The argument that no consideration would be provided for such promises seems at first sight powerful but it is unattractive. Furthermore the defendants were providing the vessel on which the deceased was being asked to work and asked for the signature before the deceased was allowed on board.

[**40**] On the second aspect of this issue, if what is under consideration is an independent contract between the defendants (an English company) and the deceased, under which the deceased was to be allowed on board an English-registered vessel, the argument for that contract to be governed by English law seems to me to be overwhelming. I would agree with the judge (following the language of art 3(1) of the Rome Convention on the Law Applicable to Contractual Obligations 1980, contained in Sch 1 of the Contracts (Applicable Law) Act 1990), that the choice of law as English is demonstrated with reasonable certainty by the terms of the contract and/or the circumstances of the case.

[**41**] It is unnecessary to come to a final conclusion on these points having regard to the views expressed on the other issues, but my inclination is to feel that the judge's decision on both points, and thus this issue, also ought to be upheld.

Appeal procedure point

[**42**] Since we will be dismissing the appeal, this point is probably of academic interest so far as the parties are concerned, but it is important to clarify the appropriate appeal route where preliminary points are tried. The submissions of the parties are set out in Mr Leonard's original supplemental skeleton, in Mr Weir's most recent written submissions, and Mr Leonard's written response thereto.

[**43**] There is no dispute about the applicable rules. The claimant's skeleton on that aspect is thus not in issue:

> 'Appropriate Appeal Court
>
> The rules governing the appropriate appeal court are set out in the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071. The rules on appeal as set out at CPR PD 52, paras 2A.1–2A.4 (White Book, Autumn 2001 edn, vol 1, pp 995–996) simply rehearse the rules set out in this order. This claim has been allocated to the multi-track, (see order of 9 September 2000) accordingly art 4 of the order (PD 52, para 2A.2) applies.

> This provides that an appeal shall lie to the Court of Appeal where the decision to be appealed is a final decision. Article 1(2)(c) (PD 52, para 2A.3) provides that "final decision" means: a decision of a court that would finally determine (subject to any possible appeal or detailed assessment of costs) the entire proceedings whichever way the court decided the issues before it. In addition, by art 1(3) (PD 52, para 2A.4) a decision of a court shall be treated as a final decision where it: (a) is made at the conclusion of part of a hearing or trial which has been split into parts; and (b) would, if made at the conclusion of that hearing or trial, be a final decision under para 2(c).'

[**44**] The question is whether the judge's decision in this case must be treated as a 'final decision'. The defendants thought not and it was in those circumstances that they applied to Sullivan J in Leeds for permission to appeal. They still seek to defend that view. The claimant says that it was, and they rely on the wording of the rule, and they further rely on the dictum of Brooke LJ in *Tanfern Ltd v Cameron-MacDonald* [2000] 2 All ER 801 at 806, [2000] 1 WLR 1311 at 1315 (para 17) as follows:

> 'A final decision includes the assessment of damages or any other final decision where it is "made at the conclusion of part of a hearing or trial which has been split up into parts and would, if made at the conclusion of that hearing or trial, be a final decision" (the 2000 order, art 1(3)); it does not include a decision only on costs. This means that if a judge makes a final decision on any aspect of a claim, such as limitation, or on part of a claim which has been directed to be heard separately, this is a final decision within the meaning of this provision.'

[**45**] Mr Leonard referred to the old rules, RSC Ord 59, r 1A(4) and the notes thereunder including the reference to *White v Brunton* [1984] 2 All ER 606, [1984] QB 570 and *Holmes v Bangladesh Biman Corp* [1988] 2 Lloyd's Rep 120 (see *Annual Practice 1999* pp 1011–1012), and sought to gain some assistance therefrom. In my view Mr Weir is right in saying strictly those authorities are of little assistance in construing the new rules. But, that said, it seems to me that what the present rules in fact reflect, in relation to treating a decision as final where it is made at the conclusion of the hearing of a preliminary issue, is the commonsense approach of Bingham LJ (as he then was) in his judgment in *Holmes'* case where he said (at 124):

> '… a broad common-sense test should be applied, asking whether (if not tried separately) the issue would have formed a substantive part of the final trial. Judged by that test this judgment was plainly final, even though it did not give the plaintiff a money judgment and would not, even if in the airline's favour, have ended the action.'

[**46**] If one poses the question—if no preliminary issue had been ordered would the decision as to the appropriate law have formed a substantive part of the final decision on damages?—the answer would undoubtedly be that it would, and that an appeal would have lain to the Court of Appeal against that final decision. The fact that the issue is sensibly taken separately should not deprive a party of their right to go to the Court of Appeal, and furthermore it would be an active discouragement to parties to support the trial of preliminary issues if the result was to so deprive them. That is the principle that the new rules in my view seek to uphold.

[**47**] In my view thus the decision on this preliminary issue was made at the conclusion of part of a hearing which the order ordering a preliminary issue had split into parts. The decision should have been treated as a final decision for appeal purposes. Thus the appropriate route for an appeal from the decision of the judge was to the Court of Appeal and that was the court from which permission to appeal should have been sought.

SEDLEY LJ.

[**48**] I agree.

SIMON BROWN LJ.

[**49**] I also agree.

Appeal dismissed.

James Wilson Barrister (NZ).