Hilary Term
[2014] UKSC 22
On appeal from: [2012] EWCA Civ 854

JUDGMENT

Cox (Appellant) *v* Ergo Versicherung AG (formerly known as Victoria) (Respondent)

before

Lord Neuberger, President
Lord Mance
Lord Sumption
Lord Toulson
Lord Hodge

JUDGMENT GIVEN ON

2 April 2014

Heard on 20 and 21 January 2014

Appellant
Alexander Layton QC
Marie Louise Kinsler
Henry Morton Jack
(Instructed by Leigh Day & Co)

Respondent
Hugh Mercer QC
Sarah Crowther
(Instructed by DWF Fishburns)

LORD SUMPTION (with whom Lord Neuberger, Lord Toulson and Lord Hodge agree)

Introduction

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

2. It is common ground that the liabilities of Mr Kretschmer and his insurer are governed by German law. It is also common ground that under paragraph 3(1) of the Pflichtversicherungsgesetz, Mrs Cox had a direct right of action against Mr Kretschmer's insurer for such loss as she would have been entitled to recover from him. That being so, the combined effect of articles 9 and 11 of Regulation EC 44/2001 is that she is entitled to sue the insurer in the courts of the member state where she is domiciled. She has availed herself of that right by suing the insurers in England for bereavement and loss of dependency.

3. Liability is not in dispute, but there is a number of issues relating to damages. Their resolution depends on whether they are governed by German or English law, and if by English law, whether by the provisions of the Fatal Accidents Act 1976 or on some other basis. Mrs Cox relies on both English and German law. The question which law applies was ordered to be tried as a preliminary issue, together with other issues which are no longer in dispute.

German and English law

4. In German law, the extent of Mrs Cox's recoverable loss is governed by section 844 of the Bűrgerliches Gezetzbuch (or "BGB"). Section 844(2) provides, so far as relevant:

> "If the person killed, at the time of the injury, stood in a relationship to a third party on the basis of which he was obliged or might become obliged by operation of law to provide maintenance for that person and if the third party has as a result of the death been deprived of his right to maintenance, then the person liable in damages must give the third party damages by payment of an annuity to the extent that the person killed would have been obliged to provide maintenance for the presumed duration of his life."

5. Sir Christopher Holland, who decided the preliminary issues in the High Court, heard expert evidence about the effect of section 844(2) and made a number of findings: [2011] EWHC 2806 (QB). These findings have not themselves been appealed, and provide the point of departure for the questions before us. In summary, Sir Christopher held that the object of section 844 of the BGB was to restore the claimant to the financial position that she would have been in as a dependant of the deceased, but for his death, taking account of any subsequent benefits received which impact on the loss of dependancy, apart from insurance recoveries. These subsequent benefits may include the income that the claimant has made or would be likely to make by taking paid employment, together with any maintenance accruing to the claimant through her remarriage or through some other relationship following the birth of a child. "Fundamental to the foregoing," he found, at para 17, "is a substantive requirement of German law: the duty to mitigate, such justifying ongoing reference to her earning capacity and to benefits accruing from remarriage or from a similar relationship."

6. Broadly speaking, German law on the damages recoverable for a fatal accident corresponds to the general principles applied at common law to the recoverability of damages in tort, which require the claimant to be put into a financial position equivalent to that which she would have been in but for the wrong. To that end, account must be taken of avoided or reasonably avoidable loss. In England, however, the law relating to liability for fatal accidents is almost entirely statutory. Before 1846, English law did not permit actions in tort for the death of a human being. This was the combined result of two rules of common law. The first was that the right of action of a person who had been tortiously injured was a personal action, which did not survive for the benefit of his estate upon his death. This rule survived until 1934, when it was abolished by the Law Reform (Miscellaneous Provisions) Act. The second rule was that "[i]n a civil court, the death of a human being could not be complained of as an injury" by dependants claiming in their own right: *Baker v Bolton* (1808) 1 Camp 493 (Lord Ellenborough). This is still the rule at common law, but it was largely superseded by the Fatal Accidents Act 1846 ("Lord Campbell's Act"), which created a new statutory cause of action in favour of certain categories of dependant, including widows. The 1846 Act was repeatedly amended, elaborated and re-enacted, and the statutory cause of action is now contained in section 1(1) and (2) of the Fatal Accidents Act 1976.

These statutory provisions remain the sole legal basis on which a claim can be made for bereavement or loss of dependency in English law.

7. The common law background explains the rather tortured form of sections 1(1) and (2) of the Fatal Accidents Act 1976. They provide:

> "**Right of action for wrongful act causing death**
>
> (1) If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.
>
> (2) Subject to section 1A(2) below, every such action shall be for the benefit of the dependants of the person ('the deceased') whose death has been so caused."

For this purpose a "dependant" means someone falling within the categories defined in section 1(3), including the widow (or widower) of the deceased (section 1(3)(a)), a civil partner (section 1(3)(aa)), or a person who for at least two years before the death had been living with the deceased in the same household as the deceased's spouse or civil partner (section 1(3)(b)).

8. Lord Campbell's Act contained no provisions relating to damages, but over the years such provisions have been added in the course of successive amendments and re-enactments. In particular, substantial changes were made in 1976 and 1982. For present purposes, the relevant provisions relating to pecuniary loss are sections 3 and 4 of the Act of 1976, as amended by the Administration of Justice Act 1982. They provide:

> "3. Assessment of damages.
>
> (1) In the action such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death to the dependants respectively.
>
> ...

(3) In an action under this Act where there fall to be assessed damages payable to a widow in respect of the death of her husband there shall not be taken account the re-marriage of the widow or her prospects of re-marriage."

...

4. 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."

9. Turning to non-pecuniary loss, section 1A of the Fatal Accidents Act provides that an action under section 1(1) "may consist of or include a claim for damages for bereavement" by certain categories of dependent defined by section 1A(2), including a widow. Damages for bereavement are expressly excluded from the general rule of damages in section 3(1). This is because they are awarded as a lump sum, effectively a *solatium*, fixed by section 1A(2) and (5).

10. These provisions are said to reflect a principle that the extent of any dependency is fixed at the moment of the death, and that anything which might otherwise be thought to affect it afterwards is legally irrelevant. For my part I would rather leave open the question whether that is a correct or helpful analysis of the Act. What is clear is that sections 3 and 4 mark a departure from the ordinary principles of assessment in English law, which can fairly be described as anomalous. They provide for what Lord Diplock in *Cookson v Knowles* [1979] AC 556, 568, called an "artificial and conjectural exercise" whose "purpose is no longer to put dependants, particularly widows, in the same economic position as they would have been in had their late husband lived." Others have gone further. *Atiyah's Accidents, Compensation and the Law*, 8th ed (2013), described damages for bereavement as "highly objectionable" (p 89) and the exclusion of maintenance from a subsequent remarriage as "one of the most irrational pieces of law 'reform' ever passed by Parliament" (p 133).

11. There are two relevant respects in which an award under the Fatal Accidents Act may differ from an award under the BGB:

(1) Damages awarded to a widow under the BGB will take account of any legal right to maintenance by virtue of a subsequent remarriage or a

subsequent non-marital relationship following the birth of a child. Section 3(3) of the Fatal Accidents Act expressly excludes remarriage or the prospect of remarriage as a relevant consideration in English law.

(2) Section 844 of the BGB confers no right to a solatium for bereavement. Under section 823 of the BGB the widow may in principle be entitled to compensation for her own pain and suffering, but this would require proof of suffering going beyond normal grief and amounting to a psychological disturbance comparable to physical injury.

Choice of law: the legal framework

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

Procedure or substance?

13. The Private International Law (Miscellaneous Provisions) Act 1995 partially codifies the law relating to the choice of law in tort. Sections 9 to 15 of that Act apply to determine the law applicable to causes of action in tort in all cases which are not governed by the Rome II Regulation EC 864/2007. Major Cox's death having occurred before the Regulation came into force, any cause of action arising out of it is governed by those provisions. The combined effect of sections 9, 11(2)(a) and 12 of the Act is that issues arising on a cause of action in respect of personal injury are to be determined according to the law of the place where Major Cox was when he suffered the injury, i.e. Germany, unless that law is displaced on the ground that the tort has substantially more significant connections with England. These rules are, however, subject to section 14(3)(b), which provides that nothing in Part III "affects any rules of evidence, pleading or practice or authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum." The effect of the proviso is to preserve the distinction between substance and procedure.

14. The leading case is the decision of the House of Lords in *Harding v Wealands* [2006] 2 AC 1. The appeal arose out of an action in England for personal injury caused by a road accident in New South Wales. Under New South Wales law, damages were limited by the Chapter V of the Motor Accidents Compensation Act 1999 (known as the "MACA"). Section 123 of the MACA provided that "[a] court cannot award damages to a person in a respect of a motor accident contrary to this Chapter." The Chapter then provided for a fixed limit to the damages and a number of detailed rules for awarding them. These included an exclusion of the first five days of earning capacity, an exclusion of economic loss, a specified discount rate to be used to calculate lump sum awards, and a rule requiring credit to be given for payments received from an insurer. The House rejected the view that in section 14(3)(b) of the Act of 1995, "questions of procedure" referred only to rules governing the manner in which proceedings were to be conducted. They distinguished between questions of recoverability (substantive) and questions of assessment (procedural). At common law the kinds of damage recoverable was a question of substance, whereas their quantification or assessment went to the availability and extent of the remedy and as such were questions of procedure for the law of the forum. The House classified all the relevant provisions of the MACA as rules of procedure. They were accordingly inapplicable to litigation in England. The leading speech was delivered by Lord Hoffmann, with whom the rest of the House agreed. Lord Hoffmann stated the principle at para 24 as follows:

> "In applying this distinction to actions in tort, the courts have distinguished between the kind of *damage* which constitutes an actionable injury and the assessment of compensation (ie *damages)* for the injury which has been held to be actionable. The identification of actionable damage is an integral part of the rules which determine liability. As I have previously had occasion to say, it makes no sense simply to say that someone is liable in tort. He must be liable *for* something and the rules which determine what he is liable for are inseparable from the rules which determine the conduct which gives rise to liability. Thus the rules which exclude damage from the scope of liability on the grounds that it does not fall within the ambit of the liability rule or does not have the prescribed causal connection with the wrongful act, or which require that the damage should have been reasonably foreseeable, are all rules which determine whether there is liability for the damage in question. On the other hand, whether the claimant is awarded money damages (and if so, how much) or, for example, restitution in kind, is a question of remedy."

This reflected the test previously stated by the majority of the House of Lords in *Boys v Chaplin* [1971] AC 356.

15. Lord Hoffmann, following the decision of the High Court of Australia in *Stevens v Head* (1993) 176 CLR 433, characterised all the relevant provisions of the MACA as procedural. This seems surprising as regards some of them, such as the exclusion of economic loss, which would appear to be substantive according to Lord Hoffmann's test. This may be why in their concurring judgments Lord Woolf and Lord Rodger of Earlsferry justified this classification not only on the grounds given by Lord Hoffmann but on additional grounds. Lord Woolf at para 11 considered that because the greater part of the provisions of the MACA relating to damages were procedural, the rest which were "arguably" substantive should be regarded as procedural also. Lord Bingham and Lord Carswell agreed with Lord Rodger as well as Lord Hoffmann. Lord Rodger found the answer in the opening words of section 123 of the MACA. He put the point as follows at para 73:

> "Section 122(1) of MACA explains that Chapter 5 applies to, and in respect of, 'an award of damages' relating to death or injury in motor accidents. Section 123 provides that: 'A court cannot award damages to a person in respect of a motor accident contrary to this Chapter.' While, of course, it may be necessary to look beneath the surface of a statutory provision to ascertain its nature, the legislature is here signalling that the provisions in Chapter 5 are directed to what a New South Wales court can award by way of damages. In other words, prima facie at least, they are concerned, not with the scope of the defendant's liability for the victim's injuries as such, but with the remedy which the courts of New South Wales can give to compensate for those injuries. For purposes of private international law, prima facie they are procedural in nature."

16. In *Harding v Wealands*, it was being contended that damages for a New South Wales tort should be awarded in accordance with a New South Wales statute. The present is the converse case, because what is being suggested is that damages for a German tort should be awarded in accordance with an English statute. It is therefore necessary to consider the damages rules of both laws.

17. I consider that the relevant German damages rules are substantive. This is because they determine the scope of the liability. Sir Christopher Holland has found that the rule of German law requiring credit to be given for maintenance received from a subsequent partner, reflects the principle requiring the victim of a tort to mitigate loss and to give credit for successful mitigation. In German law this is classified as a substantive rule. Its classification in an English court is a question of English law, but English law would regard it in the same light. Questions of causation are substantive, as Lord Hoffmann pointed out in the passage which I have quoted from *Harding v Wealands*. Such questions include questions of mitigation, because they determine the extent of the loss for which the defendant ought fairly, reasonably or justly to be held liable. "The inquiry is whether the plaintiff's harm or

loss should be within the scope of the defendant's liability, given the reasons why the law has recognised the cause of action in question": *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, at para 70 (Lord Nicholls of Birkenhead). The rule of German law which makes damages available for psychological distress in certain circumstances, and makes damages for bereavement as such unavailable, is also substantive. These are paradigm examples of rules governing the recoverability of particular heads of loss, the avoidance of which lies within the scope of the defendant's duty.

18. Turning to the categorisation of the relevant damages provisions of the Fatal Accidents Act, the Court of Appeal considered that they were procedural. Having arrived at this conclusion, they were much exercised by the difficulty of applying the damages rules of the Fatal Accidents Act to a cause of action under section 844 of the BGB, given the considerable differences between them; and the absence of any alternative basis for assessing damages for wrongfully causing death under English law. The majority considered that the damages rules in the Act could not be regarded as relevant to an assessment of damages for the German cause of action, because the conceptual differences between the English and German causes of action were too great. They therefore held that English law should adopt the German damages rules as its own and apply them not directly but by analogy. Dame Janet Smith dissented on the ground that in her opinion the Fatal Accidents Act applied as part of the *lex fori*, notwithstanding the differences between the English and German causes of action.

19. There are certainly cases in which English law has no suitable remedy for breach of a foreign law duty. As Lord Parker CJ observed in *Phrantzes v Argenti* [1960] 2 QB 19, 35, to be available in support of a foreign cause of action, the remedies afforded by English law "must harmonise with the right according to its nature and extent as fixed by the foreign law." But the ordinary consequence if it does not is that English law cannot give effect to the foreign cause of action at all, which was why Lord Parker declined in that case to order a father to provide the dowry to which his daughter would have been entitled under the law of Greece where the father was assumed to be domiciled.

20. I agree with the majority of the Court of Appeal that the damages rules of the Fatal Accidents Act cannot be applied to a cause of action under section 844 of the BGB, but for an altogether simpler reason than the conceptual differences between the two laws. In my view it is unnecessary to engage in the difficult and technical task of classifying sections 1A, 3 and 4 of the Fatal Accidents Act as procedural or substantive, because these sections are irrelevant in either case. So far as they are substantive, they are irrelevant because the substantive law in this case is German law. But whether they are procedural or substantive, they do not apply under their own terms. These provisions do not lay down general rules of English law relating to the assessment of damages, even in personal injury actions, but only rules

applicable to actions under the Act itself. Sections 1A, 3(3), 3(4) and 4, which include the provisions relevant to the present appeal, apply only to "an action under this Act", i.e. to actions brought under section 1. The context shows that the same is true of the other provisions of section 3 ("in the action"). An action to enforce a liability whose applicable substantive law is German law is not an action under section 1 of the Fatal Accidents Act to which the damages provisions of the Act can apply.

21. If the English court must apply its own rules of assessment, then what rules are these, if not those of the Fatal Accidents Act? I do not think that it is necessary to resort to analogies, because English law does provide a remedy that harmonises with the German law right, namely damages. Mr Kretschmer committed a tort under German law, and thereby incurred a substantive liability to pay financial compensation. The principal head of loss for which he was liable to compensate Major Cox's widow was the deprivation of the net financial benefit to her of her legal right to maintenance from him. This is entirely cognate with the corresponding remedy in English law. It is true, as the Court of Appeal pointed out, that because the cause of action in English law for a fatal accident is an action under section 1 of the Act, there is no non-statutory measure of damages for fatal accidents. But this does not matter. If, as I consider, the particular rules of assessment in the Fatal Accidents Act do not apply as a matter of construction of the Act, then the answer must be sought in the rules of assessment which apply generally in English law in the absence of any statute displacing them. The relevant English law principle of assessment, which applies in the absence of any statute to the contrary, is that Mrs Cox must be put in the same financial position, neither better nor worse, as she would have been in if her husband had not been fatally injured. It follows that even if one assumes, for the sake of argument, that the Court of Appeal were right to regard the damages rules of the Act as procedural, in principle credit must be given for maintenance from her subsequent partner during the period since the birth of their child. This is because damages at common law are assessed on the footing that credit must be given for receipts referable to the original loss, with very limited exceptions such as insurance receipts which are not relevant in this case.

22. The only potential difficulty concerns Mrs Cox's receipt of maintenance from her current partner during the period before they had a child, when he was under no legal obligation to maintain her either in German or in English law. It appears from Sir Christopher Holland's findings about the relevant German law that it is not just the maintenance that she would have received from Major Cox that must have been received by virtue of a legal obligation, but also the maintenance from her current partner for which she can be required to give credit. The classification of a damages rule regulating the receipts for which credit must be given in an award of damages is a difficult question which admits of no universal answer. In some cases, such a rule will be classed as part of the law of mitigation and therefore substantive. In some cases it will be regarded as a rule excluding an otherwise relevant element

from a purely factual issue about quantum, which would normally be classified as procedural: see *Roerig v Valiant Trawlers Ltd* [2002] 1 WLR 2304, para 23, and *Coupland v Arabian Gulf Oil Co* [1983] 1 WLR 1136, 1149, concerning a foreign statutory rule about the deductibility of social security receipts. In the present case, the rule in question seems to me to be substantive for a reason peculiar to the nature of the German cause of action relied upon in this case. Mrs Cox is entitled as a matter of German substantive law to an award of damages for the loss of her legal right of maintenance from her late husband. German law requires credit to be given so far as she has received corresponding benefits by virtue of an alternative legal right of maintenance from someone else. This follows from the nature of the duty in German law and of the head of damages recoverable for breach of it. It is a rule of substantive law. Purely voluntary payments from someone with no legal obligation to make them cannot be regarded as an alternative to what she has lost. It follows that credit need not be given for it.

23. It is not at all satisfactory that such significant consequences should turn on difficult and technical considerations of the kind considered in the previous paragraph. Under the law as it stood at the time of this accident, it was at least in theory possible that assessment rules of the forum could conflict with the substantive rules of the proper law. How that conflict should be resolved if it ever arose is a question on which I should prefer to express no opinion. The rational answer is that someone in Mrs Cox's position should recover in respect of a German cause of action what she would have recovered in a German court. This has now been achieved by changing the law. Section 15A of the Act of 1995 (added by amendment in 2008) applies the Rome II Regulation EC 864/2007 to causes of action arising after 11 January 2009. Article 15(c) of the Regulation applies the applicable law to "the existence, the nature and the assessment of damage or the remedy claimed."

Overriding effect of English law

24. Before us, this point has enjoyed greater prominence than it had in the courts below, but I reject it as the Court of Appeal did. If my reasons for doing so are more elaborate than theirs, this is only because it has been more elaborately argued.

25. Section 14(3)(a)(i) of the Private International Law (Miscellaneous Provisions) Act 1995 provides:

> "Nothing in this Part... authorises the application of the law of a country outside the forum as the applicable law for determining issues arising in any claim in so far as to do so... would conflict with principles of public policy."

Section 14(4) provides:

> "This Part has effect without prejudice to the operation of any rule of law which either has effect notwithstanding the rules of private international law applicable in the particular circumstances or modifies the rules of private international law that would otherwise be so applicable."

26. Mr Layton argued that the Fatal Accidents Act 1976 should be applied notwithstanding the ordinary rules of private international law, for two reasons. His first submission was that as a matter of construction that Act had extraterritorial effect. His second submission was that the principles enacted in Fatal Accidents Act represented "mandatory rules" of English law, applicable irrespective of ordinary rules of private international law. For reasons that will become apparent, I regard both submissions as raising the same issue in the circumstances of this case, and as requiring the same negative answer.

Extra-territorial application

27. Whether an English statute applies extra-territorially depends upon its construction. There is, however, a presumption against extra-territorial application which is more or less strong depending on the subject-matter. It arises from the fact that, except in relation to the acts of its own citizens abroad and certain crimes of universal jurisdiction such as torture and genocide, the exercise of extra-territorial jurisdiction is contrary to ordinary principles of international law governing the jurisdiction of states. It follows, as Lord Scarman observed in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 145, that "unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction".

28. It is, however, important to understand what is meant when we talk of the extra-territorial application of an English statute. There are two distinct questions, which are not always distinguished in the case-law. The first question is what is the proper law of the relevant liability. The answer will usually depend on the extent of any connection between the facts giving rise to liability and England or English law. If the proper law of the liability is English law, no question of extra-territorial application arises. In principle the exercise is no different from that which the court performs when it identifies the proper law of a non-statutory tort, by reference to the connection between the facts and the various alternative systems of law. This is what

Lord Hodson (at p 380) and Lord Wilberforce (at pp 390-392) did in *Boys v Chaplin* [1971] AC 356, when they held that liability in respect of a road accident in Malta in which only English parties were involved was governed by English law. The same basic principle has applied under sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995 since that Act came into force. The second question is one of extra-territorial application, properly so-called. It is the question posed by section 14(3)(a)(i) and 14(4) of the Private International Law (Miscellaneous Provisions) Act 1995, which had its counterpart in the common law, namely whether the choice of law arrived at in accordance with sections 11 and 12 is displaced by some mandatory rule of the forum. This is not a choice of law principle at all, but turns on the overriding rules of policy of the forum.

29. In the present case it is common ground that the *lex causae* arrived at on ordinary principles of private international law is not English but German law. There is nothing in the language of the Fatal Accidents Act 1976 to suggest that its provisions were intended to apply irrespective of the choice of law derived from ordinary principles of private international law. Such an intention would therefore have to be implied. Implied extra-territorial effect is certainly possible, and there are a number of examples of it. But in most if not all cases, it will arise only if (i) the terms of the legislation cannot effectually be applied or its purpose cannot effectually be achieved unless it has extra-territorial effect; or (ii) the legislation gives effect to a policy so significant in the law of the forum that Parliament must be assumed to have intended that policy to apply to any one resorting to an English court regardless of the law that would otherwise apply.

30. There is a body of case-law in which the Fatal Accidents Acts have been applied to accidents outside England. In *Davidsson v Hill* [1901] 2 KB 606, the Fatal Accidents Act 1846 was applied to the death of a foreign seaman on a foreign ship, resulting from a collision with a British ship on the high seas. The reason was that the existence of a cause of action in favour of dependants of a person negligently killed was regarded as a universal principle which should be treated as part of the international law maritime: see Kennedy J at pp 610, 614 and Phillimore J at pp 616, 618. In *The Esso Malaysia* [1975] 1 QB 198, 24 Russian crewmen serving on a Latvian trawler were killed when it collided with a Panamanian tanker on the high seas. Jurisdiction was established in England by arresting a sister ship. Brandon J held, following *Davidsson v Hill*, that the rule which imposed liability for negligently causing a fatal injury was a universal rule of the law maritime. On that footing, the Fatal Accidents Act 1846 applied, because its effect was not to create new rules of conduct, but only to regulate the consequences of existing rules of conduct: see p 206. These cases depend, in my opinion, on (i) the existence of an international principle of liability for negligent acts, which is to be regarded as part of the law maritime, coupled with (ii) the absence of any more appropriate system of law than English law to govern the precise incidents, extent and conditions of that liability. The peculiarity of the cases about collisions in international waters lies in

the absence of any relevant connection between the breach of duty and the territory of any state, or of any underlying relationship between the parties, from which some more appropriate choice of law could be derived. In *Roerig v Valiant Trawlers* [2002] 1 WLR 2304, sections 3 and 4 of the Fatal Accidents Act 1976 were also applied, but on a different basis. There were relevant connections with English law because the accident occurred on a British vessel with no other vessel involved, and also with Dutch law because the vessel was operating out of the Netherlands and the deceased was a Dutchman working for a Dutch company. The Dutch factors were held to be insufficiently significant to displace the *lex loci delicti*, which was English. These cases all, in different ways, turn on the choice of law arising from the circumstances of the case. None of them were about the extra-territorial effect of any statute. Indeed, in *The Esso Malaysia* at p 207, Brandon J declined to consider that question.

31. The relevant principle emerges perhaps more clearly from the case law on the application of the United Kingdom's scheme of statutory employment protection to employment with a foreign element. In *Lawson v Serco Ltd* [2006] ICR 250, the House of Lords heard three cases in which claims were made for unfair dismissal under section 94 of the Employment Rights Act 1996. Two of them had been brought by British nationals employed by the Ministry of Defence at overseas military bases. The third was brought by a pilot employed on international routes. His employer was a Hong Kong airline, but he was based at Heathrow airport. It was held that as a general rule the application of section 94 should depend on whether the employee was working in England when he was dismissed, but that exceptionally the Act might be applied where the employment relationship was substantially connected with the United Kingdom. This was held to be the case where a peripatetic employee was based in England, or an employee was hired in England to work in an extra-territorial enclave of the United Kingdom overseas. The employee therefore succeeded in all three cases. Lord Hoffmann, with whom the rest of the House agreed, identified the relevant question at para 1:

> "Putting the question in the traditional terms of the conflict of laws, what connection between Great Britain and the employment relationship is required to make section 94(1) the appropriate choice of law in deciding whether and in what circumstances an employee can complain that his dismissal was unfair?"

Duncombe v Secretary of State for Children, Schools and Families (No 2) [2011] ICR 1312, did not concern an extra-territorial enclave of the United Kingdom. The employees were teachers employed by the Secretary of State to work in European schools abroad. But the Supreme Court treated the result in *Lawson v Serco Ltd* as illustrative of a broader principle that employment abroad might exceptionally have

> "such an overwhelmingly closer connection with Britain and with British employment law than with any other system of law that it is right to conclude that Parliament must have intended that the employees should enjoy protection from unfair dismissal." (Baroness Hale at para 16).

In *Ravat v Halliburton Manufacturing and Services Ltd* [2012] ICR 389, the employment tribunal was held to have jurisdiction to determine a claim under section 94 by an employee based in Scotland but employed for periods of 28 days at a time at oil installations in Libya. The Supreme Court, treated the result in *Lawson v Serco Ltd* as an example of the same broader principle. Lord Hope expressed it as follows, at para 27:

> "the employment relationship must have a stronger connection with Great Britain than with the foreign country where the employee works. The general rule is that the place of employment is decisive. But it is not an absolute rule."

Like the cases about maritime torts, these cases turn on the choice of law, not on the extra-territorial effect of the Employment Rights Act.

32. The Fatal Accidents Act is an unpromising candidate for implied extra-territorial effect. In the first place, the question of extra-territorial application could not have been an issue at the time when the Act of 1976 and its predecessors were passed. This is because actions brought in England on a foreign tort were then subject to the double-actionability rule, which was a procedural rule requiring the conduct alleged to be actionable under English law as well as by its proper law. The practical effect of the rule was not to displace the law governing the tort, but to make it pointless ever to rely on that law because the elements of the tort in English law had to be satisfied anyway. The double-actionability rule had its origin in *Philips v Eyre* (1870) LR 6 QB 1, and was no doubt based on the tacit instinct of English judges that they should not be required to enforce values underlying the law of tort in foreign countries, which might not be acceptable in England. The Private International Law (Miscellaneous Provisions) Act of 1995 abolished the double-actionability rule and introduced rules requiring English courts to apply to claims in tort the law which had the most significant connection with the wrong, subject to an altogether more limited saving for the public policy of the forum applicable only in those cases where a specific foreign law was found to be repugnant to the policy of the forum.

33. Secondly, the whole purpose of section 1 of the Fatal Accidents Act, was to correct an anomaly in the English law of tort. There is nothing in the mischief of this

legislation which requires it to be applied to fatal accidents which, being governed by foreign laws, are unlikely to exhibit the same anomaly. If there is no reason of policy to apply section 1 to foreign torts, there can be no better reason to apply sections 1A, 3 and 4, which depend on section 1.

34. Thirdly, there is no reason whatsoever why Parliament should have intended the Fatal Accidents Act to apply to foreign fatal accidents with no connection to England or English law. Neither the terms nor the purpose of the Act depend for their effect on its having extra-territorial effect. The only other basis for imputing to Parliament an intention to apply the Fatal Accidents Act internationally irrespective of ordinary rules of private international law, is that the Act, and in particular its damages rules, represent a "mandatory rule". This is the expression commonly employed to describe what the Law Commissions of England and Scotland have called "rules of… domestic law… regarded as so important that as a matter of construction or policy that they must apply in any action before a court of the forum, even where the issues are in principle governed by a foreign law selected by a foreign choice of law rule": Law Commission and Scottish Law Commission Working Paper No. 87 (1984), para. 4.5. Section 14(3)(a)(i) an 14(4) of the Private International Law (Miscellaneous Provisions) Act 1995 have the effect of saving such rules. Some foreign laws governing the availability of damages for fatal accidents may no doubt be so offensive to English legal policy that effect would not be given to them in an English court. A rule of foreign law that women or ethnic minorities should have half the damages awardable to white males similarly placed was cited as an example. But the German rules with which this case is concerned are based on a perfectly orthodox principle which is by no means unjust and is accepted in principle by English common law in every other context than statutory liability for fatal accidents.

Mandatory rules

35. It must follow from my reasons for rejecting the implied extra-territorial application of the Fatal Accidents Act that Mr Layton's second submission, based on the mandatory character of the rules contained in the Fatal Accidents Act, also fails.

Conclusion

36. Since my reasons differ in some respects from those of both courts below, the declarations may require some redrafting. I would leave the exact wording to be agreed by counsel. Subject to that, I would dismiss Mrs Cox's appeal.

LORD MANCE

37. Mrs Cox claims in respect of the accident in Germany on 21 May 2004 which caused the death of her husband. The substantive law governing the relevant tort is German. But, like the claimant in *Harding v Wealands* [2007] 2 AC 1, Mrs Cox submits that English law - more specifically the provisions of the Fatal Accidents Act 1976 (the "FAA") – should apply in relation to the issues of damages which arise. In the alternative, she relies on article 844 of the German Civil Code (the BGB).

The relevant substantive law

38. I agree with Lord Sumption that the principles by which damages are recoverable by Mrs Cox are those established by article 844 BGB. The decision of the Court of Appeal should be upheld, albeit by different reasoning to that which it adopted and with corresponding variation of the declarations made, as Lord Sumption indicates in para 36.

39. I agree in particular with Lord Sumption's conclusion in paras 17 and 22 that the German rule under article 844 requiring credit to be given only for maintenance received as a matter of *legal right* from a subsequent partner is a rule of substantive, rather than procedural, law.

40. The distinction between substance and procedure originated in the common law and was preserved by the Private International Law (Miscellaneous Provisions) Act 1995, which applies in this case. (The distinction has, for torts committed since 11 January 2009, been, happily, superseded by Rome II Regulation EC 864/2007, article 15(c).) The distinction was discussed, as Lord Sumption notes, in *Boys v Chaplin* [1971] AC 356 and *Harding v Wealands* [2007] 2 AC 1. It was, as Lord Rodger noted in *Harding v Wealands*, para 65, a distinction drawn for private international law purposes, and it had in that context a somewhat special meaning. The distinction applies in the present case when examining both the nature of the German rules under article 844 BGB and the nature of sections 3 and 4 of the FAA.

41. For the purposes of the distinction, substance includes the identification of heads of recoverable loss, such as pain and suffering (see *Boys v Chaplin* itself) and loss of consortium (solatium): see *M'Elroy v M'Allister* 1949 SC 110, cited in *Boys v Chaplin*, p 82B-E, per Lord Guest, and see p 389E, per Lord Wilberforce. It further includes, as Lord Hoffmann stated in *Harding v Wealands*, para 24, the rules governing causation and remoteness and, as Lord Rodger accepted at para 74, traditionally also mitigation. The rules governing these matters are, as Lord

Hoffmann indicated in para 24, rules which determine the scope of a defendant's liability, or "for what" he is liable. When Lord Hoffmann referred in this connection to what he "previously had occasion to say", he was clearly referring to *South Australia Asset Management Sorpn v York Montague Ltd ("SAAMCO")* case [1996] UKHL 10, [1997] AC 191, where the House limited the scope of a surveyor's liability for a negligent over-valuation to such loss as flowed from the over-valuation - excluding, in effect, the further consequences of subsequent market fall as well as any increased risk of default.

42. A similar description of the substantive principles on which damages fall to be awarded is found in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883. Lord Nicholls there stated that the value judgment, concerning "the extent of the loss for which the defendant ought fairly or reasonably or justly to be held liable", involves the law setting "a limit to the causally connected losses for which a defendant is to be held responsible" under heads such as remoteness and mitigation (para 70), and involves asking "[i]n respect of what risks or damages does the law seek to afford protection by means of the particular tort" (para 71).

43. I agree with Lord Sumption's comments in para 15 on the reasoning and decision in *Harding v Wealands*. The House of Lords there refused in English proceedings to apply chapter 5 of the Motor Accidents Compensation Act ("MACA"), which would have regulated the damages recoverable had the matter been litigated in Australia. The application of the difficult distinction between substantive and procedural issues may on the facts of that case appear in some respects questionable. What is presently interesting is the acceptance by members of the House of Lords that the relevant chapter, chapter 5, contained provisions that "traditionally fall on the substantive side of the line for purposes of private international law": per Lord Rodger, para 74, and see per Lord Woolf, para 11. Yet both held (paras 11 and 77), with Lords Bingham and Carswell agreeing (paras 1 and 79), that chapter 5 was a code the whole of which was to be characterised as procedural.

44. Lord Hoffmann, with whose speech Lords Bingham and Carswell also agreed, identified in para 17 the relevant parts of chapter 5. These included a requirement that credit be given for payments made to the claimant by an insurer – on its face a mitigating receipt. The most convincing explanations of the House of Lords' decision that all aspects of the MACA were procedural seem to me in these circumstances either the package argument accepted by Lord Woolf (para 11) and perhaps also the argument that the MACA was a remedy intended only for use in Australian courts argument (see per Lord Rodger, para 75). Neither explanation affects the relevance or applicability of article 844 BGB as part of the relevant substantive law on the facts of this case.

The Fatal Accidents Act 1976 (The "FAA")

45. Lord Sumption describes the development of English law in this area in paras 6 to 10 and the differences between an award under the FAA and under article 844 BGB in para 11. The FAA creates a new cause of action in favour of dependants (and in favour of a spouse in respect of bereavement): *Seward v Vera Cruz* (1884) 10 App Cas 59, 67, per Lord Selborne LC; *Davidson v Hill* [1901] 2 KB 606, 614. Any claim for pain, suffering or other loss suffered by the deceased before death is distinct from these new claims for loss or dependency and bereavement. This is so even though these new claims only arise where the deceased would, if death had not ensued, have had a claim for damages for any loss he or she incurred. That is a mere pre-condition to the new causes of action.

46. The Court of Appeal, as Lord Sumption notes (para 18), considered by a majority (Dame Janet Smith DBE dissenting) that a dependency claim under the FAA should be categorised as involving a different sort of action from a dependency claim under article 844, and that the FAA was irrelevant on this ground alone. That may be open to question. Classification in private international law "should not be constrained by particular notions or distinctions of the domestic law of the lex fori, or that of the competing systems of law, which may have no counterpart in the other's system": *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1996] 1 WLR 387, 407C, per Auld LJ, and it should, as I said in *Raiffeisen Zentralbank Osterreich AG v Five Star Trading LLC* [2001] QB 825, paras 26-27, be "undertaken in a broad internationalist spirit". The Court of Appeal was however also of the unanimous view that the provisions of sections 3 and 4 of the FAA should under English private international law be viewed as procedural rather than substantive.

47. In my opinion, however, it can make no difference to the outcome of this appeal whether or not the dependency claims under the FAA and German law are categorised as broadly similar or whether the provisions of sections 3 and 4 of the FAA are treated as substantive or procedural.

48. Assuming that the dependency claims are categorised as broadly similar, the provisions of sections 3 and 4 of the FAA are, if substantive, irrelevant to a tort subject to German substantive law. If on the other hand, the provisions of sections 3 and 4 were to be treated as procedural, their application could have no effect on the outcome. This is not because I think that their impact must necessarily be confined to claims under the FAA, simply because that is their domestic context - private international law may require the application of procedures developed in a purely domestic context to claims governed by foreign law. Rather it is because I do not, in this context, see any basis on which an English procedural provision could expand on a defendant's liability under the substantive principles of the relevant governing law. So here an English procedural rule precluding account from being

taken of re-marriage or the prospects of remarriage could not override the substantive rule under article 844 BGB by which credit is required to be given for maintenance received by way of legal right from a subsequent partner.

49. The problems arising from potential conflicts of this sort between a foreign substantive lex causae and a domestic lex fori are discussed in the context of limitation in *Dicey, Morris & Collins's The Conflict of Laws* 15th ed (2012), para 7-056. As proposition (ii) in that paragraph states, with reference to dicta in, inter alia, *Harris v Quine* (1869) LR 4 QB 653, 658:

> "… once a substantive period of limitation of the lex causae had expired, no action could be maintained even though a procedural period of limitation imposed by the lex fori had not yet expired: in such a case there was simply no right left to be enforced."

Such problems can of course be expected to, and do arise, only very infrequently.

50. I add only that I leave open, for consideration if the need ever arises, the correctness of the dicta regarding the nature of sections 3 and 4 of the FAA to be found in *Coupland v Arabian Gulf Oil Co* [1983] 1 WLR 1136, 1149 and in *Roerig v Valiant Trawlers Ltd* [2002] 1 WLR 2304, paras 13 to 27. In *Coupland* the point was not argued at all, though Hodgson J asserted that it was correct to treat a Libyan law rule that social security benefits were not deductible from an award of general damages as a rule of quantification. The fuller reasoning in *Roerig* was unnecessary for the decision, both because Dutch law did not apply (para 12) and, as Waller LJ correctly recognised at paras 28-29, because the claim was brought under the FAA, and one cannot bring a claim under a statute without accepting its terms.

Overriding effect of English law and mandatory law

51. I agree with Lord Sumption's reasoning and conclusions on these aspects in paras 24-35 of his judgment, and have nothing to add to what he there says.