

## THE HIGH COURT

[Record No. 2003 4850P]

BETWEEN

PATRICK BURKE

PLAINTIFF

AND

UVEX SPORTS GmbH AND MOTORRAD TAF GmbH

DEFENDANTS

**Judgment of Mr. Justice Herbert delivered the 8th day of March, 2005**

1. The Plenary Summons in this case was issued on 15th April, 2003.

2. In it the Plaintiff claims damages for personal injuries, loss, and damage sustained and suffered by him as a result of the negligence and breach of duty, including breach of Statutory duty, of the first named Defendant whose registered offices are in Furth, in the Federal Republic of Germany and the second named Defendant whose registered place of business is Ansbach in the Federal Republic of Germany.

3. The Certificate as to Jurisdiction indorsed on the Plenary Summons is in the following terms:-

"The Court has power under Council Regulation (EC) No. 44/2001 of the 22nd day of December, 2000 to hear and determine the Plaintiff's claim against the Defendants and the Court should assume Jurisdiction to hear and determine the said claims under the provisions of Articles 5(1) and (3) of Council Regulation (EC) No. 44/2001."

4. Conditional Appearances were entered on behalf of both named Defendants so that the provisions of Article 24 of Regulation No. 44/2001 do not apply in this case.

5. The Statement of Claim was delivered by the Plaintiff on 15th July, 2004. At para. 4 of this Statement of Claim is it pleaded as follows:-

"In the month of August, 1999, the Plaintiff purchased a motorcycle helmet, with a visor fitted thereto, from the second named Defendant and the said helmet and visor was manufactured by the first named Defendant herein."

6. The nature of the Plaintiff's claim as appears from the Statement of Claim is that on 5th May, 2000, while riding his motorcycle on the public roadway at Rosegreen, Cashel, in the County of Tipperary in this Member State of the European Community, his motorcycle skidded because of the alleged presence of gravel or other extraneous material on the road surface and struck a roadside bank or fence. The visor of the motorcycle helmet broke, and caused or permitted the Plaintiff to suffer severe injuries to his upper lip, his nose and, the inside of his mouth.

7. The Plaintiff's claim is framed solely in tort against both Defendants, at Common Law and, additionally as against the first named Defendant only, pursuant to the provisions of Sections 2 and 5 of the Liability for Defective Products Act, 1991.

8. By a Motion on Notice dated 13th December, 2004, which came on for hearing before this Court on 28th February, 2005, the second named Defendant now seeks a Declaration that in the circumstances of the case this Court has no Jurisdiction over the subject matter of the proceedings as against the second named Defendant.

9. By a letter dated 21st February, 2005, the Solicitors for the Plaintiff notified the Solicitors for the second named Defendant that at the hearing of the Motion above mentioned, the Plaintiff would apply to the Court to amend the Claim indorsed on the Plenary Summons so as to delete from the certificate as to jurisdiction the reference to Article 5(1) of Council Regulation (EC) No. 44/2001. At the hearing, Counsel for the Plaintiff confirmed and admitted that the Plaintiff's claim against both Defendants in these proceedings lay solely in tort.

10. Counsel for the second named Defendant relied upon the decision of the European Court of Justice in the case of *Athanasios Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst and Co. and Others*, case 189/87 [1988] E.C. R, 5565 at 5585 where the Court in considering Article 5(3) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed 27th September, 1968, held as follows at page 5585:-

"...the concept of matters relating to tort, *delict or quasi-delict* must be regarded as an autonomous concept which is to be interpreted by the application of the Convention, principally by reference to the scheme and objects of the Convention in order to ensure that the latter is given full effect.

In order to ensure uniformity in all Member States it must be recognised that the concept of 'matters relating to tort, *delict or quasi-delict*', covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1)."

11. Counsel for the second named Defendant submitted to this Court that it necessarily and inevitably followed from the pleading at Para. 4 of the Plaintiff's Statement of Claim that this was, so far as the second named Defendant was concerned, a matter relating to a contract. Therefore, he said, despite the claim being pleaded solely in tort against the second named Defendant, jurisdiction was governed exclusively by Article 5(1) of Regulation No. 44/2001.

12. The argument of counsel for the Plaintiff proceeded on the following lines:-

The several bases of special jurisdiction in Article 5 of Regulation No. 44/2001 are entirely distinct and separate. The Plaintiff had a Constitutional and legal right to found his claim against both Defendants in Tort and the Court was not empowered to go behind that pleading. Having advanced his claim solely in Tort the Plaintiff was entitled to rely on the provisions of Article 5(3) to found jurisdiction. He could not be deprived of this right merely because there was a contract somewhere in the background of the case. Article 5(1) should not be construed in this manner, particularly where this might result in the Plaintiff being out of time to sue the second named Defendant in the Federal Republic of Germany. The claims against the Defendants if heard in the Courts of different Member States as a result of the application of Article 5(1)(a) would be, 'related actions' as defined by Article 28(3) with the consequent risk of irreconcilable judgments against

the first named Defendant and accordingly Article 5(3) must be given a construction to avoid such a result-.

13. Counsel for the Plaintiff sought to distinguish the judgment of the European Court of Justice in *Kalfelis v. Schröder* (above cited) on the ground that it was an action in which the Plaintiff claimed relief in the same action in, contract, tort and unjust enrichment and he submitted that the only issue determined by the Court was that in those circumstances a Court which has jurisdiction under Article 5(3) over an action insofar as it is based on tort or *delict* does not have jurisdiction over that action so far as it is not so based.

14. The Plaintiff is domiciled in this Member State and it is admitted that both the named Defendants are domiciled in another Member State, in this case, the Federal Republic of Germany. In my judgment, on an autonomous definition the proceedings in the present case are clearly a, "civil and commercial matter" as defined in *L.T.U. v. Eurocontrol*, case 29/76 [1976] E.C.R. 1541 at 1551, which I am satisfied applies with equal force to the Regulation as it did to the Convention, and whether one construed the requirement as being cumulative or alternative. Therefore, by Article 1 thereof the issue of Jurisdiction in the Court falls to be determined by reference to Council Regulation (EC) No. 44/2001, which by Article 76 thereof came into force on 1st March, 2002 and by Article 60(1) applies to these proceedings which were initiated after that date.

15. Articles 2, 5(1) and 5(3) of the 1968 Brussels Convention are in the same terms as Articles 2, 5(1) and 5(3) of the Regulation No. 44/2001 and I find nothing in the text of the Regulation considered as a whole which would prevent the decision of the European Court of Justice in *Kalfelis v. Schröder*, (above cited), from applying to these Articles of the Regulation.

16. Applying the decision in *Kalfelis v. Schröder*, (above cited), the dominant rule for ascertaining jurisdiction under the Regulation is to be found in Article 2 which provides as follows:-

"Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality be sued in the Courts of that Member State."

17. In the decision in *Kalfelis v. Schröder*, (above cited) the European Court of Justice held that:-

"...the Special Jurisdictions enumerated in Articles 5 and 6 of the Convention constitute derogations from the principle that jurisdiction is vested in the Courts of the State where the Defendant is domiciled and as such must be interpreted restrictively..."

18. Article 60 of the Regulation provides that for the purposes of the Regulation a company or other legal person or association of natural or legal persons is domiciled at the place where it has its, (a) statutory seat, or (b) central administration, or (c) principal place of business. It was admitted before me, as I have already indicated, that both Defendants in the instant case are domiciled in the Federal Republic of Germany.

19. Article 3 of Council Regulation (EC) No. 44/2001 provides that persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of the Regulation. Section 2 Article 5(1)(a) provides that a person domiciled in a Member State may, in another Member State, be sued in matters relating to a contract in the courts for the place of performance of the obligation in question. Article 5(1)(b) provides that for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where under the contract, the goods were delivered or should have been delivered.

20. Article 5(3) of the Regulation provides that a person domiciled in a Member State may, in another Member State be sued in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur.

21. Following the decision in *Kalfelis v. Schröder* (above cited), the phrase, "matters relating to a contract," in Article 5(1)(a) and the phrase, "matters relating to tort, *delict* or *quasi-delict*," in Article 5(3) must be given an autonomous or independent European Community meaning and not interpreted simply by reference to the national law of the Member State one or other of the parties. As explained by the European Court of Justice this is in order to ensure uniformity in all Member States and in *Kalfelis v. Schröder*, (above cited) the court held that the Convention must be interpreted, "principally by reference to the scheme and objectives of the Convention in order to ensure that the latter is given its full effect." I am satisfied that this principle of interpretation must apply equally to Regulation No. 44/2001.

22. The relationship between contract and tort in this Member State and in the United Kingdom was very uncertain until the decision of the House of Lords in the case of *Hedley Byrne and Company Limited v. Heller and Partners Limited*, [1964] A.C. 465 and, of the Supreme Court in this State in the case of *Finlay v. Murtagh* [1979] I.R. 249, established that the existence of a contractual relationship between the parties was no barrier to a claim based on the tort of negligence. In Member States of the European Community where the principle of mutual exclusivity is applied, no action in tort is possible between parties to a contract. In order to avoid these sort of problems flowing from the application of national laws, courts must consider issues of Jurisdiction solely by reference to the Regulation, giving full effect to its scheme and objectives.

23. In the instant case, the claim by the Plaintiff against the second named Defendant is based solely on negligence and a breach of duty and is therefore framed solely in tort. No issue of contractual law is raised by the pleadings.

24. In considering the position of contractual clauses purporting to exclude liability in tort, Kaye at p. 510 of his book, "Civil Jurisdiction and Enforcement of Foreign Judgments", suggests as the correct view, that:-

"When the principal subject matter of the proceedings concerns the existence or not of liability in tort, the matter in dispute should be regarded as tortious for purposes of application of Article 5(3), [of the Brussels Convention 1968], notwithstanding the existence of the incidental issue of contract."

25. This opinion clearly lends support to the Plaintiff's argument in the present case. However, it is clear that not all commentators were of the same view as Kropholler in *Europaisches Zivilprozessrecht* [1982] at p. 64 Article 5 considered that it was, the "contractual relationship and not the delictual relationship which is decisive."

26. However, this opinion by Kaye was expressed prior to the judgment of the European Court of Justice in *Kalfelis v. Schröder*, (above cited). The law in Kaye is stated to be the law known to the author on 2nd January, 1987 and the judgment of the European

Court of Justice was given on 27th September, 1988.

27. In its judgment, in *Kalfelis v. Schröder*, (above cited) the Court summarised facts of that case essentially as follows:-

Mr. Kalfelis concluded with a bank established in Luxembourg through a bank established in Frankfurt am Main and with the participation of the latter's procurator holder, a number of spot and futures stock-exchange transactions in silver bullion. The futures transactions resulted in a total loss. His action, which was against the Defendants jointly and severally, was based on contractual liability for breach of the obligation to provide information, on tort because the Defendants caused him to suffer loss as a result of their conduct contra bonos mores and, on unjust enrichment on the grounds that futures stock-exchange contracts in silver bullion were not binding on the parties by virtue of mandatory provisions of Germany Law so that he was entitled to reclaim the sums which he paid over.

28. In the course of its judgment the European Court of Justice held that:-

"In order to ensure uniformity in all the Member States it must be recognised that the concept of, 'matters relating to tort, *delict and quasi-delict*', covers all actions which seek to establish the liability of a defendant and which are not, 'related to a contract' in the meaning of Article 5(1)."

29. The Court considered that, "whilst it is true that disadvantages arise from different aspects of the same dispute being adjudicated upon by different courts", it pointed out... "that a Plaintiff is always entitled to bring his action in its entirety before the Courts of the domicile of the Defendant..."

30. In the case of *Réunion Européenne S.A. and Others v. Spliethoff's Bevrachtungskantoor BV and The Master of the Vessel 'Alblasgracht V002'*, case 51/97 [1998] E.C.R., I - 5611, the European Court of Justice in considering the issues, first eliminated the existence of a contractual relationship between the Insurers, (who were subrogated into the rights of the consignees), and the actual maritime carriers before going on to determine whether the action by the insurers against the carriers in respect of damage to the goods during the sea transit was a claim in, "tort, *delict or quasi-delict*", within the meaning of Article 5(3) of the Brussels Convention, 1968.

31. In my judgment, for the purpose of establishing Jurisdiction under Council Regulation No. 44/2001, this Court cannot overlook the existence of the contractual relationship, however basic, between the Plaintiff and the second named Defendant. In my judgment the Plaintiff cannot avoid the consequences of the existence of that contract by seeking his remedy solely in tort. The fact that the national law of this Member State permits of such an action is not relevant in considering the objectives of the Regulation and in ensuring that the Regulation is given its full effect. The parties at the hearing before me accepted and, on the evidence before the court I am satisfied, that the contract between the Plaintiff and the second named Defendant was not a 'Consumer Contract' within the provisions of Section 4 Articles 15 to 17 inclusive of Regulation No. 44/2001.

32. In my judgment there is nothing in the terms of the Regulation as interpreted, which would enable this Court to determine Jurisdiction by reference to a possible detriment to the Plaintiff if, - and there was no proof of this, (see *O'Callaghan v. O'Sullivan* [1925] I.R. 90), - due to time limit rules he would be unable to recommence proceedings against the second named Defendant in the Federal Republic of Germany.

33. Counsel for the Plaintiff referred to Article 28 of Regulation No. 44/2001 which provides as follows:-

"1. Where related actions [*which are defined in subpara. 3*] are pending in the courts of different Member States any court other than the court first seised may stay its proceedings."

34. Article 22 of the Brussels Convention, 1968 had previously provided as follows:-

"1. Where related actions are brought in the courts of different Contracting States any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings."

35. In its judgment in the case of *Réunion Européenne S.A. and Others*, (above cited), the European Court of Justice held that Article 22 of the Brussels Convention, 1968 only applied when separate actions had been brought before the courts of different Contracting States and did not afford jurisdiction to a court of a Contracting State to try an action which is related to another action of which that court is seised under the rules of the Convention.

36. In my judgment that decision of the European Court of Justice applies with equal effect to the provisions of Article 28 of Regulation No. 44/2001. To borrow the words of Advocate General Comos in that case, (as translated from the original Greek), "the fact is that separate actions were not brought before the courts of different Member States. As a result, and in any event, the conditions for the application of Article 22 were not satisfied."

37. It is the conclusion therefore of this Court that it does not have Jurisdiction to determine the Plaintiff's claim against the second named Defendant and, accordingly, the Motion of the second named Defendant must succeed.