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Case No: QB-2020-000408

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/10/2022

Before :

MRS JUSTICE LAMBERT

- -

Between :

SUSAN SEDGWICK	**Claimant**
- and -	
MAPFRE ESPANA COMPANIA DE SEGUROS Y REASEGUROS SA	**Defendant**

Matthew Chapman KC (instructed by **Leigh Day**) for the **Claimant**
Philip Mead (instructed by **Hextalls**) for the **Defendant**

Hearing date: 27-29 April 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on 26/10/2022 by circulation to the parties or their representatives by e-mail.

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Mrs Justice Lambert DBE:

1. This is an action for damages for personal injury and financial losses arising from an accident which occurred on the Spanish island of Tenerife on 23 January 2016.

2. The claimant lives in Wales. At the time of the accident she was aged 55. She was on her honeymoon, staying at the Hotel Blue Sea Callao Garden in Santa Cruz which was owned and operated by a company registered and incorporated in Spain. During the early evening of 23 January 2016 she was descending an inadequately lit concrete staircase when she fell and sustained severe fracture injuries to her left knee and to her right heel. She was taken to the local hospital in Tenerife where she underwent an open reduction and internal plate fixation of the left tibial fracture and stabilisation of the right os calcis fracture in a plaster cast. She was repatriated on 31 January via air ambulance and admitted to hospital in the UK where she underwent an internal fixation of the right os calcis on 5 February. On 7 February she was discharged home non weight bearing for out-patient review and physiotherapy.

3. A letter before action pursuant to the Pre-action Protocol for Personal Injury Claims was sent to the hotel on 11 September 2017. The letter required the hotel to confirm the identity of its insurers by return of correspondence and to forward the letter to the insurers without delay. Proceedings were commenced against the defendant, the Spanish public liability company providing insurance cover to the hotel, in the Queen's Bench Division on 31 January 2020. The defence, served in September 2020, was non-committal in respect of the circumstances of, and liability for, the accident but, by the date of trial, liability had been admitted. The issues for me therefore concern quantum only.

4. The claimant was represented by Mr Chapman KC and the defendant by Mr Mead. I am grateful to them both for their submissions.

The Issues:

5. It is common ground between the parties that Spanish law is the governing law of the insurance contract/policy which provides the tortfeasor with the right of indemnity within the terms of the policy and that the claimant has, under Spanish law, a direct right of action against the insurer.

6. The parties agree that the law of Spain applies to the claim in tort. Article 4.1 of the Rome II Regulation on law applicable to non-contractual obligations (Regulation No 864/2007) ("Rome II") sets out: "*Unless otherwise provided for in this Regulation the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur*."

7. The scope of the law applicable is set out in Article 15 of Rome II: "…*the law applicable to non-contractual obligations under this Regulation shall govern in particular: (a) the basis and extent of liability including the determination of persons who may be held liable for acts performed by them; (b) the grounds for exemption from liability, any limitation of liability and any division of liability; (c) the existence, the nature and the assessment of damage or the remedy claimed;…*"

8. Article 1(3) of Rome II reserves all matters of procedure and evidence to the law of the forum court: "*This Regulation shall not apply to evidence and procedure ....*"

9. In summary, in the context of this case therefore, Spanish law applies to matters of substance (including the existence, nature and assessment of damages and remedy) but English law, as the law of the forum court with jurisdiction, governs matters of procedure and evidence.

10. Against this uncontroversial background, the issues for my determination can be grouped into three topics:

i) the resolution of a series of questions relevant to the award of general damages (for non-pecuniary loss) under Spanish law;

ii) whether the claimant is able to pursue a claim for subrogated losses on behalf of her travel insurer;

iii) the appropriate rate of interest to apply to the damages award, whether the Spanish (penalty) rate of interest under Article 20 of the Spanish 50/1980 Insurance Contract Act of 8 October 1980, or a rate applied under s 35A Senior Courts Act 1981.

Spanish Law Framework:

11. English law holds that the content of foreign law is a question of fact, and if foreign law is to be relied on it must be pleaded and proved as a fact, as a rule by expert evidence: see *Dicey* Morris and Collins on the Conflict of Laws 15th edn Rule 25(1). Dicey's Rule 25(2) is that: "In the absence of satisfactory evidence of foreign law the Court will apply English law to such a case." This rule, commonly known as the "presumption" that foreign law is the same as English law, has been re-examined and endorsed by the Court of Appeal in *OPO v MLA* [2014] EWCA Civ 1277, [2014] EMLR 4: see [108]-[111] (Arden LJ).

12. Both parties have instructed Spanish law experts: Mr David Sanchez Almagro for the claimant and Professor Luis Carreras del Rincon for the defendant. Mr Sanchez was admitted to the Madrid Bar in 1995. He joined the law firm Estudio Juridico Almagro in 1997 and became the litigation partner in that firm in 2001 specialising in civil claims involving English tourists in Spain. Professor Carreras is a lawyer with the firm of Bufete Carreras Llansana Abogados in Barcelona. He qualified in 1984. In addition to his work as a practising lawyer he is currently Professor at the Law Faculty of the Universidad Ramon Llull of Barcelona. The experts provided detailed reports and a joint note setting out areas of agreement and disagreement and both gave evidence before me at trial via remote link.

13. The experts agree the broad legal framework for the assessment of damages in actions for personal injury before the Spanish courts. I set out the elements relevant to this claim below.

14. In Spanish law, the rule is that a victim of an accident should, as far as money can do so, be restored to the position he/she would have been in but for the accident. In the field of motor liability the Spanish legislator has passed Royal Decree 8/2004, the

Baremo, setting out the rules for the assessment of damages in personal injury claims arising from road traffic accidents. The principle of full reparation is set out in Article 33 of the *Baremo* which provides that:

"1. *Full reparation and the structured reparation of the damage are the two fundamental principles of the system of valuation.*

2. The principle of full reparation is intended to ensure full compensation for the damages suffered. Compensation under this system takes into account any personal, family, social and economic circumstances of the victim, including those affecting loss of income and loss or diminution of earning capacity.

3. The principle of full reparation governs not only the pecuniary consequences of bodily damage but also the moral or non-pecuniary consequences and implies, in this case, compensating by means of socially sufficient and reasonable amounts that respect the dignity of the victims, all relevant damage in accordance with its extent".

15. The *Baremo* provides a structured set of rules for the assessment of various heads of loss. The experts inform me that the rules are only binding upon the courts in the quantification of damages following a road traffic accident. In the absence of any alternative scheme for the assessment of damages for injuries other than those arising from road traffic accidents however the court typically will use the *Baremo* as an indicative guideline to inform the assessment of damages in other personal injury claims. There always remains a discretion to depart from the *Baremo* rules but in this claim both experts adopt the *Baremo* rules as the appropriate mechanism for quantification of damages for non-pecuniary loss. So far as relevant I set them out below

16. Article 138 of the *Baremo* entitles the victim to a daily rate/tariff during the period of "*lesiones temporales*" or temporary injuries until the victim's condition has stabilised or "consolidated." There are four tariffs which may be applied depending upon the severity of the victim's loss of quality of life: very severe, severe, moderate and basic. The *Baremo* (Article 138(6)) provides that "*The degrees of damage are mutually exclusive and applicable successively. In any event, only one degree shall be assigned to each day (where damage exists)."*

17. Article 138 (2) sets out that: "*very serious damage is that in which the injured person temporarily loses personal autonomy to carry out almost all essential activities of ordinary life. Admission to an intensive care unit constitutes damage of this degree*." It is common ground that the claimant's injuries did not, at any stage, fall into this category.

18. The daily rate for severe temporary loss of quality of life is 75 euros. Severe temporary loss of quality of life refers to either:

i) an inability to perform "*a significant part*" of the essential day to day activities of ordinary life. These are defined by Article 51 of the *Baremo* and comprise: "*eating, drinking, toileting, getting dressed, sitting, getting into and out of bed, bowel control, moving around, performing basic household chores, using devices, taking decisions and performing similar analogous activities related*

to physical, intellectual, sensory or organic self-autonomy."...Article 138(3) states that "*a stay in hospital constitutes a damage of this degree."*

ii) And/or, an inability to perform, not all but, "*the majority of*" the "*specific personal fulfilment activities.*" These are defined in Article 54 as activities: "*related to joy or pleasure, relationships, sex life, leisure, practice of sports, training/education and the performance of a profession or job and which have the purpose of fulfilling a person's life both as an individual and as a member of the community*".

19. The tariff for "moderate" temporary loss of quality of life is 52 euros per day. Moderate temporary loss of quality of life means an inability to perform "a good number" of the so called specific personal fulfilment activities defined in Article 54. Mr Sanchez notes that, on road traffic accident claims, the standard approach is to deem a moderate loss of quality of life until the victim is able to resume work.

20. In Spanish law a claimant is entitled to a basic daily tariff of 30 euros until the injuries reach a plateau or point of consolidation. The injuries are deemed to consolidate when they reach the stage when they cannot improve with medical treatment. Those residual injuries then become a "*secuela*" or a "long term issue". See article 134(10) of the *Baremo*.

21. Spanish law applies a points-based method of calculation of damages for sequelae. Table 2.A.1 of the *Baremo* sets out over 600 different types of symptoms affecting different parts and systems of the body. An assessment is made of the existence of, severity and functional impact of any residual symptoms by the allocation of points within a bracket (typically) each point carrying an economic value. In Spanish law it is for the judge to decide (with the assistance of a Forensic Medical Examiner – see below) whether a particular symptom exists and, if so, how many points to allocate. When the judge has allocated points to all of the permanent symptoms, the judge must tot them up and then, using the complicated "Balthazar" formula, the points are converted into a monetary value for compensation purposes. The Spanish law experts have agreed to undertake the necessary calculation for quantifying the assessment of sequelae (and indeed the other aspects of the final award).

22. By virtue of article 93(1) of the *Baremo* the relevant point in time when the court will assess the existence of ongoing symptoms and their quantification is the date of consolidation.

23. Claimants are also entitled to compensation for cosmetic deficit, the valuation being made in a similar way to the award for sequelae. There may also be an award for permanent loss of quality of life, see Article 108 of the *Baremo*. Although there are various grades of disability for loss of quality of life, the claimant accepts in this case that her residual loss of quality of life falls into, albeit at the top of, the mild range. The tariff range is between 1,500 euros and 15,000 euros. In assessing the appropriate figure, the court must take into account the extent to which the victim is able to undertake the specific activities for personal fulfilment.

24. I turn now to deal with the disputed aspects of the quantum assessment in this claim.

General Damages: Pre-consolidation

The Evidence

25. If the quantum hearing had taken place in a Spanish court, the judge would be assisted by a Forensic Medical Examiner, that is, a doctor instructed either by the court or by the parties who gives expert advice to the judge on matters of medical judgement, such as the date of consolidation, how many points should be awarded for various permanent symptoms. Although the Judge is not bound to adopt the advice of the Forensic Medical Examiner, he or she would usually do so.

26. In this jurisdiction there is no equivalent of a Forensic Medical Examiner although the parties have instructed expert orthopaedic surgeons to comment upon the claimant's condition and prognosis: Mr Kumar for the claimant and Mr Simmons for the defendant. I note two points here. First, there is very little difference between the medical experts and therefore, sensibly, neither was called to give evidence. The reports, including a joint statement, were in the trial bundle and both counsel made submissions on their contents. Second, neither medical expert focusses upon the range of issues particular to the Spanish system of assessment. The Spanish law experts have endeavoured to assist the court by expressing a view on the relevant matters but they are no more experts in the field of assessment of the existence or severity of medical conditions than I am. I take into account their views on the issues arising from the medical evidence to the extent appropriate but ultimately the decisions are mine on the basis of the witness evidence and expert reports.

27. For the purposes of the assessment therefore I have read the comprehensive witness statements from the claimant, her husband and two daughters (Sarah Hayes and Ms Cooke). I have also read statements from the claimant's two work colleagues, Ms Robinson and Ms Trow. None of these factual witnesses gave evidence. In addition to the expert reports, I have also taken into account the contents of two bundles of medical records (hospital and general practitioner).

28. I set out the parties' respective positions and my conclusions on the outstanding issues below.

Severe Temporary Loss of Quality of Life

29. The daily tariff for severe temporary loss of quality of life is 75 euros. There is no disagreement between the parties or experts as to the approach which I must take to this element of the award. The question for me is one of fact: for how many days was the claimant unable to perform a "significant part" of the "essential day to day activities" as defined and/or was unable to perform "the majority of the essential activities of day to day life?"

30. The claimant submits that her condition fell within this category for a period of 4 months or 120 days from the date of the accident. The defendant submits that the claimant was disabled to the extent of suffering a severe loss of quality of life for only 10 days, that is, whilst she was in hospital and no longer.

31. Mr Chapman makes the following points:

i) it is wrong in principle to limit the period of severe loss of quality of life to a period of hospital admission. Mr Chapman accepted that hospital admission would be likely to constitute a severe temporary loss of quality of life but under the most recent iteration of the *Baremo* this is no longer the sole criterion by which an injured person may qualify for an award under this heading.

ii) A review of the evidence including the medical records and witness statements demonstrates that for a period of around 4 months, or 120 days, the claimant had to use a wheelchair regularly as she was largely unable to weight bear; she required assistance with toileting and was unable to do household chores; she was unable to work; she was unable to do sport and had no intimate life with her husband. The extent of her loss of amenity therefore justified an award reflecting a severe loss of quality of life.

32. Mr Mead does not submit that an award for severe loss of quality of life is only justified when the victim is in hospital but argues that the reference in the *Baremo* to hospital admission provides a broad indication of the level of disability required. He contends that the claimant overstates the extent of the loss of amenity following her discharge from hospital. A review of the hospital outpatient records shows that she was not wheelchair bound for 4 months: she started weight bearing on 21 March and appeared thereafter to make good progress in her mobilising. She started work on 1 June, working reduced hours for one week only. Mr Mead submits that this is not the description of someone who is disabled to a similar extent to hospital incapacity.

Discussion/Conclusions

33. I have read the claimant's witness statement with care. It records her distress and depression at being so dependent upon her husband and family during the period following surgery in the UK. She states that she could do nothing, or very little, for herself. She was dependent upon others for mobility, including getting to and from the bathroom which she found deeply embarrassing. She records her disappointment at going "backwards and forwards" to hospital only to be told that she should not weight bear in order to give the fractures a chance to unite. She describes turning a corner in early March when she was advised by the consultant that she could start using crutches but even then it was a slow process to regain the ability and strength to walk. The claimant describes returning to work in June 2016. She remains unable (even now) to play with her grandchildren as she would wish, or walk her dogs as frequently as she did before her accident. She describes the strain which the injuries have had on her relationship with her husband, including her inability to enjoy an intimate relationship with him.

34. The claimant's daughters, Ms Cooke and Ms Hoyle, record spending 2 or 3 hours caring for their mother either every other day (Ms Cooke) or every day (Ms Hoyle) and that this continued for the first 2 to 3 months following the accident. It was around "spring 2016" that her mother started to recover and was able to lightly weight bear.

35. The Betsi Cadwaladr Hospital records include the following entries:

i) at review on 9 March 2016 the claimant was reported to be non-weight bearing on both legs, in a wheelchair and upset because she feels as though she has lost her independence;

ii) at review on 4 April, the claimant was reported to be now allowed to weight bear fully on the left and partially on the right; she had a moon boot on the right ankle;

iii) on 8 April she was reported to be in a wheelchair but using her legs to push herself along. She took a pulpit walking frame home;

iv) on 22 April she was reported to be managing to do more but was advised that she should continue partial weight bearing;

v) on 27 April she was reported to be keen to get back to work;

vi) 3 May, using a static bike at home without concern and occasionally walking with no aids at home;

vii) by 17 May, she was walking with no sticks at home.

36. The records confirm that the claimant was unable to mobilise independently until the middle/end of March. It appears that she recovered her independence gradually over the following weeks until by mid-May she was mobilising without sticks in the house. I find that, for as long as the claimant was unable to mobilise independently of equipment or other assistance in the home, her quality of life will have been severely eroded. The factual witness statements confirm that she was significantly reliant upon others for self-caring (including in respect of her toileting needs) and in the performance of basic household chores as long as she was reliant upon a wheelchair or crutches. During this period her ability to enjoy walking, have intimate relations with her husband, were non-existent.

37. It follows therefore that I have concluded that the claimant suffered a severe loss of quality of life from the date of her accident until 17 May during which time she was walking without aids in the home. I have no doubt that she still suffered a real loss of amenity thereafter (see below) but that this fell into the moderate, rather than severe, category. I allow 115 days (until 17 May) of severe temporary loss of quality of life.

Moderate temporary loss of quality of life:

38. There is little between the experts here. They agree upon the "rule of thumb" that a victim will suffer (at least) a moderate loss of quality of life until he or she returns to work. The difference between the parties on this question (of how many days I should allow for this loss) therefore turns upon when the claimant returned, effectively, to work. The claimant's allowance takes into account that the claimant returned to work on a phased return basis and was not able to operate at full capacity for around 14 days.

39. The claimant worked for Blind Veterans as a carer. The hospital record for 24 May 2016, notes that she was going back to work "next week." The entry in the general practitioner notes for 1 June 2016 records her wishing to get back to work on

amended duties and that she had been given Tramadol to ease pain at night. On 9 June, she was recorded to have informed the doctor that she "*feels she managed well at work; she also attending the gym at work and fees that her knee is getting stronger.*"

40. The contemporaneous documentation demonstrates that the claimant returned to work on or around 6 June 2016. I accept that her return to work was on a phased basis. Ms Trow, her colleague, states that when the claimant initially returned to work in approximately June 2016, she came to work wearing a leg brace and struggled walking up and down stairs due to leg pain. For this reason her work was adapted. Allowing for one week for a return to full time duties, I find that the claimant suffered a moderate loss of quality of life from 17 May until 13 June that is 27 days.

Date of consolidation

41. The Spanish law experts agree that the date of consolidation is the date upon which the "*injuries are deemed to have reached a plateau when they cannot improve significantly with medical treatment and the victim is given medical discharge.* " The date is to be identified retrospectively with the benefit of all medical and factual evidence.

42. The claimant submits that the date of consolidation is 25 September 2017, that being the date upon which the recorded hospital plan was "to leave things alone" and review in one year. The defendant submits that the date is 22 June 2016 by which time the claimant was driving and performing housework, alternatively 25 July 2016, that date being the date of the claimant's discharge from the fracture clinic.

43. I accept the claimant's submission that the date of consolidation is 25 September 2017. Although, as the defendant observes, the claimant was discharged from the fracture clinic on 27 July 2016, that was not the end of her treatment. On 31 October 2016 she was seen by Mr Hanna in the orthopaedic clinic when surgical treatment was considered but rejected and a conservative approach proposed. Such an approach would "*allow her to live with her knee as such*." Her valgus deformity of the knee was to be addressed by the use of a dynamic brace for weight bearing over long distances so that "*hopefully overall that would help her to get back to as much activity as she can*." The knee brace was fitted on 29 December 2016.

44. On 25 September 2017, the claimant was reviewed by Mr Hanna, who recorded that the claimant was "*very pleased with the results after using the brace, She is feeling more comfortable and she did doing as much as she can… we are going to leave things alone and she would like to come back to see me in a years' time*." In September 2018 Mr Hanna recorded that the claimant was happy to live with the knee as such subject to 12 month review.

45. I therefore find the date of consolidation to be 25 September 2017. By that date there had been a trial of the knee brace, which had proved to be useful, and a decision made to "*leave things alone*" subject to review in one years' time. Whilst pinpointing the exact date of consolidation is impossible, it seems to me that by 25 September 2017 and no earlier a joint decision had been made that no further improvement in the claimant's condition was likely to be achieved.

***Post-Consolidation Sequelae**:*

46. The awards made under this head are not for the severity of the original injury but for the permanent on going symptoms, the task of the judge being to allocate a number of points for each symptom and then convert the points into cash value in accordance with the Balthazar scale in the *Baremo*. The *Baremo* provides for a range of points for each symptom and in the Spanish court the judge would allocate the number of points. Again, in the absence of input from a Forensic Medical Examiner, I take into account the views of the Spanish law experts whilst reminding myself that they are not experts in this field. The number of points to allocate is a matter for my judgement taking into account all of the evidence.

Overview of her Condition:

47. The claimant reports pain in both the foot and knee preventing her bending the knee or kneeling on the floor, climbing or going down stairs. She wears a knee brace all of the time. Her injuries have an impact upon her ability to play with her young grandchildren and to enjoy her pre-accident hobbies of running and walking.

48. I have the benefit of a joint report from the orthopaedic experts, Mr Kumar and Mr Simmons. There is a good deal of agreement between them.

49. Left Knee: the knee is in slight valgus alignment compared to the right knee. There is a risk (unquantified) of post traumatic arthritis. The chance of the claimant requiring a left knee replacement is increased: per Mr Kumar it has been accelerated by 5 years, per Mr Simmons the risk is doubled (from 10% lifetime risk to 20% lifetime risk). Both agree that it is unlikely that the claimant will have to retire early because of the knee and that if knee replacement surgery was needed this would be post retirement.

50. Right heel fracture: both agree that there is a less than 20% chance of the claimant requiring a subtalar fusion in the next 20 years and that if one is required it will be after her retirement. Bespoke orthotics will be required. The experts agree that the knee brace is now unlikely to be serving any functional benefit but is a psychological support.

51. In respect of the residual symptoms arising from fracture of the left knee, I make the following observations and findings.

    i) Loss of flexion: the *Baremo* tariff bracket is 5 to 9 points. Mr Sanchez is at the top (8) and Carreras at the bottom of the range (5). I note that there is no reference in the joint medical report to limitation on flexion but Mr Kumar measures a reduced range of 10 to 90 degrees compared with hospital assessment of 0 to 110. I find that there is some restriction in the range of movement of the left knee (which is consistent with pain/ inability to kneel). The limitation in flexion is not however at the more extreme end of the scale. I award 6 points.

    ii) Ongoing pain in left knee: the *Baremo* tariff bracket is 1 – 5 points. Mr Sanchez proposed 4 points, Professor Carreras only 1 point. On the basis of the evidence before me, it seems that the claimant's ongoing knee pain is

significant. It may not justify a score towards the upper end of the range, but 1 point is too low. I allow 3 points for this ongoing symptom.

iii) Metalwork in the left knee: the tariff bracket is 1 – 8 points. Mr Sanchez supports an award of 7 points, Professor Carreras only 4 points. Mr Sanchez supports the high award because of the "*impact that the metalwork may have on the future deterioration of the knee*" – he notes that according to Mr Kumar the metal fixation is a factor predisposing to the development of secondary arthritis. I accept the point that there is an element of overlap here, even taking into account the opinion of Mr Kumar. I allow 6 points under this head.

iv) Ankle pain: the tariff bracket is 1 – 8 points. Mr Sanchez proposes an award of 7 points and Professor Carreras 4 points. I note that Mr Kumar refers to the claimant suffering discomfort when standing on tip toes (report 25.7.21) with 10% reduction in right ankle movements. The claimant reported to Mr Simmons in June 2021 that she found walking on uneven ground to be a problem and that she suffered pain around the heel and hind foot area. She told him that her ankle might swell after prolonged walking. She said that she did not take painkillers on a day to day basis but only once a week when symptoms are severe and depending upon her activities. Later in the report Mr Simmons noted that the subtalar joint was stiff, with tenderness on movement which she said was excruciating. I allow 6 points here. Although the claimant said that her pain was very severe or "excruciating" this does not seem to me to be consistent with only taking pain relief once a week.

v) Metalwork in the ankle. The tariff is 1 – 6 points. On behalf of the claimant an award of 5 points is proposed (because of the potential need for fusion surgery due in part to the presence of metalwork). The defendant allows 2 points. I allow 5 points for the reason advanced by Mr Kumar. The risk of further surgery exists due in part at least to the the need for metalwork in the ankle.

vi) Loss of plantar flexion: the tariff range is 1 – 7 points. Mr Sanchez refers to Mr Kumar's opinion that there has been some, albeit very modest, loss of flexion. Mr Sanchez advises that this would support a score of 2 points. Professor Carreras denies that any award should be made here. I find that there is some loss of range of plantar movement but it is so modest as to be unlikely to have any real functional impact. I would allow only 1 point under this head.

Cosmetic Defect

52. The *Baremo* sets out different categories of cosmetic defect. Each category attracts a bracket of points. On behalf of the claimant it is submitted that her knee and ankle scarring fall towards the top end of bracket for mild scarring (1-6 points) or towards the bottom end of the scale for moderate scarring (7 – 13 points). The defendant submits that the scarring is relatively insignificant and falls towards the middle of the mild range. I have seen photographs of the scars. She has a 10 cm long curved healed operative scar on the front of the left knee following the operation for internal fixation. She also has an L shaped healed operative scar on the outer aspect of the right ankle consistent with the operation of internal fixation. They are well healed.

They are not particularly visible when clothing is worn and not particularly unsightly. I agree that they fall between the upper mild and lower moderate range. I allow 9 points.

Award for permanent loss of quality of life:

53. Article 107 of the *Baremo* provides that: "*the award for loss of quality of life is aimed at compensating victims for their pain and suffering where they are left with residual symptoms which impair or restrict their personal autonomy to perform essential day to day activities or their personal fulfilment by performing specific activities*." I have been referred to Article 54 once again for the definition of those so called "*specific activities of personal fulfilment.*" See paragraph 17 above.

54. Article 108 of the *Baremo* categorises the award for loss of quality of life into very severe, severe, moderate or mild. The claimant does not contend for an award other than in the mild range (between 1,500 euros and 15,000 euros). She seeks an award towards the top of that bracket on the basis of her handicap on the labour market, her loss of amenity including her inability to enjoy her pre-accident hobbies and the knock on effect of her disability on her mood. Professor Carreras proposes a figure in the middle of the mild range. I allow 15,000 euros under this head. It is clear from reading the witness statements of the claimant and her family that the accident has had a significant impact upon her ability to enjoy her life. It has affected her mood generally and she is not the person she was before the accident. She was a new bride when the accident occurred and I am told and accept that the accident had an effect on the claimant's relationship with her husband. Further, she is no longer able to enjoy long walks, go running or play with her grandchildren. She is very fortunate in having an understanding and supportive employer but I am confident that should she lose her job then she would have some difficulty getting another. Her loss of amenity justifies an award at the top of the mild bracket.

Miscellaneous Heads of Loss

55. The claimant seeks a modest loss of income in the sum of £5,107.33. This figure has been calculated on the basis that her payslip figure of £2,086 net for the month before the accident would have represented her "but for" monthly earnings. She received modest payments between February and May 2016 which have been brought into account in calculating the sum claimed. The defendant does not dispute the loss in principle, just the final figure. I allow the claim as pleaded on the basis of the calculation set out in the claimant's closing note.

56. The recovery of the cost of orthotics and the diminution of value of holiday have been compromised. I allow £1000 towards the cost of an electric bike and make no allowance for the costs of bespoke shoes. I leave the parties to make the final reckoning of these heads of loss.

Claim for Subrogated Losses.

57. The claimant seeks recovery of subrogated losses incurred under a policy of travel insurance for sums paid out by the travel insurer (Insurefor.com) for repatriation and other medical expenses. The relevant sum is £35,498.69. The policy of travel

insurance is a UK policy and the relationship between the claimant and Insurefor.com is governed by English law.

58. It is not disputed by the defendant that under Spanish law medical and associated travel expenses incurred by the claimant as a consequence of accident are recoverable heads of loss. Nor does the defendant dispute that a claim may be brought in respect of those losses. The contentious issue is whether the claimant herself is able to bring a claim for subrogated losses or whether the claim must be brought in a separate action by the insurer.

59. The defendant submits that the claim for those losses incurred by Insurefor.com must be brought in accordance with Spanish law and that the proper person entitled to bring a claim against the defendant insurer under Article 43 Spanish Insurance Contract Act 50/1980 is the third party insurer, not the claimant, as those subrogated losses are losses of the third party payer. Article 43 of the Spanish Insurance Contact Act states that: "*Once the compensation has been paid, the insurer may exercise the rights and actions corresponding to the insured due to the claim against the persons responsible for it, up to the compensation limit*."

60. Thus, submits the defendant, the claimant has no standing to bring the claim for subrogated losses. Any recovery of losses paid by way of outlay in relation to repatriation and medical costs must be brought in a separate action by the relevant Insurer, in this case Insurefor.com. Such a claim would now be statute barred but this outcome lies at the door of the travel insurer which has failed to protect its interests by pursuing the claim.

61. The claimant submits that Spanish law is relevant only to the extent that, as the applicable law of the tort, it provides for recovery of medical and travel expenses. Spanish law does not govern the relationship between the claimant and the travel insurer, nor the travel insurer's rights of subrogation by means of the claimant's claim under those policies. Those matters are regulated by the law governing the insurance policy, in this case, English law. This is according to Mr Chapman spelt out in Article 19 of the Rome II Regulation.

62. Under the heading "*Subrogation*" Article 19 provides that:

> *"where a person (the creditor) has a non-contractual claim upon another (the debtor) and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty***,** *the law which governs the third person's duty to satisfy the creditor shall determine whether and the extent to which the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship*."

63. Mr Chapman submits that, although somewhat densely worded, the effect of Article 19 is to impose the law of the policy of travel insurance (in this case English law) on the question of whether, and the extent to which, the third party insurer can recoup its losses from the tortfeasor. Article 19 provides the complete answer to the question which I must decide.

64. Mr Chapman draws support for this proposition from two respected textbooks:

i) *Dicey, Morris & Collins* (15th edition) where, at [34-074] the authors state: "*where an insurer has paid or is under an obligation to indemnify an insured, the law applicable to the contract of insurance will determine whether and to what extent the insurer is subrogated to the rights of the insured against the tortfeasor or other defendant. Article 19 does not however affect the law applicable to the non-contractual claim to which the insurer (or other third person) is subrogated.*"

ii) Bernard Doherty "Accidents Abroad" where the author states: "*Whether the English travel/medical insurer can seek to be subrogated to the rights of the English claimant in respect of its outlay on medical costs will depend upon English law as the law governing the insurer's obligation to indemnify the Claimant. Whether the costs of medical treatment are a recoverable head of damage in tort however will remain a question of the law governing the action in tort*."

65. Mr Chapman also draws my attention to the case of *Scales v MIB* [2020] EWHC 1747 where at [181] Cavanagh J noted that it was common ground between the parties (also Mr Sanchez for claimant and Professor Carreras for the defendant) that subrogated insurance costs (in that case for private medical treatment and travel costs) incurred up to the date of consolidation were recoverable by the victim. His point here, I assume, is that the argument now advanced in this trial is something of a late runner.

Discussion/Conclusion

66. The expert evidence upon this topic is limited. In his report, Mr Sanchez refers only to the fact that the: "*Insurer's outlay is recoverable under Article 43 of 50/1980 Spanish Insurance Contract Act*" and "*Spanish law does not provide for recovery of employer's claims in subrogation*." He makes no reference to Article 19 of Rome II. Although referring to Article 43, Mr Sanchez does not explain or justify the entitlement of the claimant to bring the subrogated recovery action for an indemnity in respect of compensation paid by the travel insurer.

67. Nor does the defendant's expert report challenge the subrogated claim. It is only in response to Part 35 questions that Professor Carreras gives his opinion that, under Spanish law, only the insurer can claim for losses paid to a victim and that they must be brought in separate proceedings. He says that: "*Subrogation in the inverse sense of what I have just explained does not exist in Spanish law. The injured person cannot claim on behalf of or in place of the insurer. The injured person cannot act by subrogation of the insurer as if he was the insurer.*" He makes no observations upon Article 19 of Rome II and its bearing on the case.

68. The expert evidence in this case does not therefore provide me with much help save for both experts confirming that, under Spanish law, the action for subrogated recovery must be brought by the third party insurer in a separate action. However, this is not the point that I must grapple. Nor, do counsel's submissions focus upon the key issue as I identify it to be.

69. I set out my views below.

70. Article 19 of Rome II has the effect that, where an insurer has indemnified its insured, the law which governed its obligation to do so (i.e. the law of the insurance contract) "*shall determine whether, and the extent to which*" the insurer is entitled to pursue a non-contractual claim by subrogation. It is therefore clear that in the context of this case English law governs whether the insurer can pursue a subrogated claim and also the extent to which it can pursue such a claim (e.g. whether there are limits upon it).

71. The question for me is whether English law also governs the manner in which / means by which such a claim can be pursued, since in English law an insurer brings a subrogated claim in the name of the insured whereas, on the evidence I have heard, in Spanish law, an insurer must bring the claim in its own name and by way of a separate action. This is a matter of substantive law, since subrogation is treated by Rome I and Rome II as substantive: see *Dicey* at para. 4-074 where the authors observe that the Rome II Regulation (like Rome I) treats claims for contribution as substantive and that the law applicable to the debtor's non-contractual obligation towards the creditor will determine whether the creditor may demand compensation from the other debtors.

72. It seems to me that the key issue is as follows: is the question of whether the insurer may bring a claim <u>in the name of the insured</u> (rather than by other means) a question of "whether, and the extent to which" the insurer is entitled to exercise the rights of the insured against the third party? In my view, it is. It is a question of the extent to which the insurer can exercise the rights of the insured, since it is a matter of substantive law integral to the insurance relationship. Being able to require the insured to lend his/her name to an action is a substantive right which an insurer enjoys in English law by virtue of the contractual insurance relationship. Conversely, the insurer not being able to sue in its own name is a feature of the insurance relationship. See MacGillivray on Insurance Law at para. 22-043: "*The cause of action for damages remains in the insured, and the insurer subrogated to the insured's rights requires the insured to bring the action. It remains the insured's action. By contrast, if the insured has made an express assignment of his rights to the insurer, the cause of action has vested in the insurer who can exercise in his own name the rights originally belonging to the insured*."

73. I find therefore that, as a matter of both language and substance, an issue of whether the insurer can require a subrogated action to be pursued in the insured's name is a question of the extent to which the insurer can exercise the insured's rights of action. Putting the matter another way, it would be distinctly odd if English law determined the right of subrogation and limits upon that right (e.g. the legal principle that there must be full indemnity before subrogated rights attach) but an important aspect of the English law of subrogation (namely that the claim may and must be brought in the name of the insured) may not apply depending on where loss is caused which is to be indemnified.

74. Mr Mead relies on the case of *Ergo Insurance SE v If P& C Insurance* [2016] Cases C-359/14; C-475/16 (CJEU) in support of his proposition that Article 19 is of limited operation. The reference arose from an accident involving a vehicle and another unit comprising a tractor and trailer. Both trailer and tractor were insured by different insurers. The tractor insurer compensated the victim in full and sought an indemnity against the trailer insurer. The question for the court was the correct law which

governed that issue. The court resolved that there were three different relationships and sets of obligations: (a) the law of the place of the accident governs whether both trailer owner and tractor owner are liable and apportionment of liability between them as the premise underlying potential liability is non-contractual (paras. 59 and 61); (b) the law of the insurance contract governs the conditions under which the insurer may exercise the rights of the accident victim against the other insurer (paras. 58 and 62).

75. As to (c), the question of subrogation, the court said this:

> *57. More particularly, Article 19 of the Rome II Regulation provides that, in that case, the issue of any subrogation of the victim's rights is governed by the law applicable to the obligation of the third party, namely the civil liability insurer to compensate the victim.*
>
> *58. Thus the insurer's obligation to cover the civil liability of the insured party with respect to the victim resulting from the contract of insurance, concluded with the insured party and the conditions under which the insurer may exercise the rights of the victim of the accident has against the persons responsible for the accident depend upon the national law governing that insurance contract…*
>
> *59. However the law applicable to the determination of the persons who may be held liable and the allocation of responsibility between them and their respective insurers remains subject in accordance with Article 19 and to Article 4 et seq of the Rome II Regulation….*
>
> *60. ….the insurer of the tractor unit, after compensating the victim, has a right of action against the insurer of the trailer since the law applicable, in accordance with Article 7 of the Rome I Regulation, to the insurance contract provides for the subrogation of the insurer to the victim's rights."*

76. I mention the case because of the importance Mr Mead attaches to it. However, on my reading, the case does not advance his case at all, or indeed that of the claimant. The court simply examined each of the three sets of obligations involved in the claim without considering the scope of Article 19.

77. For these reasons therefore I allow the claim for subrogated recovery of losses in the agreed sum of £35,498.69.

Interest Rate

78. The Spanish law experts agree that Spanish law provides specific rules for the calculation of interest in claims against insurers.

79. Those special rules are set out in Article 20 of Insurance Law 50/1980. I set out the relevant provisions below:

"*If the insurer is in default of performance, the compensation for damages will follow these rules regardless of the validity of the contract clauses that are more beneficial to the insured.*

…….

2. *It will apply to the delay in the satisfaction of the compensation through payment .....of the minimum amount of what the insurer may owe.*

3. *It will be understood that the insurer is in default when it has not fulfilled its obligations within three months of the claim or has not paid the minimum amount of what it may owe within forty days from receiving the claim.*

4. Compensation for default will be imposed ex officio by the court. It consists of the payment of annual interest equal to the legal interest rate in force when it accrues increased by 50%. However after two years from the claim, the annual interest rate will not be less than 20 per cent.

....."

80. The judgment of the Spanish Supreme Court of 1 March 2007 (RJ 2007/798) set out the general principle that interest under Article 20 should be calculated as follows:

i) For the first two years from the date of the accident (or date of knowledge) interest will accrue by reference to the Spanish legal interest increased by 50%, that is, an annual 4.5% in 2016/2018

ii) Two years after the accident (or date of knowledge) interest will accrue at a rate of 20% (annual interest).

81. The experts agree that the purpose of the imposition of a penalty rate of interest under Article 20 is to discourage delay in litigation and in particular to discourage insurers from protracting payment where they are aware of their payment duties under the insurance policy

82. Article 20(6) provides an exemption to the general position that the initial date of the accrual of interest arises from the date of the accident where there has been a failure to report the accident, in which case it is from the date of the communication or from the date the court considers the insurer to have been formally aware of the claim.

83. Penalty interest will not apply where there is a justifiable cause for the delay or the delay in payment is not attributable to the defendant, see Article 20(8) "*There will be no compensation for delay by the insurer when the failure to pay the compensation or to pay the minimum amount is based on a justified cause or is not attributable to the insurer.*"

84. In this case, a letter before action was sent to the hotel on 11 September 2017. The letter advised the hotel to forward the letter to its insurers and to confirm the identity of the insurers by return; the claim form was issued on 31 January 2020 and proceedings were served on 27 July 2020; a further updated Schedule of Loss was served on 28 January 2022. The claimant submits that the defendant had knowledge

of the action by no later than 11 September 2017. No payments have been made by the defendant in this case however, at any stage.

85. Accordingly, the claimant submits that the penalty interest provisions of Article 20 are engaged and penalty interest is payable from no later than September 2017. Alternatively, Mr Chapman submits that, following *Maher v Groupama* [2009] EWCA Civ 1191, and *Scales v MOD* [2020] EWHC 1747 I should award a rate of interest equivalent to Spanish penalty rates of interest pursuant to the discretionary power available under section 35A Senior Courts Act 1981.

86. Mr Mead argues that the Spanish law provisions concerning penalty interest in Article 20 do not apply. The rate of interest to be imposed upon an award of damages is a procedural matter, excluded from the Rome II Regulation, and the applicable law is the law of the court not the law of the tort, see Article 1(3) of the Rome II Regulation.

The Competing Arguments:

87. Mr Chapman submits that the penalty interest rule in Article 20 is plainly a substantive rather than a procedural provision. This is clear from the mandatory language which it employs. For example, the preamble to the provision is couched in mandatory terms as is the language of Articles 20(2)(3) and(4) . The language is a strong pointer to the provisions being substantive in effect.

88. Mr Chapman draws my attention to the commentary in *Dicey* 15th edition where it is suggested that the rate of interest on damages under the Rome II Regulation is a matter of substantive law and as such governed by the law of the tort and not the law of the court. At 7- 112 the authors state: *"Article 15(c) applies to "the existence, the nature and the assessment of damage or the remedy claimed." The intention for issues relating to the assessment of damages to be determined by the lex causae is clear. It might be argued that the rate of interest upon damages goes to, or is intrinsically linked with, the assessment of the overall amount which the claimant can recover in respect of the damages claim. It may be that the exclusion of evidence and procedure should be construed narrowly*." The authors express the hope that the ambit of the exclusion of evidence and procedure in both the Rome I and Rome II Regulations may be subject to elaboration in due course. "*Until then, it is tentatively suggested that the rate of interest on damages in respect of tortious obligations is governed by the lex causae*."

89. Leggatt J found this tentative reasoning to be persuasive in *AS Latvijas Krajbanka v Antonov* [2016] EWHC 1679 where at [10] he remarked: "*In particular the authors of Dicey point out that it might be argued that the rate of interest recoverable on damages goes to, or is intrinsically linked with, the assessment of the overall amount which the claimant can recover and thus falls within scope. I find this suggestion and the argument on which it is based persuasive. Indeed it seems to me that the broad working of article 15 requires the court to exercise any power conferred by its procedural law to award interest as compensation to a claimant for being kept out of money as a result of the defendant's wrong only when and in the way that a remedy would be granted under the applicable foreign law to provide such compensation."*

90. Mr Chapman also points out that in *Scales* (a case in which Professor Carreras appeared for the defendant) the defendant did not argue that the penalty interest

provisions in Article 20 did not apply. Indeed Cavanagh J recorded Professor Carreras' concession that it was a provision of substantive legal effect. The debate in that case, and Cavanagh J's conclusions, concerned the operation of the exclusionary provision of Article 20(8). He characterises Professor Carreras's current position therefore as representing a real volte face.

91. Professor Carreras justified his position in this case by referring to Article 576 of the Civil Procedural Law, a provision which he candidly explained he had previously overlooked. It is a provision which deals with interest on late payment in proceedings and sets out that: "(1) *From the date on which the judgment or order for payment of a sum of money is given at first instance, interest shall accrue annually at the legal rate of interest plus two percentage points, or at such other rate as may be agreed between the parties or provided for by special provision of law, in favour of the creditor*." Professor Carreras gave his opinion that Article 20 is just such a "special provision of law" and as a consequence should be considered to be a procedural rule. I pause to note that this provision has no bearing upon the issue before me, dealing as it appears to with interest on judgment debts.

92. Mr Mead made the following points:

i) Mr Sanchez gave evidence that the obligation upon the defendant under Article 20 is only to make a reasonable assessment of the value of the claim within three months of notification and then only make a reasonable payment within that time. Mr Sanchez accepted that all that was required of the defendant was payment of a conservative sum or even the "irreducible minimum" value of the claim. He also told me that the purpose of the rule was not just to avoid procrastination but to incentivise a pro-active approach by the defendant to valuing the claim, so that even if the value of the claim had not been particularised by the claimant, the defendant should be able to form its own view, upon investigation, and then make a payment.

ii) In the light of this evidence Mr Mead submits that the rules are for all practical purposes a form of mandatory interim payment procedure coupled with a penalty in the form of enhanced interest payments for lack of compliance. There are similarities between the Spanish system and the English system for early offers contained in CPR 36. Both sets of rules are, submits Mr Mead, procedural in character, and obviously so.

iii) Mr Mead relies upon the judgment of Griffiths J in *Troke v Amgen Seguros Generales Compania de Seguros y Reaseguros* [2020] 4 WLR 159. This case is centre stage in his submissions. In *Troke*, a personal injury claim arising from a road traffic accident in Spain in which proceedings were commenced in Plymouth County Court, the only dispute was the appropriate rate of interest. As in this claim, the claimant sought payment of interest at penalty rates pursuant to Article 20; the defendant at the rate applicable under s 69 County Courts Act 1984.

iv) The matter came before Griffiths J on appeal who upheld the judgment of the recorder at first instance who had awarded interest according to the law of the court, not of the tort. At [71] Griffiths J concluded "*I agree with the judge that the award of interest in this case was a procedural matter excluded from*

Rome II by article 1(3); that there was no substantive right to interest at Spanish rates to be awarded to the Claimants under the lex causae; that interest could be awarded under section 69 County Courts Act 1984 as a procedural matter in accordance with the law of England and Wales as the lex fori; and that he was entitled to award interest at English and not Spanish rates accordingly." Central to Griffiths J's decision was his finding that the penalty rates of interest were not mandatory but discretionary, a view reached on the expert evidence before him and upon his analysis of the provisions. At [69] he says this: "*The point is that the Spanish rates, being penalties were ultimately discretionary and not mandatory as a matter of law, even if the cases in which the Spanish rates are not awarded are restricted*."

v) Mr Mead supports the reasoning in *Troke.* Moreover he submits that it is binding upon me. The issue before the court in that case was same issue with which I must grapple. Unless I reject the conclusion of Griffiths J as wrong, and plainly so, then I must follow it. (see *R v Greater Manchester Coroner, Ex parte Tal and Another* [1984] 3WLR 643).

93. Mr Chapman argues that I should treat the case of *Troke* with a degree of caution. He submits that the conclusion which Griffiths J reached was "at odds" with the approach taken in *AS* (above). He draws my attention to the judgment of *Royalty Pharma Collection Trust v Boehringer* [2021] EWHC 2692 where at [291] HHJ Hacon (sitting as a judge of the High Court) questioned whether Griffiths J would have reached the same conclusion had he found that the penalty interest provisions under Spanish law had been mandatory. Judge Hacon thought it to be a "fair inference" that, had he done so, then he would have found the rate of interest to be part of the lex causae which had to be applied and that in consequence the discretionary English laws on both the availability of interest and the rate to be applied were redundant.

94. In the alternative, Mr Mead argues that the claim falls within the exclusionary criteria of Article 20(8). He argues that no payment was made in this case for good reason: the claimant failed, until service of the revised Schedule in January 2022, to provide a particularised Schedule. Until that point the defendant was always in the dark about the value of the claim and could not have made even an educated stab at its realistic value. The claim for penalty interest therefore falls within the exclusionary criteria in 20(8).

Interest Rate: Discussion/Conclusion

95. There is limited common ground here. The parties agree that matters of procedure are governed by the law of the court and matters of substance governed by the law of the tort. Whether the penalty interest provisions in Article 20 are procedural or substantive law is the crux of the issue. The authors of *Dicey* acknowledge the difficulty on occasions in discriminating between rules of procedure and rules of substance and state in terms that the distinction is not aways clear cut. They emphasise the need to refer to foreign law in deciding the issue and counsel against an overly mechanistic and linguistic approach stating the importance of considering the rules as a whole.

96. In considering the question posed, that is, whether the penalty interest provisions are procedural or substantive, I have taken into account the following matters.

97. Whether binding or not, the judgment of Griffiths J in *Troke* is a powerful authority in this context. The central issue which confronted him was whether the right to penalty interest was a substantive right and therefore fell to be determined by the lex causae to be applied under Rome II. Griffiths J reached the conclusion that the penalty interest provisions were procedural and that the judge below had therefore been right not to apply the Spanish rates of interest but award interest under s 69 County Courts Act 1984.

98. Griffiths J's reasoning was based in part upon the expert material before him and the observation in the joint expert report of the relevant Spanish law "contemplates a penalty interest." To his mind, this suggested a discretionary entitlement not a mandatory one. However he said that the expert report referring to the law "contemplating a penalty interest" simply reinforced his view that penalty interest was a procedural rather than substantive right. At [64] he said:

> *"Interim payments on account of a substantive award or settlement to be determined later seem to me to have the quality of procedural matters. A penalty also is to be distinguished from a substantive right. A penalty is a procedural sanction (or incentive). It is not a fundamental right, it is also to be expected that a penalty award will ultimately be in the discretion of the court (and so procedural) rather than being claimed as an absolute right (and so part of the substantive as opposed to procedural law)."*

99. He noted that the exclusionary jurisdiction under Article 20(8) was highly restrictive but as he set out at [69] "*the point is that the Spanish rates, being penalties were ultimately discretionary and not mandatory as a matter of law, even if the cases in which the Spanish rates are not awarded are restricted (Scales paras 271-272; in para 275 the word "exceptional" is used)"*

100. As I have already observed, Mr Chapman urges me to treat *Troke* with a degree of caution. It is "at odds" with the decision in *AS*. However he does not submit that it is wrong, let alone "plainly wrong." Nor does he convincingly argue that the case can be satisfactorily distinguished. I find it difficult to see how the case can be distinguished. The issue before Griffiths J is the same as that before me. Its ratio is clear. Although in part based upon expert evidence that is not before me (the reference to the Spanish law "contemplating" the imposition of penalty interest") Griffiths J's conclusion that the penalty interest provisions were procedural was based centrally upon their discretionary character as demonstrated by the Article 20(8) exclusion and his understanding that they constituted a discretionary procedural sanction for failing to make a timely interim payment.

101. Whether the decision in *Troke* is binding upon me or not, I agree with its conclusion and the underlying reasoning which I endorse and follow. I make the following observations and findings:

i) the right to claim interest by way of damages clearly falls within Article 15 of Rome II and hence to be determined by the law applicable to the non-contractual obligation. Article 15(d) applies the law of the non-contractual

obligation to the measures which the court may take to ensure the provision of compensation. *"The right to claim interest by way of damages in a claim in tort is within the ambit of Article 15 and is not, in any sense, a procedural question for the law of the forum.*" See *Maher v Groupama* (supra) and *Dicey* 16th edition at [4.113].

ii) The purpose of penalty interest in Spanish law is to incentivise early interim payments and to discourage delay and procrastination on the part of the defendant. I agree with Mr Mead (and Griffiths J) that penalty interest is a procedural sanction to give teeth to a procedural regime aimed at early disposal of cases and as such it is not a substantive right.

iii) The purpose of an award of damages for personal injury is to restore the victim of an accident to the position he/she would have been in but for the accident. Full reparation is the objective. The substantive right to an award of interest to compensate the victim for being kept out of his or her award and the loss of use of the money is therefore consistent with this objective. But the imposition of an award of penalty interest by definition is not intended to achieve restitutio in integrum for the claimant but to penalise the defendant for having failed to comply with the requirement of making a conservative payment within 3 months of the claim. The observations in *Dicey* which were picked up and endorsed in *AS*, that penalty interest might be seen as a remedy in the form of compensation for the claimant being kept out of his or her money, must in my view be considered in this context.

102. I note with interest the observations of the authors of *Dicey* that, unlike under Rome I, the rate of interest may be a matter of substantive law of the lex causae. This is, as the authors acknowledge, a tentative suggestion only. It was a tentative suggestion that was brought to the attention of Griffiths J. It was based upon the breadth of the wording of Article 15 of Rome II as to the scope of the lex causae (which is broader than the equivalent provision in Rome I) and the premise that the exclusion of evidence and procedure should be construed narrowly. However, to my mind, the penalty interest provisions are discretionary; they may be excluded if there is a good reason to do so and they are procedural in character.

103. I therefore reject the claimant's submission that the Spanish law provisions concerning penalty interest are substantive and that I am bound to apply them in this case. I find that they are procedural and therefore the interest rates are those of the lex fori, that is under s. 35A Senior Courts Act 1981.

104. This however is not the end of the matter. The further question for me is whether under the (uncontroversially) discretionary power to award interest under s. 35A Senior Courts Act I should award a rate of interest consistent with the Spanish law penalty rates.

105. In *XP v Compensa Towarzystwo SA, Mr Przeyslaw Bejger* [2016] EWHC 1728 (QB) Whipple J was dealing with a damages action arising from a road accident in Poland. She found that the relatively favourable Polish rates of interest applied. She made no finding as to whether the Polish rate of interest was substantive or procedural but remarked that if the rate were a procedural matter to be resolved under English law then she would exercise that discretion in favour of the Polish rates as "*interest on the*

award should be calculated under Polish law. That would be consistent with this Court's role in hearing the Claimant's case against Compensa under Rome II, namely to arrive at a figure for damages which equates to that which would have been awarded by a Polish court if this case had been heard in Poland."

106. In considering this question I take into account that, had this case been issued and tried in Spain, then the penalty rates of interest would have been applied. There is no good reason why they would have been excluded under Article 20(8). The defendant had notice of this accident (probably) on the date of the accident via the completion of various accident report forms. I have not seen those report forms however. But the defendant was certainly aware of its potential liability at the latest in September 2017 when a detailed letter before action was sent to the hotel. The hotel were advised to inform their insurer and to provide the identity of the insurer to the claimant's solicitors. The letter provided information concerning the accident which would have enabled the defendant to undertake investigations as to liability and it described the injuries. There was no obstacle to a litigation savvy insurance company such as the defendant complying with the procedural requirement of making an interim payment of a conservative amount to reflect the value of the claim. Nor, as Cavanagh J in *Scales* set out, is the exclusionary power in Article 20 not engaged by virtue of there being a defence to the litigation – whether to the tort itself or to aspects of the damages claimed.

107. The value of the interim payment made may not have been realistic, even taking into account the requirement of early particularisation of the claim which I am told exists under Spanish law. But this is no defence to the need to make an interim payment. As Mr Sanchez explained, and I accept, the court will take into account the level of interim payment in the context of the level of particularisation of the claim when considering whether to impose penalty interest rates. The point Mr Sanchez made was that, under Spanish law, the important thing is to make the interim payment: even if too low ultimately, it will still be likely to be an effective defence to the imposition of penalty interest.

108. I accept that the imposition of the Spanish penalty interest rate upon the damages award may, as Mr Mead outlined, expose the defendant to a double jeopardy of Spanish penalty interest and costs and interest penalties under CPR Part 36.17. This does not seem to me to be a good reason not to apply the Spanish rate of interest. Of course, the sanctions set out in CPR 36.17 are themselves discretionary and may be displaced in the presence of a good reason to do so.

109. For all of these reasons therefore I exercise my discretionary power under s. 35A Senior Courts Act 1981 to award interest on general and special damages in accordance with the penalty rate which would have been applied had this litigation been issued and pursued in Spain. The date from which the penalty interest will apply is from the date of the pre-action protocol letter in September 2017. Whilst I am informed that the defendant is deemed to be aware of the accident from its date via its insured, it seems to me to be reasonable and fair in the circumstances to award penalty interest from the date upon which I am confident that the defendant knew of the accident, the circumstances and the injuries.

110. I therefore invite the parties, via their experts, to undertake the necessary calculations and produce a set of final figures giving effect to this judgment. I also invite them to draw up the final Order.