

Cross Border Personal Injury Claims: Recent Developments

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Introduction

- Brexit!
 - Choice of law
 - Jurisdiction and Enforcement
- Recent case law including:
 - Awards of interest
 - Limitation
 - Contribution claims
 - Exclusive jurisdiction clauses

Brexit transition period

- UK withdrew from EU at 23:00 on 31.01.20
- Legally, little changed because the Withdrawal Agreement created transition / implementation period during which most EU law continues. This expires at 23:00 on 31.12.20.
- If proceedings are commenced after 31.12.20:
 - Which rules will govern applicable law?
 - Which rules will govern jurisdiction and enforcement?

Choice of Law – Pre-Transition

- Rome I (Regulation (EC) No 593/2008) governs choice of law for contractual obligations.
- Rome II (Regulation (EC) No 864/2007) deals with choice of law for non-contractual obligations (for our purposes, tort).
- Both will continue to apply until the end of the transition period (Article 66 of the Withdrawal Agreement).

Choice of Laws – Post transition

- Rome I and Rome II with minor amendments will be incorporated into UK domestic law
- See The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/834).

General Rules Under Rome II

- Applicable law is “*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.*” (art.4(1)).
- Distinguish “*occurrence of damage*” from “*event giving rise to damage*” and from “*indirect consequences.*”
- In fatal accident claim, the damage occurs where the accident leading to death occurs, not where the dependants suffer their loss of dependency: *Lazar v Allianz SpA* (C-350/14).

General Rules Under Rome II

- Where claimant and defendant “*both have their habitual residence in the same country*”, that country’s law applies (art.4(2)).
- It “*is a question of fact: has the residence of a particular person in a particular place acquired the necessary degree of stability*”
Re LC (Children) [2014] UKSC 1.
- For example, see *Winrow v Hemphill* [2014] EWHC 3164 (QB).

General Rules Under Rome II

- Where the tort is “*manifestly more closely connected*” with another country, that country’s law applies (art. 4(3)).
- Again, see *Winrow v Hemphill*. But compare *Marshall v MIB* [2015] EWHC 3421 (QB) (upheld at [2017] EWCA Civ 17).
- “*Manifestly,*” is likely to mean exceptionally.
- The tort, not an issue in the tort.
- Consider relevant facts at date of decision, i.e. consider consequences.

Special Regimes

- Article 5 contains special rules for product liability cases.
- Article 7 contains special rules for environmental liability cases.

Article 15: Scope Of Applicable Law

- Once applicable law is selected, which issues does it govern?
- The applicable law does not govern evidence or procedure, which are for the law of the forum (art.1(3)).
- Article 15 defines matters which courts must treat as governed by applicable law, including liability, contributory negligence, assessment of damages, vicarious liability and limitation.

Jurisdiction and Enforcement – Present Regimes

- Brussels I Recast (Regulation (EU) No 1215/2012) (chiefly where D domiciled in EU member state)
- Lugano Convention 2007 (parties are EU, Denmark, Iceland, Norway, Switzerland, so chiefly where D domiciled in Iceland, Norway or Switzerland).
- Common law rules (most other cases)
- Travel conventions: Montreal, Athens, Berne.

Jurisdiction and Enforcement – Post Transition

- Brussels I Recast and Lugano will cease to apply at 23:00 on 31.12.20: The Civil Jurisdiction and Judgment (Amendment) (EU Exit) Regulations 2019 (SI 2019/479).
- Transitional provisions: if English court seised and case not concluded before 31.12.20, “*the relevant instruments ... continue to have effect in relation to questions of jurisdiction, or recognition or enforcement ... as if those instruments had not been revoked.*” (reg 92).
- Court seised when document issuing proceedings is lodged (issue of claim form) as long as then duly served (reg.95). Essentially same concept as in Brussels I Recast.

Jurisdiction and Enforcement – Post Transition – Lugano?

- UK has been party to Lugano via its EU membership not as an individual contracting party.
- On 08.04.20, the UK made an application to become a party to Lugano in its own right pursuant to art.72(1).
- Accession requires unanimous consent of all existing parties, who should endeavour to give consent within a year: art.72(3).
- At present, indications of approval from Switzerland, Norway, Iceland but nothing from EU.
- If UK then invited, it deposits instrument of accession and subject to further objections UK becomes party three months later.
- So unless time abridged, UK will not be party by 01.01.21

If Lugano, what are rules?

- Text of Lugano 2007 follows Brussels I (Regulation (EC) No 44/2001) very closely. So it is a Brussels generation behind Brussels I Recast.
- For personal injury litigators, it has the benefit that most of the significant rules would still be similar or at least broadly familiar: domicile, additional defendants, third parties, special rules relating to insurance (including the *Odenbreit* rules), special rules relating to consumer and employment contracts.
- Plus the benefit of simplified enforcement procedures, though not so simplified as in Brussels I Recast.

Jurisdiction and Enforcement post-transition if no Lugano?

- If no other provisions in place, then other than cases governed by transport conventions, largely thrown back on common law rules found in Practice Direction B to CPR 6.
- Contain general rules: domicile of D, additional Ds and third parties who are necessary or proper parties, and special rules for contract and tort.

Jurisdiction and Enforcement – Post-transition?

- Most significant for personal injury are common law rules for jurisdiction in tort, governed by PD6B, para.3.1(9).

*“(9) A claim is made in tort where –
(a) damage was sustained, or will be sustained, within the jurisdiction; or
(b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction.”*

Common law rules – forum non conveniens

- A significant difference under common law rules is that there is a discretion to decline jurisdiction in favour of courts of another country if the other country is the more appropriate forum: *Spiliada* [1987] AC 460.
- Unlike under Brussels and Lugano rules where once jurisdiction established it cannot (ordinarily) be declined by the court.

What happens next? EU Guidance

- On 27.8.20 the EU published a revised notice as to how conflict of laws/jurisdiction issues would be determined post-Brexit. It makes no mention of Lugano and envisages UK being party to the Hague Convention on choice of court only (irrelevant to personal injury claims).
- https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/civil_justice_en.pdf

What happens next? UK Guidance

- On 30.9.20 the UK government published its own guidance note:

<https://www.gov.uk/government/publications/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals-from-1-january-2021/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals-from-1-january-2021>.

- It also envisages UK not being party to Lugano.

FS Cairo (Nile Plaza) LLC v Brownlie [2020] EWCA Civ 996

- In a tort claim, what sort of damage sustained within the jurisdiction suffices to found jurisdiction? The initial injury only, or could consequential loss suffice?
- By 2-1 CA held latter suffices, thus potentially greatly increasing the number of injury claims which might be brought in England.
- But permission to appeal to Supreme Court.
- And remember forum non conveniens could apply even if jurisdiction is established.

Pandya v Intersalonika General Insurance Co SA [2020] EWHC 273 (QB)

- Trial of preliminary issue concerning limitation.
- C, a 15 year old UK national suffered a traumatic brain injury following an RTA on 29.7.12 whilst on holiday in Kos, Greece.
- C brought a claim against a Greek registered insurance company pursuant to Rome II.
- Claim received by Court on 25.07.17, issued on 11.08.17, served 26.01.18.
- D alleged claim was statute barred because Greek Law requires issue and service to take place for limitation to stop running

Pandya(2)

- *"The law applicable to non-contractual obligations under this Regulation shall govern in particular: ... (h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation."* (Article 15(h)).
- *"This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22."* (Article 1, sub-rule 3).
- C argued service was a point of procedure and that CPR 7.2 applied ie the claim was 'brought' for limitation purposes the Court received the claim form.

Pandya (3)

- Both parties adduced expert evidence from Greek lawyers who agreed that service was necessary to stop limitation under Greek law
- Tipples J found at para 40:

“Therefore, service of the claim form is, as a matter of Greek law, an essential step which is necessary to interrupt the limitation period. Service of the claim cannot be severed, carved out or downgraded to a matter of mere procedure which falls to be dealt with under English Civil Procedure Rules. That, apart from anything else, would give rise to a different limitation period in England and Wales than in Greece. The clear intention of the Rome II Regulation is to promote predictability of outcomes and, in that context, it seems to me that such an outcome is not what the Regulation intended to happen in these circumstances.”

- The claim was statute barred and therefore dismissed.

Hutchinson v Mapfre [2020] EWHC 178 (QB)

- Accident victim could sue a liability insurer in England despite a policy term limiting cover to liabilities established before the Spanish courts.
- The judge held that arguably such term was a kind of disguised jurisdiction agreement (even though the injured claimant was of course not a party to the insurance contract) forbidden under the rules of jurisdiction for matters relating to insurance.

Begum v Maran (UK) Limited [2020] EWHC 1846 (QB)

- A shipbreaker suffered a fatal accident when demolishing a ship in Bangladesh in March 2018.
- The widow brought a Fatal Accidents Act claim against a D, a UK company agency providing shipbroking services.
- C alleged D was responsible for the ship ending up in Bangladesh where there were dangerous working conditions.
- D applied for Summary Judgment on basis that

Begum (2)

- The choice of law was relevant since in Bangladesh law a limitation period of one year applied.
- Article 4(3) of Rome II:
 - *“Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question”.*
- Accident occurred in Bangladesh and all witnesses lived in Bangladesh, so Article 4(3) did not apply.

Begum (3)

- However Article 7 Rome II provides:
 - *“The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to **base his or her claim on the law of the country in which the event giving rise to the damage occurred.**”*
- Mr Justice Jay at §83 held that English law applies as law of the place where events giving rise to damage occurred ie D’s involvement in the sale of the ship when knowing that the Bangladesh ship yard was unsafe.
- D’s application for summary judgment failed. Case going to appeal in February 2021.

Troke v Amgen [2020] EWHC 2976 (QB)

- Griffiths J has held that the penalty interest under Spanish law is procedural and not automatically applicable under English law.
- Practically important since the rate is 1.5x bank base for 2 years and then 20% p.a. and applies to all damages past and future.
- Still open to judge to apply those rates when awarding interest under s.35A SCA but difficult to see it would often be appropriate.

Roberts v Soldiers, Sailors, Airmen and Families Association [2020] EWCA Civ 926

- C suffered brain injury at birth in a hospital (AKV) in Germany.
- C sued D, the employers of the midwife, and the MOD, who agreed to indemnify D.
- D and MOD brought third party contribution proceedings against AKV.
- The underlying liability case was to be judged according to German law.
- Did German law also apply to the contribution claim? If so it was time barred.

Roberts (2)

Civil Liability (Contribution) Act 1978

s.1(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

...

s.1(6) References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales.

Roberts (3)

- At a trial of the preliminary issue the Judge found the 1978 Act had extra-territorial affect.
- Appeal dismissed. The 1978 Act does not limit or exclude contribution claims where the law of the contribution was foreign law.
- The 1978 action creates a statutory cause of action for contribution and is governed by English law, despite the fact the liability for the contribution it creates is governed by German law

Aspen Underwriting Limited v Credit Bank Europe [2020] UKSC

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- C, insurers. insured a vessel under a hull and machinery risks insurance policy. D, a bank domiciled in the Netherlands, funded the financing of the vessel and took a mortgage over the vessel and an assignment of the policy.
- The policy had an exclusive jurisdiction clause in England and Wales
- The vessel sank and C paid out under the policy pursuant to a settlement agreement which also claimed exclusive jurisdiction.
- It later transpired that the owners had procured the scuttling of the vessel.
- C issued in the High Court making a restitutionary claim to recover sum paid in settlement on grounds of the owners misrepresentation or insurer's mistake.
- D challenged jurisdiction.

Aspen (2)

- SC held D was not bound by the exclusive jurisdiction clause, since it was not a party to the contract nor the successor to the rights of the insured under the policy.
- SC also held that the claims were matters relating to insurance; D was a beneficiary under the policy so within the words of the rules, and there was no additional “weaker party” requirement.

END

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