Holidays from hell

In part two of their report on holiday damages, Kirsty McKinlay and Amy Rollings look at how to quantify losses after a non-package-holiday accident abroad

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'The expert evidence as to the applicable foreign law must be obtained at the outset, indeed, at the time of the very first notification of the claim and prior to other expert evidence.'

There are frequently fundamental differences in the valuation of damages in personal injury claims between jurisdictions. Depending on the jurisdiction these may be to the advantage or disadvantage of the claimant.

The application of foreign law in the English courts in tortious claims is specifically dealt with in the Rome II Regulation. Article 4.1 provides that:

> 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.

Where evidence of foreign law is not produced

Under the common law in England and Wales, the general rule in relation to the application of foreign law is that a party who wishes to rely upon foreign law must plead and prove it. The difficulty is that proving foreign law in the English courts can be time-consuming, complex and expensive. Expert evidence as to the applicable foreign law will be required.

The current position is that, in default of evidence as to applicable foreign law, the court will decide the case on the basis of English law on the presumption that foreign law and English law are the same.

In the Court of Appeal case of *Brownlie v Four Seasons Holdings Incorporated* [2015], the appellant, Four Seasons Holdings, argued that in the context of Rome II, it is not open to the court to apply the presumption in default of evidence as to foreign law.

That argument was dismissed by the Court of Appeal, which also refused to exercise its discretion to make a reference to the Courts of Justice of the European Union for a preliminary ruling in respect of the issue.

The Supreme Court gave a judgment on the matter on 19 December 2017. In fact the claim took a rather different turn, where as a result of evidence adduced before the Supreme Court for the first time, it became clear that the defendant was not the correct defendant and the claimant would have no prospect of establishing a cause of action against the defendant. It was upon that basis that the appeal was allowed.

Despite this somewhat unexpected conclusion, the Supreme Court did make observations regarding the meaning of the word 'damage' in CPR 6BPD para 3.1(9) in relation to the conditions for permitting service out of the jurisdiction in tort claims. This is a fascinating judgment that is well worth reading, as Lady Hale, Lord Clarke and Lord Wilson took one view as to the meaning of 'damage' while Lord Sumption and Lord Hughes took another.

However, no view was expressed in relation to the issue as to whether the common law presumption applies in default of evidence as to foreign law in the context of Rome II. Therefore to that extent the position remains that the common law presumption applies in default of evidence put before the court as to foreign law.

Depending on the facts and the value of the claim it will probably be the case that the foreign law applicable is to the manifest advantage or disadvantage of one or other of the parties. This will force the issue into play between the parties with the result that both will probably seek to adduce evidence. However, in some very-low-value cases, in light of the cost of evidencing applicable foreign law, it may be more prudent to allow the court to apply the default rule and decide the case on the basis of English law. This may particularly be the case in the age of QOCS. Nevertheless, most moderate to higher value claims will be worth the additional complexity and expense of pleading and proving foreign law in relation to damages.

The question then arises as to how the applicable foreign law is to be evidenced.

Wall

The application of Rome II in relation to evidence and procedure was addressed by the Court of Appeal in the leading case of *Wall v Mutuelle de Poitiers Assurances* [2014].

That case concerned a collision that occurred in Western France between Mr Wall's motorcycle and a car driven by Monsieur Clement, the defendant's insured. As a result of the accident Mr Wall sustained a very serious spinal cord injury and was left with partial paraplegia. Proceedings were brought in England by Mr Wall pursuant to the Council Regulation on Jurisdiction and the Fourth and Fifth Motor Insurance Directives. While liability was admitted, quantum remained in issue.

The parties accepted that the heads of damage should be determined by French law but the question before the Court of Appeal was essentially one of case management, where the parties were in dispute as to exactly how expert medical evidence should be or was required to be provided to the English court under Rome II.

The preliminary issue was set out by Master Cook:

> Does the issue of which expert evidence the Court should order fall to be determined: (a) by reference to the l aw of the forum (English Law) on the basis that this is an issue of 'evidence and procedure' within Article 1.3 of Rome II; or (b) by reference to the applicable law (French Law) on the basis that this is an issue falling within Article 15 of Rome II.

The claimant's position was that any question of how expert evidence was to be presented to the court was a question of 'evidence and procedure' within Art 1.3 of Rome II, which states in the clearest of terms '[t]his Regulation shall not apply to evidence and procedure without prejudice to Articles 21 and 22' (Arts 21 and 22 relate to formal validity and burden of proof). Upon that basis the claimant contended that the court should order the expert reports that would ordinarily be provided in English proceedings.

The defendant's position was that the intention of the Regulation was that the English court must arrive at an assessment of damages at the amount (or as close as possible) that the French court would have awarded. The only way that this can be achieved is to have evidence given in the same way as it would have been to the French court.

In three separate but concurring judgments given by Longmore LJ, Jackson LJ and Christopher Clarke LJ, the Court of Appeal upheld the first instance decision of Tugendhat J on the basis that it cannot be the case that Rome II envisages that the law of the foreign jurisdiction where the accident occurs should govern the way in which evidence is to be given to the English court.

In Wall, the parties were in dispute as to exactly how expert medical evidence should be or was required to be provided to the English court under Rome II.

Nevertheless, the court did give some further (albeit obiter) guidance on the extent of the foreign jurisdiction 'law applicable' as referred to in Art 4 and whether this should be understood in the broader sense to include 'judicial conventions and practices' or whether this should be limited to a narrow interpretation, being only 'the law': that is, the fixed legal rules that dictate a result.

Perhaps it is indicative that a broad interpretation is required when

References

Council Regulation on Jurisdiction – Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (now superseded by Brussels Recast)

Fourth Motor Insurance Directive – Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC

Fifth Motor Insurance Directive – Directive 2005/14/EC of the European Parliament and the Council of 11 May 2005 amending Council Directives 76/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles

Consolidated Motor Insurance Directive – Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insurance against such liability

Rome II – Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations

considering how difficult it is to define 'the law' while excluding judicial conventions and practices. This is particularly the case in a common law jurisdiction like the UK.

Certainly the Court of Appeal concluded that a narrow view of 'law' is inappropriate:

> ... if there are guidelines, even if they can be disapplied in an appropriate case, judges will tend to follow them. No doubt one can call this 'soft law' rather than 'hard law' but it is law nevertheless. Any foreign judge having to apply English law on the assessment of damages would find the Judicial College Guidelines helpful as a starting point. If, therefore, French law had the equivalent of these guidelines, I would hold the Master could permit evidence of them to be given by an English Court.

The Court of Appeal therefore confirmed that it was appropriate to permit evidence from both parties as to the French method of calculating losses.

The practical implications of this decision are that expert evidence will be required as to what the foreign law, including judicial conventions and practices, is. While the English court will require evidence from English experts as to liability and quantum in the usual way, those experts may need to consider a wider range of issues than usual depending upon the foreign law to be applied in determining the claim.

In those circumstances, in our view, the expert evidence as to the applicable foreign law must be obtained at the outset, indeed, at the time of the very first notification of the claim and prior to other expert evidence. This is to ensure that any English experts instructed to deal with either liability or quantum are aware of and understand the issues that they need to consider and opine upon. It is this expert evidence that will inform in turn what expert evidence is required for determination and quantification under the applicable law.

Getting the right report

Any report on the applicable foreign law must be CPR compliant and from a lawyer or jurist properly qualified in the relevant jurisdiction. It will need to contain sufficient detail and explanation so that the English experts and the English court are able to fully understand the process adopted in the foreign jurisdiction. It may be that there is a dearth of available experts and that choice is limited, but it is preferable to obtain a report from a practitioner with some experience of the practical application of the law rather than an academic with limited practical experience.

Whichever expert is chosen, some caution will be required in preparing clear and careful instructions in order to properly control and limit the evidence that is given.

Whichever expert is chosen, some caution will be required in preparing clear and careful instructions in order to properly control and limit the evidence that is given. As with local standards reports, there can be a temptation on the part of foreign law experts to give a judgement, particularly when they may be more used to being the advocate in a claim! The distinction may be a fine one but while their 'opinion' may be required as to the basis of assessment of damages, their view as to what that assessment of damages should be is most definitely not.

On occasions it may be possible to jointly instruct a foreign expert to prepare a report in relation to the applicable law, but in light of the very early stage that this should be done this is probably not realistic as neither party will have ascertained its position at that point.

In terms of case management, in reality the parties will need to obtain their evidence as to the applicable foreign law prior to the first CCMC in order to be able to make informed submissions at that hearing as to how the claim should be case managed, the evidence required and the likely costs. To that extent the cost of the primary report in respect of foreign law will already be incurred. However, care should be taken with the preparation of the Precedent H to ensure that this provides fully for appropriate evidence to be obtained and considered in respect of the foreign applicable law.

Brexit

The budgeting process very clearly demonstrates the costly nature of obtaining foreign expert evidence. However, it is essential in an appropriate case to comply with the intention of Rome II to provide consistency in the approach of all EU courts as to the applicable law and jurisdiction. Of course, come 11pm on 29 March 2019 all is likely to change with Brexit. Whatever happens, Rome II will no longer automatically apply in England and Wales.

At the moment, while there is talk of a transitional period, there is simply no firm indication or suggestion as to how any such transitional arrangement would operate or what it would mean for matters of jurisdiction. The options may be that:

- Rome II or equivalent legislation remains in one form or another (for example if the Great Repeal Bill is passed);
- the principles revert to an application of the common law and any domestic legislation (equivalent to the Private International Law (Miscellaneous Provisions) Act 1995) to determine the applicable law and jurisdiction; or
- some other unknown option is pursued.

In light of that prospect, enjoy the certainty of the costly instruction of a foreign lawyer to advise on a defined principle of 'applicable law' while you still can. ■

Brownlie v Four Seasons Holdings Incorporated
[2015] EWCA Civ 665;
[2017] UKSC 80
Wall v Mutuelle de Poitiers Assurances
[2014] EWCA Civ 138