ROME II

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ROME II - ALL CHANGE FOR OVERSEAS ACCIDENTS?

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.

Introduction

The implementation of EU Regulation 864/2007 has important implications for personal injury lawyers embroiled in or likely to become embroiled in European (EU) cross-border accident litigation.

The Rome Convention on the law applicable to contractual obligations ("*Rome I*") was agreed by European Member States in 1980. It lays down uniform rules to determine the law applicable to *contractual* obligations. *Rome I* was implemented in the United Kingdom by the Contracts (Applicable Law) Act 1990. The material scope of the *Rome II* is that it applies to non-contractual obligations in "*civil and commercial matters*", a term which is to be understood in the same sense as in the Brussels I Regulation (jurisdiction). The Regulation would therefore not apply to revenue, customs or administrative matters. Article 1(2) specifically excludes non-contractual obligations arising out of family relationships, matrimonial property regimes and succession, obligations under negotiable instruments, the personal liability of officers and members for the debts of a corporate and incorporated body, the personal liability of persons carrying out a statutory audit, the liability of settlors, trustees and beneficiaries of a trust, and, finally, non-contractual obligations arising out of nuclear damage. The approach taken by the Commission in the Regulation is to divide non-contractual obligations into two major categories, those that arise out of a tort or delict and those that do not.

Whilst it is important to bear in mind that *Rome II* extends to most torts (defamation and privacy are excluded as usual), the focus of this article is the single major change it introduces into English law with regard to the *assessment of personal injury damages* arising out of accidents in other jurisdictions of the EU.

Revision

It is worth revising what the current position is in actions litigated in England involving *European* (EU) accidents. Briefly, the applicable law for the issues arising out of an accident will invariably be the law of the place where the accident occurs (section 11 – Private International [Miscellaneous Provisions] Act 1995) subject to exceptions (section 12). So far as is relevant these sections provide as follows:

Private International Law (Miscellaneous Provisions) Act 1995

Section 11: Choice of applicable law: the general rule

(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.

(2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being–

(a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;

Section 12:

(1) If it appears, in all the circumstances, from a comparison of–

(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and

(b) the significance of any factors connecting the tort or delict with another country,

that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.

And section 14 (so far as relevant) importantly provides as follows:

(3) Without prejudice to the generality of subsection (2) above, nothing in this Part–

(a) .....

(b) affects any rules of evidence, pleading or practice or authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum.

Thus, the applicable (foreign) law – the law of the place where the accident occurs - determines what types or *heads* of damage are recoverable (because this is what the tortfeasor is liable *for* which is always a substantive matter) but the English court applies its own rules on *assessment* or quantification to work out what the amount awarded should be. Assessment is regarded as a *procedural* matter, hence, for our purposes, the application of English law to the issue of quantification.

That the assessment of damages was to be determined by the *lex fori* was most recently clarified by the House of Lords in *Harding v Wealands* [2006] UKHL 32. This concerned a road traffic accident that happened on 3 February 2002 on a dirt track near Huskisson in New South Wales, when the respondent Ms Wealand lost control of the vehicle she was driving and it turned over. Negligence is admitted. The appellant Mr Harding, who was a passenger, was severely injured and is now tetraplegic. Mr Harding is English and Ms Wealand Australian. They had formed a relationship when Mr Harding visited Australia in March 2001 and in consequence Ms Wealand had come to England in June 2001 to live with Mr Harding. At the time of the accident they had gone together to Australia for a holiday and a visit to Ms Wealand's parents. The vehicle belonged to Ms Wealand and she was insured with an Australian insurance company. After the accident, Mr Harding and Ms Wealand returned to England. The action was tried by Elias J, who applied English law to the assessment of damages for two reasons. First, because the assessment of damages was a matter of *procedure* governed by the *lex fori* and secondly, because even if it was a matter of substantive law, it was in this case "substantially more appropriate" to apply English law.

Had the law of NSW been applied to the quantification of personal injury damages then by virtue of section 123 of the Motor Accidents Compensation Act 1999, very strict limits would have been placed on the amount recoverable by the inured Claimant. 4 of the most accessible examples of such limits would have been:

> (a) The maximum recoverable for non-economic loss (pain and suffering, loss of amenities of life, loss of expectation of life, disfigurement) is A$309,000;
>
> (b) In assessing loss of earnings, an excess of net weekly earnings over A$2500 must be disregarded;
>
> (c) There is no award for the loss of the first 5 days of earning capacity;
>
> (d) No award may be made for gratuitous care which does not exceed 6 hours a week and is for less than 6 months ...

Lord Hoffman said this in confirming the important difference between substantive law and procedure (the latter including assessment of damages):

> The conclusion that the amount of damages for an injury actionable by the lex causae must be determined according to the lex fori was to be left untouched is confirmed by the Report of the Law Commission and the Scottish Law Commission (*Private International Law: Choice of Law in Tort and Delict* (Law Com No 193, Scot Law Com No 129), published in 1990, on which Part III was based. Paragraph 3.38 dealt with damages:

> "The Consultation Paper [Law Commission Working Paper No 87 and Scottish Law Commission Consultative Memorandum No 62, which had been published in 1984] provisionally recommended that there should be no change in the present law on the question of damages, which we confirm. Accordingly, the applicable law in tort or delict determines the question of the availability of particular remedy.
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> In principle, therefore, I think that the relevant provisions of MACA should be characterised as *procedural* and therefore *inapplicable by an English court.*

This is all changing with effect from 11 January 2009.

The Regulation - Preamble

As with all European Regulations the legislators start with a long preamble stating the objectives of the legislation about to be introduced. The relevant extracts of the preamble for overseas personal injury accidents are as follows.

> 6. The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.
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> 17. The *law applicable* should be determined on the basis of *where the damage occurs*, regardless of the country or countries in which the indirect consequences could occur. Accordingly, *in cases of personal injury* or damage to property, the country in which *the damage occurs should be the country where the injury was sustained* or the property was damaged respectively.

Regulation 864 (already known for some years through the drafting process in more user-friendly terms as "Rome II") covers as already emphasised all non-contractual liabilities to pay damages, but is of particular interest to international litigators so far as it touches on *personal injury* accidents.

The General Rule

> Article 4:
> 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.

Thus far we are directed that the applicable law of a tort shall be the law of the country where the damage occurs (*Article 4*) which in personal injury cases

means the country where the *injury* is sustained (*Preamble 17*). Note that this relates to all personal injury accidents not just those arising out of road traffic accidents. The Regulations goes further. The Ministry of Justice says this:

> **The general choice of law rules are set out in Article 4 of the Regulation. They give way to the special choice of law rules in Articles 5 to 9 and generally only apply therefore in cases where the latter rules do not apply. The general principle is that the law of the country in which the damage occurs or is likely to occur should be applied (Article 4(1)). This law should be applied irrespective of the country in which the event that gave rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. Focus is therefore on the place where the claimant suffers the direct damage. Indirect damage suffered by the claimant elsewhere should be ignored.**
>
> **In the context of claims for personal injury the place of damage will generally be the place where the victim suffered the injury. The fact that the victim and his or her dependants suffered financial loss elsewhere would seem to be irrelevant. In cases where the claim involves damage to property, the general principle points to the place where the property was situated when it was damaged as being the place of damage. Where the claim is for economic loss not consequent on personal injury, death or damage to property, in principle the place of damage should normally be the place where the direct economic loss was suffered and the law of that place applied. Where the person claimed to be liable and the person sustaining the damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country should apply (Article 4(2)). For example, in an accident that occurs in London and both the parties who cause the accident and the personal injury victim live in France, French law would automatically apply. The meaning of habitual residence is discussed later in this guidance note.**

The Scope of the Applicable Law

By Article 15 the *scope* of the applicable law is specified. We are directed that the applicable law determined in accordance with earlier provisions covers (for example):

(a) The basis and extent of liability (e.g. *who may be liable*);
(b) Defences (grounds of exemption) or limitation (contributory negligence);
(c) The existence, nature and *assessment* of damages;
(d) Vicarious liability;
(e) Entitlement to compensation (e.g. *who gets damages*);
(f) Limitation periods.

There is only one element of Regulation 864 that reflects any major change for cases litigated in England. It is that the *assessment of damages* in personal injury cases should be in accordance with the law of the place where the damage occurs, namely the country *where the injury is sustained*. This is a victory for the lobbyists in the insurance industry. From time immemorial it has been the position that the heads of loss in an English court would be determined in accordance with the law of the place where the accident occurred, but hitherto the quantification or assessment of the amount payable was undertaken in accordance with English principles of assessment. An *earlier draft* of the Regulation amended by the European Parliament called for the assessment of damages to be in accordance with the rules of the place where the victim habitually resided. This would have ensured that an English victim injured in Poland (for example) would have had recoverable heads of loss assessed at a level suitable for the place of that victim's residence whilst a Polish victim injured in England would not get a handsome windfall.

Some Exceptions

There are certain limited exceptions to these general principles. First, if both parties habitually reside in one state but have an accident in another it is the law of their own state that should be applied in all material respects. However, it is difficult to see the logic in this. An English resident is injured in a RTA in Malta by a Maltese driver has damages assessed in accordance with Maltese calculations (and probably loses out as a result) whereas an English pedestrian run over in Malta by an English resident using a hire car on holiday gets damages assessed according to English principles (albeit limited to Maltese heads of loss). The resulting difference seems rather arbitrary. Secondly, if another system of law is clearly more closely connected to the issues than that of the place where the injury occurred, by way of exception, that other system law can be adopted. The preamble to Regulation 864 makes it very plain that the deployment of this exception should be truly *exceptional* and recognized as a departure from the default position in the rare situations where it likely to apply.

Implementation

Rome II *applies* from 11 January 2009 but it *came into force* on 19 August 2007 and the Regulation says, it "shall apply to events giving rise to damage which occur after its entry into force". *Coming into force* is achieved 20 days after publication of the Regulatioon in the Official Journal of the EU. It follows that the Regulation will apply to events occurring on or after 19 August 2007, but cannot be used until 11 January 2009. It appears, therefore, that actions commenced prior to 11 January 2009 but in respect of events occurring on or after 19 Augsut 2007 will still be subject to the old conflicts rules. Why this convoluted implementation procedure and transitional period was considered necessary remains opaque.

Matters of pure procedure remain for the *lex fori* – that is the court of the member state seised of the action.

Europe and beyond?

Article 3 of the Regulation provides that the law thereby created should apply whatever the domestic law of individual member states may be on the conflict of laws. That being the case it is (albeit tentatively) suggested that the change made to English law by the Regulation as to the scope of the applicable law of the tort in personal injury cases, namely that *assessment* of damages is for the law of the place where the injury was sustained, is likely to be of universal application. That is, the new rule will supplant the traditional rules on assessment *wherever* the accident occurs overseas – even outside the EU.

Pause for Thought -Recital 33

It is tempting to conclude that the change brought about by the new common rule that damages should be *assessed* in accordance with the law of the place where the accident occurs would be easy enough to implement even if it does not suit everyone's taste. A close look at recital 33 in the preamble to the Regulation, however, sows the seeds of future confusion. It applies to road traffic accidents only and says:

> According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.

What does this mean? Assistance from the European Court of Justice cannot be expected anytime soon. It is tentatively suggested that the regulators have been alert to the fact that due to the varying economic conditions in different Member States the amount of money required by road accident victims to properly compensate them for special damage and future loss will vary. The cost of living and the cost of care and medical treatment in the UK, for example, is radically higher than similar costs in, say, Slovakia or Poland. So it seems that the regulators by *clause 33* are urging courts to award damages that actually compensate injured parties according to the cost of living where they reside so far as is consistent with assessment principles in the court seised of the action. Perhaps after all the regulations, the actual outcome will not be that much different in the event.

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