PRIVATE INTERNATIONAL LAW:

Jurisdiction, applicable law and questions of evidence/procedure

A PRESENTATION FOR APIL

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I. JURISDICTION

Stylianou v Toyoshima & Another [2013] EWHC 2188

Most of the interest in this recent decision relates to what the Judge (Sir Robert Nelson) had to say about applicable law (in the wake of ***Wall v Mutuelle de Poitiers Assurances*** [2013] EWHC 53 which is considered separately below). However, it also represents a perhaps surprising expansion of the English Courts' jurisdictional interest.

The facts were as follows:

This was a claim brought against a tortfeasor driver and the tortfeasor's motor insurer. The case came before the Court on the Defendant motor insurer's application to set aside an order granting permission for the Claimant to serve a claim form out of the jurisdiction and an order for substituted service on the tortfeasor.

The Claimant was a UK national habitually resident in England. She was very seriously injured in a road traffic accident while on holiday in Western Australia and was rendered tetraplegic. The accident happened when the Claimant was a front seat passenger in a car driven by the First Defendant tortfeasor who was Japanese. The Second Defendant was the driver's insurance company and was registered in Queensland, Australia. The Claimant returned to England after the accident and issued proceedings against the driver in Western Australia. Liability was admitted. The day before the expiry of the three-year limitation period, the Claimant changed horses and brought a personal injury claim in England against the driver and the motor insurer. She obtained permission to serve the claim form out of the jurisdiction and an order for substituted service on the driver at the insurer's Australian address. At the time of the hearing which came before Sir Robert Nelson, the Western Australian proceedings were at an advanced stage but had been stayed (pending a determination as to what would happen in England). It was likely that damages awarded in England would be substantially in excess of those which would be likely to be awarded in Australia (the obvious reason for the Claimant's change of mind?) The insurer's (perhaps obvious) position was that the applicable law and forum for the claim was Western Australia, and that the Claimant was simply "*forum shopping*" in order to find the legal system which would award her the highest level of damages. The Claimant contended that her reason for bringing proceedings in Australia was to obtain

interim payments for her rehabilitation and because of uncertainty as to the effect of Regulation 864/2007 aka Rome II.

The Court dismissed the jurisdictional challenge:

It was necessary to apply CPR r.6.36 and r.6.37 in order to obtain permission to serve out of the jurisdiction with the result that a Claimant had to satisfy the court that one of the grounds set out in CPR PD 6B para.3.1 had been established. The relevant ground for this tort motor claim was CPR PD 6B para.3.1(9)(a). On their natural meaning, the words "*damage ... sustained within the jurisdiction*" in that provision were wide enough to cover any kind of damage, direct or indirect. Therefore, economic loss or financial damage, such as loss of earnings or loss of care sustained in the United Kingdom, was in principle damage sustained within the jurisdiction, even though the initial injury causing direct physical harm occurred elsewhere. In this regard, the Court had regard to a mass of recent authority on this issue: see, for example, ***Booth v Phillips*** [2004] 1 WLR 3292, 3300F-G *per* Nigel Teare QC (QB); ***Cooley v Ramsey*** [2008] EWHC 129, paragraph 53 *per* Tugendhat J (QB); ***Harty v Sabre International Security Ltd & Another*** [2011] EWHC 852, paragraph 2.7 *per* MacDuff (QB); ***Michael Wink v Croatio Osiguranje DD*** [2013] EWHC 1118 *per* Haddon-Cave J, paragraphs 32ff (QB).

What about the fact that parallel proceedings were at an advanced stage in Western Australia? The Court recognised that the continued and active pursuit of the proceedings in Western Australia was an important factor in respect of *forum conveniens*. However, on an overall exercise of discretion, the most real and substantial connection with the action was England, notwithstanding that the accident occurred in Australia, that the applicable law was Western Australian and that the proceedings in Australia had been pursued for over two years. The most significant factors in favour of England as the forum for trial were the quantum of the claim and the fact that she was English and would continue to reside in England. She was unable to travel to Australia to attend trial. Moreover, all the medical evidence and documentation on quantum was English, which would require a large number of experts to travel to Australia were the trial to be held there. Accordingly, England was the proper place in which to bring the claim in the interests of all the parties and for the ends of justice. One might regard this as a somewhat lucky result; the *quid pro quo* was that the Claimant lost all her arguments on applicable law.

Pike & Another v The Indian Hotels Company Limited

[2013] EWHC 4096 (QB) (19.12.13)

This decision concerned a personal injury claim brought by two (English domiciled) UK nationals against the Indian registered company which operated the Taj Mahal Hotel, Mumbai. The Hotel was the subject of a terrorist attack in November 2008. The Claimants sustained personal injury (in the case of the First Claimant, catastrophic spinal injury) while seeking to escape from the Hotel. They brought proceedings in negligence against the Defendant operator of the Hotel. An application was made by the Defendant pursuant to CPR Part 11 seeking, among other things, a declaration that the English Court had no jurisdiction. The application (and applications for allied orders) failed:

It was conceded by the Defendant that there was a serious issue to be tried on the merits (see, paragraph 7 *per* Stewart J) –

(i) The Defendant Indian-registered company was the "*operator*" of the Hotel (the *ownership* of the Hotel was not, it seems, identified as an issue in the Defendant's application);

(ii) The application proceeded on the assumption that a duty of care in tort was owed by the Defendant Hotel Operator to the Claimant;

The approach taken to CPR Part 6, PD 6B, paragraph 3.1(9)(a) (as to the meaning of "*damage sustained within the jurisdiction*") in cases like ***Booth v Phillips***, ***Cooley v Ramsey*** and ***Wink v Croatio Osiguranje DD*** (see above) was confirmed as correct.

The approach taken by the Court to the question – "*Are the English Courts the Forum Conveniens for this Claim?*" – Stewart J took the view that it was not in the interests of justice to grant a stay of the English proceedings – requiring the Claimants to pursue their claims in the Courts of India (in this regard evidence was before the Court as to the (im)practicalities of litigating a high value personal injury claim in India).

II. APPLICABLE LAW

Most of the activity in this area has concerned the proper reach of Rome II and, a perennial favourite: the distinction between procedure and substance.

Some revision: the *Harding v Wealands issues*

In ***Harding v Wealands*** certain quantum-relevant issues were identified in the speech of Lord Hoffmann (see, Lord Hoffmann in ***Harding v Wealands*** [2007] 2 AC 1, 12A – D (HL(E)). Are these issues procedural/evidential (and, therefore, remain for the law of the forum under article 1(3) of Rome II) or are these issues substantive (and, therefore, for the applicable law of the tort under article 15(c) of Rome II)? A number of the academic commentators have discussed these matters:

Issue	**Procedural**	**Substantive**
(a) A prescribed maximum sum for non-economic loss		**C, N & F**, page 845; **P & W**, para 16-043 (as a rule aimed not at accurate assessment of the loss, but instead a rule of law determining the value of the loss suffered); **G & L**, p 33; **Garnett**, para 11.54;
(b) In the assessment of loss of earnings, disregard of an excess of net weekly earnings at a certain limit		**P & W**, para 16-043; **Garnett**, para 11.54;
(c) No award for the loss of the first 5 days of earning capacity		**P & W**, para 16-043; **Garnett**, para 11.54;
(d) Minima for the award of gratuitous care		**P & W**, para 16-043; **Garnett**, para 11.54;
(e) Prescription of the	**R & S**, page 294 unless the applicable law	**P & W**, para 16-043; **Garnett**, para 11.54 (by

discount rate at 5%	discount rate is "*not an attempt factually to determine the claimant's loss, but instead is an artifice by which to lower insurance premiums ...* ."	reference to Rome II);
(f) Credit for payments made by an insurer		**Garnett** suggests at para 11.54 that deductibility of *benefits* will be treated as a matter of applicable law under art 15(c) of Rome II. The other textbook/article writers do not deal expressly with this issue, but are likely to treat it as substantive.

Key

JJ Fawcett & JM Carruthers, *Cheshire, North & Fawcett Private International Law* (14th ed, 2008): **C, N & F**

R Plender & M Wilderspin, *The European Private International Law of Obligations* (3rd ed, 2009): **P & W**

A Rushworth & A Scott, "*Rome II: Choice of Law for Non-contractual Obligations*" [2008] LMCLQ 274: **R & S**

Professor Mario Giuliano & Professor Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations* ("*the Giuliano Lagarde Report*") OJ C 282 (31 October 1980): **G & L**

R Garnett, *Substance and Procedure in Private International Law* (2012): **Garnett**

The guidance in the authorities is somewhat mixed. Might it be possible to divide up these (and other) issues (by reference to arts 1(3) and 15(c) of Rome II) by asking the following two questions of each relevant rule of foreign law:

1. **Is this rule concerned with the *administrative or judicial machinery* by which the assessment of damages is *conducted*?**

- **If the answer is yes, then the rule is procedural and a matter for the law of the forum and if the answer is no, then it is necessary to ask 2. below;**

2. **Is this rule –**

(a) concerned with the assessment of the losses *actually experienced* by the Claimant (to put the matter another way, is the rule concerned with the *organisation* of the factual evidence by which the loss is accurately calculated); or,
(b) is it *determinative* of the *valuation* of the claim (whatever the actual losses might have been)?

- **If (a) then the rule is procedural/evidential within the meaning of article 1(3) and dealt with by the forum and if (b) then it is part of the applicable law for article 15(c).**

Can the application of this test resolve the issues raised above. To take the ***Harding v Wealands*** examples above from Lord Hoffmann's speech:

A prescribed maximum sum for non-economic loss
In the assessment of loss of earnings, disregard of an excess of net weekly earnings at a certain limit
No award for the loss of the first 5 days of earning capacity
Minima for the award of gratuitous care
Prescription of the discount rate at 5%
Credit for payments made by an insurer

- We could probably agree that these rules are not concerned with the administrative or judicial machinery by which the assessment of damages is conducted, but I suspect that we could also agree that – with the possible exception of the deductibility of an insurer's payments – they fall within 2.(b)

above because they determine the value of the Claimant's claim, rather than being concerned with an accurate assessment of the Claimant's actual loss. One might say the same about the award of interest (this is certainly the view of Garnett although he says this at para 11.55 (in respect of interest), "*... all questions relating to the award of pre-judgment interest* [under Rome II], *including the right to claim interest and at what rate, are governed by the law applicable to non-contractual obligation. Post-judgment interest , however, given its role in facilitating the enforcement of judgments, may continue to be regarded as procedural and to be governed by the law of the country in which judgment was rendered*.").

Does the use of this test, pay sufficient regard to the changes introduced by Rome II at article 15(c) – has due regard been paid to the need for "*the existence, the nature and the assessment*" to be determined by the applicable law of the non-contractual obligation? The application of the test set out above would mean that the ***Harding v Wealands*** approach to the procedural and substantive is no longer good law with respect to the Rome II Regulation. It may be that we will know more when ***Wall*** reaches the Court of Appeal early next month ...

Why does Rome II reserve procedure and evidence to the law of the forum?

Some suggestions:

a. Because it is impossible to replicate the judicial and administrative machinery of the applicable law State in the forum State;
b. Because Rome II is not concerned with evidence and procedure and has a wholly different focus – it says nothing about disclosure, expert evidence, trial windows etc and the insertion of art 1(3) was out of an excess of caution to make this clear;
c. Because in most EU Member States the heads of recoverable loss and the assessment of damages under the same were both dealt with by the same applicable law. In the circumstances, the division between applicable law (assessment) and forum law (procedure/evidence) created few problems. That it does create a potential problem in the UK is because of the approach taken (historically) in this jurisdiction, rather than because of some overarching policy of the EU to regulate the forum State's evidence and procedure;

d. Because the absence of the words "*within the limits of the powers conferred on the court by its procedural law*" in art 15(c) was an inadvertent omission.

Some lessons from Wall v Mutuelle de Poitiers Assurances [2013] EWHC 53 ***and Stylianou v Toyoshima & Another*** [2013] EWHC 2188

It should be noted that permission to appeal has been granted in ***Wall*** and will reach the Court of Appeal on 5 and 6 February 2014.

Some lessons from ***Wall*** ...

a. The application of a foreign law to the tort (for the assessment of damages) will not lead the English Court to abandon CPR Part 35 when it comes to the expert evidence required for the assessment of quantum;

b. A catastrophically injured English Claimant is probably (still) entitled to the usual gallery of English medico-legal and other expert witnesses in respect of causation and quantum even when French/Spanish/Azerbaijani law is being applied to the tort (by the English Court that has jurisdiction);

Some lessons from ***Stylianou*** ...

c. The phrase "*manifestly closer connection*" in article 4(3) of Rome II is similar to the "*proper forum*" test used in the *forum conveniens* test in ***Spiliada***;

d. Recital (33) of Rome II requires only that the forum Court look at the actual costs, for example as to aftercare, in the RTA victim's country of residence and takes those into account *only insofar as the applicable law enables it to do so*;

e. A 6% discount rate for the selection of a future loss multiplier (found in the law of Western Australia) is, as a ceiling on damages imposed by statute, an applicable law, rather than a procedural matter.

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