Damage vs Damages:

Stylianou v Suncorp, Rome II and the Applicable Law in International Personal Injury Law

The recent case of *Stylianou v Toyoshima and Suncorp Metway Insurance Limited* [2013] EWHC 2188 (QB) has addressed three important areas in the developing field of international personal injury law. Firstly, it has confirmed the Court's broad discretion in relation to jurisdiction. Secondly, it has demonstrated the potential for Article 4(3) to be used as an "escape clause" where a manifestly close connection can be shown to the claimant's home country. Thirdly, it has raised the questions as to whether "the assessment of damage" (Article 15(c)) should be determined by rules of law (the applicable law) or evidence and the procedural law.

In *Stylianou*, the Claimant was a British national who had been involved in a serious road traffic accident in Western Australia. She suffered catastrophic injuries, which rendered her tetraplegic. After receiving emergency care in Australia, she was repatriated to England, where she continued to receive round-the-clock care first in hospital and then from home. The driver of the car was a Japanese national and could not be traced. His insurers, Suncorp, were an Australian company, based in Queensland. Liability had been admitted in full so the claim only concerned the assessment of damages.

Proceedings had been issued in Australia against both the driver and Suncorp but the Claimant wanted to bring her claim in England, partly because she was restricted to a wheelchair and required constant care. She also wanted English law to apply as the 6% discount rate in Australia would have prevented her receiving damages to meet her actual needs. The court therefore had to consider both whether she should be allowed to bring the claim in England and what the applicable law should be.

JURISDICTION

In order to be granted permission to serve a claim form outside of the jurisdiction, a claimant must persuade the Court that there is a serious issue to be tried and that England is the proper

place to bring the claim (CPR, r.6.36 and r.6.37(1)). The latter is fulfilled by the *forum conveniens* test set out in *Spiliada Maritime Corp v Cansulex Ltd ("The Spiliada")* [1987] AC 460. The claimant must also satisfy the Court that one of the grounds in CPR 6B PD 3.1 has been established, which, for Ms Stylianou, was that "damage was sustained within the jurisdiction" (6B PD 3.1, para 9(a)).

Following the cases of *Booth v Phillips* [2004] 1 WLR 3292 and *S.A Cooley (by his father and litigation friend P.A Cooley) v T.R Ramsey* [2008] ILP r 27, [2008 EWHC 129 (HC), "damage" in the phrase "damage... sustained within the jurisdiction" has been interpreted widely to include economic loss so that as long as there had been, for example, loss of earnings sustained in the jurisdiction, the case could be brought here, even if the accident occurred elsewhere.

Suncorp sought to persuade the Court that this interpretation could no longer stand in light of the passage of Rome II. They submitted that "damage" under the CPR could not bear different meanings for jurisdiction and applicable law and that, in any event, the CPR must be construed in accordance with Rome II as binding European Regulation (at [18]).

The Court rejected this argument, holding that "damage" for the purposes of Rome II covers "any consequence arising out of tort/delict" (Article 2) and was therefore "on its face wide enough to include any damage, direct or indirect which the Regulation as a whole covers" [49]. Further any difference in meaning between Brussels I and Rome II when compared with the CPR was acceptable because the CPR has an important "safety valve" in that it "includes the exercise of discretion under the forums conveniens test whereas Brussels I and Rome II do not" [51]. This discretion was exercised in favour of the Claimant.

Whilst Suncorp submitted that *Booth* and *Cooley* had been wrongly decided, they remain good law since the passage of Rome II. However the case of *Wink v Croatia Osiguranje D.D* [2013] EWHC 118 (QB), which followed them, is in the process of appealed to the Court of Appeal so this landscape may yet change.

APPLICABLE LAW

The Escape Clause

The Court also had to decide which law should apply. Rome II governs applicable law in non-contractual actions brought in the EU. It applies whether or not the accident itself was in the EU (Article 3).

The basic rule under Article 4(1) is that the 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". In the present case, this would have been Western Australia.

Under Article 4(2) there is an exception where both parties are nationals of the same country: "where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply". As the Claimant was a British national and the driver Japanese, this did not help her. However, the subsection does serve to illustrate that "residence is a highly relevant factor" (per Robert Weir QC [58]).

Therefore the only hope for the Claimant was Article 4(3). As this was the first time this "escape clause" was used before the courts, it was an issue of central importance. The Claimant sought to persuade the Court that the applicable law should be English law as the country more manifestly closely connected with the claim:

> "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 [the basic rule] or 2 [the common residence rule], the law of that other country shall apply" (Article 4(3)).

The Recitals and Explanatory Memorandum are unclear as to how this clause is to be used. On the one hand it is an "escape clause" (Recital (18)), only to be used in "exceptional" cases, as described in p.12 of the Explanatory Memorandum, and to "preserve the intended application of the rule to most cases" (see, obiter, Moore-Bick LJ in *Jacobs v Motor Insurers Bureau* [2011] 1 WLR 2619). However, they also describe the Article's purpose as to "create a flexible framework" and to "enable the court seised to treat individual cases in an appropriate manner" (Recital (14)). The provision therefore "brings a degree of flexibility, enabling the court to adapt the rigid rule to an individual case so as to apply the law that reflects the centre of gravity of the situation" (Explanatory Memorandum, p.12).

Suncorp sought to persuade the Court that Article 4(3) must be used only exceptionally and that it relates to direct damage and not indirect damage, thus bearing a narrow meaning, consistent with Article 4(1).

The Court accepted that Article 4(3) was an escape clause to be used rarely but rejected arguments that it referred to only direct damage [61]. The meaning of "damages" was different across Articles 4(1) and (3) [62]:

> "If such a broad interpretation is not given to Article 4(3) so that all the circumstances can be considered, the court will not be able to exercise its judgment properly in the individual case and decide whether those circumstances reveal that the tort is manifestly more closely connected with a country other than that indicated in Article 4(1)."

The Court compared this task to the "proper place" test used when exercising discretion as to jurisdiction: to identify the best forum "for the interests of all parties and the ends of justice" (*Spiliada Maritime Corpn v Cansulex Ltd* [1987] 1 AC 460).

This is of great importance to the choice of applicable law. Providing a more manifest connection can be established with the victim's home country than the country of the accident, claimants may be able to apply their own domestic law. This may well be more favourable and will undoubtedly more accurately reflect the cost of care and future needs.

In *Stylianou*, England was in fact rejected as being the place more manifestly closely connected with the case. It was accepted that the Claimant could not travel to Australia, that all her losses would be felt in England, and that all material witnesses were based in England (see [65]). It was also accepted that neither the driver nor the insurers had any connection with Queensland, being from Japan and Western Australia respectively. The only thing connecting the claim to Western Australia was the accident, for which liability had been admitted. However, proceedings had been issued in Australia and this proved the deciding factor: "I am nevertheless satisfied that the continued and active pursuit of the proceedings in Western Australia, including the service of a detailed schedule of damages based on evidence obtained, is an important factor to take into consideration under Article 4(3)" (per Sir Robert Nelson at [82]).

There will no doubt be many cases in which proceedings have not been issued in another jurisdiction. Take, for example, road traffic accident claims brought within the EU. Following the Fourth Motor Insurance Directive, claims may be pursued directly against the defendant's insurer. Under Article 9(1)(b) of Brussels I, a claimant, as beneficiary, can sue in the courts of their domicile. This was confirmed in the case of *FBTO Schadeverzekeringen NV v Odenbreit* (C-463/06) 2007 ECR. I-11321; [2008] Lloyd's Rep, IR 354, which was recently approved in the case of *Wall v Mutuelle de Poitiers Assurances* [2013] EWHC 53 (QB) at [1].

In such a scenario, where neither the claimant nor the defendant are nationals of the country in which the accident occurred; where the claimant is living out the consequences of her injuries in her own country; where liability has been admitted so that the only matters to be decided concern the assessment of damages; and where damages are assessed according to the costs of care and treatment in the claimant's home country, surely there has to be a powerful argument that the tort is manifestly more closely connected with the claimant's home country so that the law of that country should apply. Whether this will prove "exceptional" is yet to be seen. Article 4(3) may be less of an "escape clause" but rather a clause that more accurately reflects the centre of gravity of the case and allows justice to be done.

The case is also the first time that arguments have been advanced under Article 14. Suncorp submitted that in bringing proceedings in Western Australia, the Claimant had "evinced an intention to be bound by Western Australian law" (at [79]). This, it was argued, was tantamount to a "non-contractual obligation" under which parties may voluntarily agree to submit themselves after the event giving rise to the damage occurred (Article 14(1)(a)). This held no traction with the Court because Suncorp was not a party to the initial proceedings, which were brought directly against the driver and because, in the circumstances, the Court did not find that the Claimant had much choice.

Assessment of Damage under Procedural Law or Applicable Law

The Claimant's alternative argument for applying English law to the assessment of damages was that the important element, namely the discount factor, was a procedural and evidential

matter, falling outside the remit of Rome II and to be governed by the law of the Court in which it is held, which in the Claimant's case was England.

Article 1(3) explicitly states that: "This Regulation shall not apply to evidence and procedure". Traditionally, English law has treated the assessment of damages as a procedural matter (*Boys v Chaplin* [1971] AC 356; *Harding v Wealands* [2006] UKHL; 32 [2007] 2 AC 1; *Hulse v Chambers* [2001] 1 WLR 2386). However, Article 15 describes the scope of the applicable law as follows (my emphasis):

> "The law applicable to non-contractual obligations under this Regulation shall govern in particular:
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> ...
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> (c) the existence, the nature and **the assessment of damage** or the remedy claimed".

The question is what is meant by "assessment of damage"? Which aspects of the damage assessment are to be applicable law and which procedural? If the phrase were taken to mean "the assessment of actionable damage" then there would have been no change to English law. This interpretation was suggested by Cheshire, North, and Fawcett in *Private International Law*, 14th edn (p.846). However, the face of the Article appears to mean: "The existence and both the nature and assessment of damage or the remedy claimed are to be governed by the applicable law" (per Sir Robert Nelson at [84]).

The Claimant pointed out that Rome II must be read in keeping with Rome I. The equivalent provision in Rome I is Article 12(c), which reads:

> "The law applicable to a contract by virtue of this Regulation shall govern in particular:
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> ...
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> (c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as governed by rules of law."

The Claimant therefore submitted that the words "insofar as it is governed by rules of law" should be implied into Article 15(c) of Rome II, thus re-asserting the distinction in English

law between "heads of damage, which are governed by fact, and hence the law of the forum, and heads of damage governed by rules of law, which are governed by the law applicable" (at [85]). This is also the interpretation placed on Article 15(c) by Cheshire, North, and Fawcett in *Private International Law*, in which it is stated that an early draft of 15(c) contained the words "insofar as prescribed by law" and that there was nothing to suggest the later omission was deliberate (14th edn, page 845). Cheshire, like the Claimant, states that it is "only where the applicable law had rules of law on the measure of damages that the forum was required to apply that rule" (at [90]). As the editor of Cheshire points out, a ceiling on damages in a statute or an international convention clearly involves a rule of law and is subject to applicable law. Questions of fact, however, are more difficult to identify (per Sir Rober Nelson citing Cheshire at [90]):

> "Insofar as the calculation took into account the social and economic conditions in the country, that must be regarded as a question of fact, but the question remained as to whether a particular method of calculation was a rule of law or matter of fact."

The Court rejected this interpretation, holding that the wording of Article 15(c) is clear and that if the words "insofar as governed by law" had been intended, they could have been included (at [92]). Sir Robert Nelson preferred the approach of Dicey and Dickinson in *The Rome II Regulation: The Law Applicable to Non-contractual Obligations* (Oxford, 2008), thus changing English law by "make[ing] the assessment of damages in all cases subject to the applicable law and not, as it was under Harding, the law of the forum relating to evidence or procedure" (at [86]).

In coming to this decision, Sir Robert Nelson heavily relied upon the reasoning Tugendhat J in *Wall v Mutuelle De Poitiers Assurances* [2013] EWHC 53 (QB), in which it was decided that "the [English] court must determine in accordance with its own procedure what evidence was required in order to prove French law, and how it was to be applied to an award of damages" (see *Stylianou* at [91]).

The Court was also comforted by the consistency "with the intention to produce certainty and to reject the law of the victim's country of residence as the applicable law" (per Sir Robert Nelson at [92]). However, the same Court had just demonstrated that the law of a claimant's

country may quite easily be applied as long as a manifestly closer connection can be shown under Article 4(3).

Moreover, the Court did not address the now disparate meaning between Article 12(c) of Rome I and Article 15(c) of Rome II. This is despite the fact that Recital (7) of Rome II specifically states that the provisions should be consistent with Brussels I and Rome I. The whole purpose of these Regulations is to harmonise the law and create predictability. This judgment will allow inconsistency. Take, for example, the employee who sues his employer for a workplace accident in both contract and in tort. The two claims may apply different discounts rates. This state of flux may be settled, however, as the decision in *Wall*, is also in the process of being appealed.

The stated aim of Rome II may well have been to "improve the predictability of the outcome of litigation [and] certainty as to the law applicable" (Recital (6)). However as matters stand it has only raised questions about the remit of Article 4(3) and where the line falls between assessment of damages as matters of evidence or rule of law, creating more uncertainty in the field of private international law.

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