

**DEALING WITH INTERNATIONAL
PERSONAL INJURY CLAIMS**

**KATHERINE ALLEN
IRWIN MITCHELL SOLICITORS**

Acting for clients who have been injured in accidents abroad can be immensely challenging and complex. There are a number of issues that must be considered which do not arise in domestic claims and there are a number of practical problems that need to be overcome throughout the litigation process. This lecture highlights some of the considerations and issues that will be faced.

JURISDICTION

One of the first decisions that needs to be made is which jurisdiction you are going to litigate the claim in. When dealing with European claims, the Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (EC Regulation 44/2001) is the starting point.

Article 2(1) of the Regulation provides as a general rule that people domiciled in Member States shall be sued in the Member State in which they are domiciled:-

“Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”

However the Regulation then provides rules of special jurisdiction in particular cases. The special jurisdiction provisions which are most likely to be relevant in personal injury cases are the provisions in Articles 5(3) and 6(1). Article 5(3) provides that in cases relating to tort, a Defendant may be sued:

“in the courts for the place where the harmful event occurred or may occur.”

Article 6(1) provides that where a Defendant is one of a number of co-Defendants, he can be sued:

“in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.”

What amounts to a sufficiently close connection is a matter for consideration in each case, but it would seem logical that claims in tort against multiple Defendants in a road traffic accident case would be held to be sufficiently closely connected.

In summary therefore, by virtue of the Regulation, the courts that can have jurisdiction in a personal injury case are the courts in the jurisdiction where any of the Defendants are domiciled and/or the courts in the jurisdiction in which the accident occurred. This may mean that in a particular case you will have a choice of jurisdiction, and in this scenario you will have to make a decision as to which jurisdiction is the most appropriate for your claim.

CHOICE OF JURISDICTION

Where you do have a choice of jurisdiction, there are a number of factors that may influence which jurisdiction you ultimately choose to litigate in. These factors include:-

- Liability provisions and applicable law
- Quantum of Damages
- Costs recovery
- Funding

Liability Provisions and Applicable Law

As a general rule, if you choose to litigate your client's claim in the jurisdiction where the accident occurred, then the law of that country will apply to the claim in respect of all issues in the case, whether they be issues of a substantive nature (liability, limitation, heads of damage recoverable) or of a procedural nature (quantum of damages).

However, if you are pursuing the claim in a country other than where the accident occurred, the rules of private international law dictate that the applicable law when deciding substantive issues in the claim is generally the law of the country where the tort occurred. This general rule can be displaced if it is substantially more appropriate to apply the law of another country.

In personal injury cases, therefore, the applicable law in respect of substantive issues in the claim will generally be the law of the country where the accident occurred. Whether or not it will be substantially appropriate to apply the law of another country to substantive issues will depend on the particular circumstances of the case and will involve a consideration of factors including those relating to the parties, the accident and the consequences of the accident.

When dealing with procedural issues in the case, the general rule is that the law of the country in which the claim is being litigated will be the applicable law. Therefore it is perfectly feasible for the substantive issues to be decided by reference to the law of one country and for questions of procedure to be decided by reference to the law of another country.

It is important to note that in July 2003 the European Commission published the "Rome II proposal" on the law applicable to non-contractual obligations. The aim of the proposal is to ensure that courts in all EU Member States apply the same rules to decide which law should apply to cross-border disputes concerning non-contractual obligations. The current draft of the Regulation proposes that the general rule is that the applicable law should be the law of the country in which the loss is sustained, although the parties can agree that a different country's law can apply. There is also provision for special rules to be applied in certain types of claim and, in road traffic accidents, the current draft of the Regulation provides that the applicable law for determining liability issues is the law of the country where the accident occurred but, in cases involving personal injury, the applicable law for determining the quantum of

damages is the law of the victim's country of habitual residence unless this would be inequitable. The proposal is still under consideration in the Council.

When considering the jurisdiction in which the claim should be pursued issues of liability and applicable law may be relevant. In some countries strict liability regimes will be applied or there may be a reverse burden of proof which will assist your client. This will be particularly relevant in cases where liability on a fault basis is a particularly difficult issue. France, for example, has a quasi strict liability regime which applies to drivers of motorised vehicles who cause injury to passengers, pedestrians and cyclists. Spanish courts have also tended to shift the burden of proof in tort law for the protection of consumers so that there is a presumption of negligence by the Defendant in consumer cases which can only be rebutted if the Defendant can show that it took all reasonable steps to avoid the accident.

If there is no strict liability regime or reverse burden of proof, then the legal principles in the different jurisdictions may be very similar in relation to liability issues. For example, what the English courts would deem to be negligent driving upon English roads is also likely to found a civil claim for damages in the courts of most countries with reasonably developed legal systems

Quantum of damages

When considering the jurisdiction in which to bring the claim, consideration needs to be given to the amount of damages recoverable in each of the potential jurisdictions. It may be that not all of the heads of damage you would ordinarily claim for in a domestic claim are recoverable in other jurisdictions. The quantification of damages is also dealt with differently in different jurisdictions. In some jurisdictions, damages may be quantified by reference to a tariff or bareme, whilst in some jurisdictions precedent case law will be relevant.

One of the considerations that will undoubtedly be weighed when deciding the jurisdiction in which to bring your client's claim is in which jurisdiction your client will recover the most damages. Generally in Europe, the amount of damages recoverable in Eire, Northern Ireland and England will be higher than the amount recovered in other countries. An exception to this general rule is in respect of fatal accident claims, where you can generally recover higher sums in many European countries for bereavement, and often for a much wider class of relative, than you can in England.

Costs Recovery

In many jurisdictions, a successful party's legal costs are not recoverable from the losing party. At best only a contribution towards costs and at worst nothing will be recovered from an unsuccessful party. Clearly different jurisdictions have their own costs recovery rules and these should be investigated with lawyers in the relevant jurisdiction(s) and made clear to any client or legal expenses insurer indemnifying your costs.

If any inter partes costs are recoverable it will usually be at a much reduced rate. In some Australian states there is likely to be recovery of up to 60% of the inter partes

costs in any case. In many countries including Greece, Turkey and many Caribbean countries, an even smaller contribution towards costs will usually be recovered in successful cases. In some countries, whilst the costs of the lawyer practising in the jurisdiction where the claim is being litigated may be recoverable, the fees of a lawyer in a different jurisdiction may not be.

The extent of any inter partes costs recovery may be a relevant factor when deciding the jurisdiction in which your client's claim should be pursued, particularly once the potential funding arrangements and likely value of the case have been identified.

Funding

Legal Aid (public funding) is generally now not available for the pursuit of personal injury claims in England and Wales. Even when Legal Aid was available it would, in practice, only be granted for the pursuit of domestic proceedings.

Some jurisdictions do have their own equivalent of legal aid. The form and operation of such schemes does differ from country to country and includes the provision of free or low-cost legal advice or court representation by a lawyer, or sometimes only partial or total exemption from other costs, e.g. court fees, which would normally be levied.

In some circumstances, it may be possible for a foreign party to obtain the benefit of any system of public funding operating in the jurisdiction in which their claim is being pursued. You should obtain the advice of a lawyer in the relevant foreign jurisdiction as to the availability of legal aid in each case and, if necessary, to make the appropriate application.

Most holidaymakers who have been injured abroad will be likely to have the benefit of a travel insurance policy which may contain provision for legal expenses insurance which will indemnify them in respect of the legal costs of pursuing a claim. If not, household contents or other policies may contain relevant cover and clients should always be advised to check all their insurance policies to determine if cover is available. It may be that cover is only available to pursue a claim in a particular jurisdiction and this may be a very relevant consideration when advising a client as to the jurisdiction in which to pursue the claim.

In some countries lawyers may be prepared to enter into a funding arrangement whereby they will only get paid for the work that they do in the event that their client's claim is successful, e.g. Conditional Fee Agreements in England and Wales, and contingency fee agreements in the USA. The form of and obligations under these agreements are likely to vary from jurisdiction to jurisdiction but this type of funding arrangement may make a particular jurisdiction more attractive to a client, particularly in cases where there are likely to be significant and lengthy liability investigations and/or in cases where the initial costs associated with the investigation of liability and/or quantum would be very high and which the client would otherwise have to fund upfront.

HANDLING THE CASE

The use of foreign lawyers as agents

Unless you have suitable qualifications and/or suitable recent experience, in any case involving a foreign accident it is essential that you seek advice from a reliable lawyer, suitably qualified and experienced, in the country where the accident occurred. No matter which jurisdiction the claim is being litigated in, there will invariably be issues relating to the investigation of the merits of the claim, the applicable law, the obtaining of documents and other evidence abroad that an agent can assist with. A good foreign agent will also be able to either provide advice and/or representation in any foreign proceedings or act as an expert in relation to foreign law in English proceedings.

Once you have decided the jurisdiction in which you are going to pursue the claim, the litigation process will begin. If you are able to pursue the claim in the jurisdiction in which you are qualified to practice in, then you will deal with the claim in accordance with that jurisdiction's procedures. You may need to get some advice and/or evidence from a foreign lawyer in relation to any relevant issues of foreign law that may need to be considered in the particular claim, but you will be in control of the litigation and you will be able to actively deal with the litigation process.

However, it may be that you have decided to pursue the claim in a foreign jurisdiction and, if so, you will need to instruct a foreign lawyer to deal with the actual litigation itself. You will need to agree with the agent what steps you are going to take and what steps in the litigation process he or she will be responsible for so that work is not duplicated.

Limitation

When litigating a claim that arises out of an accident abroad, do not assume that the limitation period which applies to domestic claims in your jurisdiction will also apply to the foreign claim. The limitation period differs from jurisdiction to jurisdiction and may also differ for different causes of action within the same jurisdiction. You will need to get advice from a foreign agent as to the limitation period that will apply in your client's claim.

Where you have a choice of jurisdiction, it is good practice to ascertain the limitation period which applies in each of the potential jurisdictions in which your claim can be pursued and to ensure that you interrupt the shortest limitation period that could possibly apply in respect of the claim. The method by which you must interrupt limitation can also vary from jurisdiction to jurisdiction – in some countries limitation can be interrupted by sending a telegram to the Defendant, whilst in others the issue and service of proceedings is the only method available to stop the limitation period running.

Foreign Civil and Criminal Courts

Although in many countries around the world there is a distinction between the jurisdiction of criminal and civil courts, there are examples where a merger of jurisdictions can occur. Even in Europe, there are examples of criminal courts allowing civil claims to be lodged effectively within criminal proceedings, provided they are commenced in time (e.g. France and Spain for claims including those relating to RTAs). Commencing civil proceedings in this way can be a relatively quick and low cost option, but proceedings will often have to be commenced within a shorter time scale than claims in the civil courts.

Police Evidence

If there is a police report in respect of an accident, then, just as with an accident in this jurisdiction, you should obtain a copy of the report. In some countries the police and other official bodies will not release information/reports without a power of attorney in favour of the attorney representing the client, and even then release of the reports can be slow.

It is the practice for drivers from some European countries to carry a document called a "constat amiable" in their motor vehicles which can then be completed at the scene of the accident and which, if signed by all the parties involved in the accident, can be regarded as an agreed statement of facts. Although not legally binding on any Court which later considers any claims for personal injury arising out of the accident, as a contemporaneous document completed at the time of the accident it is likely to be of great evidential value, and it will be difficult to subsequently persuade a civil court that its contents are inaccurate. This presents real problems if, for instance, an English driver unwittingly signs a Constat which wrongly describes that an accident was caused by their neglect.

There is space on the Constat for an accident site plan to be drawn and to identify the damage which has been caused to the vehicles involved. There is also a space provided to briefly state how an accident occurred and to confirm whether any injuries have been sustained.

Of even greater evidential value will be any accident report prepared by the Police. Again, if the report suggests that the accident was the fault of your client, strong evidence suggesting otherwise will need to be obtained to persuade a Court not to accept the evidence of the police report.

Conclusions reached by police in their reports, and similarly reached by criminal Courts in any criminal proceedings arising out of an accident, will not normally bind the civil courts but will be highly persuasive.

Medical Evidence

Some foreign countries do not have any legislation equivalent to the Data Protection Act 1998 which gives English patients a right to access to their medical records and

therefore, if a client has been treated abroad, it may be very difficult to obtain copies of medical records. There may also be obvious language difficulties in requesting records and arranging for payment. This is another task in which the services of a foreign agent may be of great assistance. An agent's fees will often be worth paying rather than sustaining significant delays in obtaining records and x-rays.

The instruction of medical experts may also cause problems. The following are some of the issues that will need to be considered:-

- The use of a domestic expert in foreign proceedings can be problematic. This is particularly so in jurisdictions that have completely different methods of quantifying damages. For example, in France, French experts prepare reports with reference to scales which determine the value of the claim for pain, suffering and loss of amenity. Domestic experts may have no knowledge or experience of applying these scales, severely reducing the expert's use. In some countries, the Courts will not accept the evidence of a foreign expert as having the same weight as an expert from within their own jurisdiction. The advice of a lawyer practising in the jurisdiction where the claim is being litigated should be sought before costs are incurred in instructing an English expert in such cases.
- The use of foreign experts can also pose its own problems. There is the practical difficulty of identifying a suitable expert and the advice of a lawyer in the jurisdiction where the claim is proceeding could make the difference between instructing a good as opposed to a bad expert, or an objective as opposed to a partisan expert. Of course your client will normally have to be examined by that expert if a report is to be prepared and therefore will usually have to travel to the country where the claim is being pursued for this purpose. An expert who speaks the same language as your client or a good interpreter is essential for a successful examination.
- In some countries, for example, France, Belgium and Spain, medical experts may be appointed by the Court and the lawyers conducting the case will normally have very little input in the selection of the expert. Precise methods of selection vary from country to country, and sometimes from court to court.
- In some foreign countries there may be a more limited range of experts available than you are used to in your own country. Some jurisdictions do not have a well developed system of specialisation and therefore reports may not deal adequately with all relevant issues. In cases where the appointment of experts is at the discretion of the parties, discussion about the identity and specialisation of the expert with your agent would be well advised.

Non-Medical Experts

In England it is accepted that the evidence of non-medical experts may be required in respect of a variety of issues. For example, the evidence of a road traffic accident reconstruction expert, ski-ing or swimming pool construction expert may be required to assist on liability issues in an appropriate case. A host of other experts, from care consultants to case managers and architects, may be considered appropriate to assist the English courts in the quantification of larger claims.

However, in some jurisdictions there may be no suitable experts available to give such evidence and you will need to discuss with your agent the best way of putting any relevant non-medical expert evidence before the court. The court may also not allow non-medical expert evidence to be adduced or may restrict the extent of any such evidence. It is advisable to check the position in this regard with a foreign agent before incurring the cost of any reports from such experts.

Disclosure

In a case being conducted in a foreign jurisdiction, the procedural law of that country will be applied, including any rules on disclosure. These may differ substantially from the procedural rules that apply in your jurisdiction. You will need to seek advice from your agent as to the obligations of the parties in respect of disclosure.

Settlement/Attending Trial

If the claim is proceeding in a jurisdiction other than the jurisdiction in which you ordinarily practice, then any foreign agent that you have instructed is likely to be undertaking any settlement negotiations on your behalf. You will need to ensure that your agent is aware of the extent of any authority he has to settle claims without reverting to you and/or your client. You will also need to be advised by your agent as to the procedure once settlement has been agreed, e.g. what documents, if any, have to be signed by your client in respect of the settlement, where do these documents need to be filed, is the settlement complete until such paperwork has been sealed by the court?

If a settlement cannot be reached, either through negotiation or mediation, and the matter proceeds to trial, you will need to liaise with your agent as to whether the attendance of the client, and any witnesses and/or experts in your jurisdiction will be required. If so, arrangements will need to be made and it is important to bear in mind right from the start of the case that the costs associated with this can be significant and may have a bearing on the economics of the case.

Once judgment has been given in any case pursued in a foreign jurisdiction then, depending on the outcome, you will also need to get advice from your agent as to the likelihood of an appeal being made by the opposing party, the feasibility of lodging an

appeal on behalf of your client, the grounds on which an appeal can be pursued, the prospects of success of such an appeal and the likely costs involved.

ENFORCING JUDGMENT

If you are pursuing a claim against a Defendant in a jurisdiction which is not the Defendant's country of domicile, you may need to consider whether or not any judgment obtained against him can be enforced against him in his country of residence.

The procedure for recognition and enforcement of judgments in all Member States of the European Union other than Denmark is contained within:-

- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; and
- Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

Denmark has not adopted the above Regulations and so the Brussels Convention applies to the relationship between Denmark and the other Member States. The Brussels and Lugano Conventions will also apply in any country which is a signatory to either of these Conventions and is not a Member State of the European Union.

If the Defendant is domiciled in a country which is not a signatory to the Brussels or Lugano conventions, or in a country which is not a Member State of the European Union and therefore is not covered by the above Regulations, you will need to check with a lawyer in the country where the Defendant is domiciled whether the judgment you have obtained can be enforced against the Defendant under the laws of that country.