

Foreign RTA Claims: What could possibly go wrong?

Philip Mead

3 April 2025

Krakow

12

King's Bench Walk

09/04/2025

www.12kbw.co.uk

 @12KBW

What is different about Rome II claims?

- ❖ Importing:
 - foreign law/rules
 - foreign discretion
 - (foreign) evidence of fact
 - foreign experts
- ❖ Challenge: making assumptions based on one's own experience of your legal system which will be valid for the conduct of the foreign claim
- ❖ Applies to both the lawyer conducting the litigation and the lawyer whose expertise is being imported

Before you issue [1]

- ❖ Limitation
- ❖ How long?
- ❖ Can you interrupt limitation?
- ❖ How do you stop the clock?
- ❖ Do you need to issue proceedings?
- ❖ Is limitation the same against the insurer as the tortfeasor?
- ❖ Are children/protected parties treated differently?
- ❖ Is your know-how up to date?
- ❖ Is it sensible to cover-off with up to date advice?

Before you issue [2]

- ❖ Who can sue?
- ❖ Fatal accidents: who can claim? Is there one claim or several claims?
- ❖ Who has suffered loss: gratuitous care – loss of the primary victim or the care provider?
- ❖ Does the employer have a claim?
- ❖ Are there hospital or social security expenses that are (or should be) recoverable by the injured Claimant?

Service of proceedings

- ❖ Check period of validity of claim form
- ❖ Service within limitation
- ❖ Translation
- ❖ Method of service valid in the State of Service
- ❖ Proof of service (need for Summary Judgment; Enforcement)
- ❖ Serve on the claims representative (Spedition Welter)
- ❖ [UK: need for permission to serve out of the jurisdiction]

Early Liability Considerations

- ❖ Can you get hold of the police file?
- ❖ Do you need a local correspondent?
- ❖ Is there a criminal case?
- ❖ Do you wish to participate?
- ❖ How to participate without prejudicing a civil claim in your own Courts?
- ❖ Can you take advantage of other proceedings/findings of fault/liability?
- ❖ Quality of the local evidence/police report?
- ❖ Need for early accident reconstruction evidence?

Contributory negligence

- ❖ Is it always the same?
- ❖ Where no fault liability applies?
- ❖ Was there an adequate investigation of the fault of the tortfeasor?
- ❖ Do you need medical evidence to establish causation?
- ❖ Or other experts (eg seatbelt expertise)?
- ❖ Proportionate reduction for acts of the passenger (Candolin/Wilkinson)?

Witnesses of Fact: Evidence by Videolink

- ❖ Time zones and running order of witnesses?
- ❖ Translation?
- ❖ Witness accompanied by a lawyer?
- ❖ Anyone else in the room?
- ❖ On mobile phone?
- ❖ Back-up needed?
- ❖ Working audio?
- ❖ Bundle?
- ❖ Holy book to swear an oath?

Need for Permission from a Foreign Government?

- ❖ Position of Hague Convention countries available on Convention website:
<https://www.hcch.net/en/publications-and-studies/details4/?pid=6546&dtid=42>
- ❖ Many others are on the UK Government's Guidance website:
<https://www.gov.uk/guidance/taking-and-giving-evidence-by-video-link-from-abroad#tribunals>
- ❖ France: Permission required (from French Central Authority).
- ❖ Germany: Videolink evidence not allowed.
- ❖ Greece: Permission required (from Greek Court).
- ❖ Spain: Permission required.

Expert evidence: the problem of Importation

- ❖ Issues of fact/evidence for the law of the forum
- ❖ NB: Courts, not Experts, judge veracity of witnesses
- ❖ Substance of the law for the Expert
- ❖ What if the way [forum] law treats evidence differs from foreign law?
- ❖ What if the way the [forum] Court deals with expert evidence differs?

The Essential Qualities of an Expert

- ❖ Whether the Expert Witness is Impartial in their presentation and assessment of the evidence
- ❖ Whether there is a reliable body of knowledge or experience to underpin the expert's evidence
- ❖ Overriding duty to the Court
- ❖ Duty of the expert: to be independent; provide objective unbiased opinion in relation to matters within their expertise; state facts and assumptions; state questions outside their expertise
- ❖ Includes duty to identify a range of opinions

Expert Opinion Evidence and Ipse dixit

- ❖ Need for separation of Fact from Opinion.
- ❖ Foreign expert should not be opining on how to prove questions of fact: Eg: a foreign law expert states in their Opinion: “In accordance with [the Foreign law], this head of pecuniary loss is recoverable provided the Claimant is able to provide receipts for the expenditure incurred.”
- ❖ *“What really matters in most cases are the reasons given for the opinion. As a practical matter, a well-constructed expert’s report containing opinion evidence sets out the opinion and the reasons for it. If the reasons stand up, the opinion does, if not, not.”*
- ❖ *“As with judicial or other opinions, what carries weight is the reasoning, not the conclusion.”*

Foreign law evidence: questions in advance for the foreign expert

- ❖ How to evidence foreign law?
- ❖ How to describe and evidence discretion/matters of appreciation of the Judge?
- ❖ Is there a band of reasonable responses?
- ❖ What is outside the band of reasonable responses (ie unreasonable/impermissible/wrong)?
- ❖ What happens in systems with no binding appeals/precedent?
- ❖ Can you say position of the other side is wrong?

Questions to Consider (I)

- ❖ Is your expert bomb-proof?
- ❖ Do they understand the exigencies of cross-examination?
- ❖ Do they adequately reason their opinion?
- ❖ Do they express a range of opinion; if not why not?
- ❖ Are they advocating for one side, or giving that appearance?
- ❖ Is their opinion supported by other cases or published doctrine? If yes, is that evidenced? If so, how?
- ❖ Is there risk attached or uncertainty in the issue?

Questions to Consider (2)

- ❖ Proof of injury/loss = question of fact (for the law of the forum)
- ❖ Assessment of quantum (for the foreign law)
- ❖ Medico-legal aspects: Fact or Law?
- ❖ Does the Expert deal with issues of factual evidence or medical evidence?
- ❖ Use of a medico-legal assessor: to assess percentages of disability or categorization under the bareme?
- ❖ Is the medico-legal expert accepting facts as provided in the medical evidence? If not, why not?
- ❖ Does the legal expert refer to an assessor for an Opinion? Or ask questions of the medical experts? Do you need a separate medico-legal expert?

Questions to consider (3)

- ❖ What happens where foreign law does not in practice recognize particular heads of loss?
- ❖ Case management costs?
- ❖ Accommodation claims?
- ❖ Future losses and uncertainty? Matter of evidence or of law?

12

King's Bench Walk

Thank you.

09/04/2025

www.12kbw.co.uk

 @12KBW