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Wall v Mutuelle De Poitiers Assurances [2013] EWHC 53 (QB)

By Daniel Clarke - 28 June 2013

Applicable law - Rome II

Summary

One of the most radical and obvious changes brought about by Council Regulation 864/2007 ("Rome II") is that it affords a much greater scope of application to the applicable law than previously.

Of particular relevance to personal injury lawyers is the extension effected by Article 15(c). This provides that the "applicable law" governs "the existence, the nature and the assessment of damage or the remedy claimed". The applicable law therefore now governs not just what heads of loss may be claimed in a particular case (as pre-Rome II) but also their quantification (previously the preserve of English law).

But how far does the scope of the applicable law (and indeed Rome II itself) extend? Article 1.3 of Rome II makes it clear, in principle, that Rome II "shall not apply to evidence and procedure..." But where is this line to be drawn? The recent High Court decision of Wall v Mutuelle De Poitiers Assurances [2013] EWHC 53 (QB) considered this question in the context of the provision for expert evidence in a large personal injury claim.

25 January 2013

High Court, Queen's Bench Division

Tugendhat J

The claimant (who is English) suffered "very severe" injuries in a motorcycle crash with a French driver while on holiday in France in 2010. There was no dispute that French law was the "applicable law" within the meaning of Article 4.1 of Rome II. Liability was admitted. A claim was then issued directly against the French driver's insurer.

The Court was asked to determine as a preliminary issue whether the issue of what expert evidence the Court should order fell to be determined by reference to English law and practice or French. In particular, the Court was required to determine the scope of "evidence and procedure" in Article 1.3 and "applicable law" in Articles 4.1 and 15(c).

This was important on the facts because the approaches of the 2 jurisdictions differ greatly. The claimant sought permission "as is customary in English litigation of this kind" to rely upon reports of 8-10 separate experts. These included spinal injuries, clinical psychology, care, rehabilitation costs, accommodation, assisted technology, neuro-physiotherapy, transport, and employment or accountancy.

By contrast, the defendant submitted that the Court should follow the French practice. This was because "law" within the meaning of Article 15(c) included the practices, conventions and guidelines regularly used by judges in assessing damages in the courts of the state whose law was the applicable law. Only by this method could the Court achieve the legislative purpose of Rome II and arrive at a figure for damages which would actually be awarded in France.

The French practice is far more restrictive. It entails giving permission for only 1 expert (exceptionally 2). This expert may collate the evidence of other, more specialised experts - "sapiteurs" - who do not report directly. One can see that the defendant's suggested approach was likely, if nothing else, to greatly reduce costs.

Decision

The Court rejected the defendant's approach. Questions about expert evidence, particularly how many experts should be permitted to give evidence, were a matter of "procedure" within Article 1.3, and therefore fell to be determined by reference to English law as the law of the forum. They fell outside Rome II altogether.

Further, CPR Part 35 did not provide for the Court to give permission to a single expert to convey to the Court the opinions of other experts whom she or he has consulted on matters outside their own expertise. The Court was not required to put itself in the position of a court in France and to decide the case as that court would have decided it. The English Court was not required to adopt new procedures.

Comment

The Court therefore gave a clear answer to the question directly before it. It also laid down a more general marker. Tugendhat J approved several passages from **Dicey & Morris** and Dickinson, **The Rome II Regulation: The Law Applicable to Non-Contractual Obligations.** These were to the effect that "evidence and procedure" in Article 1.3 should be interpreted narrowly so as to apply only to matters which are "an integral and indispensable feature of the forum's legal framework for resolving disputes, such that they cannot satisfactorily be replaced by corresponding rules of the applicable law".

Nevertheless, "evidence and procedure" would still cover matters such as the constitution and powers of courts, case management (potentially quite a wide spectrum of matters), mode of proof of facts, costs and the mode of trial.

This guidance may well prove to be of assistance in resolving future disputes. But it is only in general terms. Future cases are bound to throw up difficult and borderline cases. **Wall** is likely to be but the beginning of the process of establishing more precisely the limits of Rome II and the applicable law.