

**Handling Foreign Claims  
The Practicalities  
PIBA 10<sup>th</sup> November 2018**

# Cross Border Cases

## Examples

- English domiciled individual injured in foreign country
- Foreign Domiciled individual injured in E and W
- English domiciled individual injured in E and W and moving abroad
- Actions in different places
- Impact of Rome II and private international law
- But ...let talk practicalities
- Some tips rather than too much dry law

## Impact of these claims

- Suddenly victim and family
- Have to contend with the immediate aftermath of the accident
- May have to deal with issues thrown up by what happens to others
  - Clinical issues in foreign setting
  - Practices may be quite different
  - Potentially language barriers
  - Cultural issues
  - Medical and general insurance issues

## What is required

- Actually a lawyer maybe the last person required
- But will often be the first
- But insurers note
  - Case manager may be one of the most important
  - With clinical skills
  - Maybe language skills
  - Versatile
  - Committed
  - A good manager

# What may be required – accident UK or elsewhere

- Liaison with hospital in locality
- Liaison with family
- Funding for relatives arriving or staying longer
- And repatriation
- If seriously injured here
  - May want to start rehab here
  - Maybe more joined up here
  - Head injury rehab
  - SCI Rehab

## Example

- US and SCI
- Extremely good acute care – but at a price
- But
  - Few if any rehab centres like Stoke or Oswestry
  - Aim to discharge patients quickly
  - May be better to aim for repatriation of UK residents once medically stable
  - And maybe better for patients and family

## Likewise

- Claimants injured here
  - Maybe better rehab here than at “home”
  - Though NHS charges will apply – and if issues on liability need to remember that
  - But if possible then may be appropriate
  - Requires
    - Sympathetic or responsible insurer
    - Preferably under rehab code
    - And with an eye to the family too
  - For insurer – may set the tone with C

## Who should manage once repatriated

- Maybe a mix of case manager and lawyer
- But clinical needs – always better for a case manager
- Can be done at distance
- But needs regular visits
- Funding
- Interims
- And the rehab code
- Again for insurers – may set the tone



## **The case**

- Will differ obviously according to whether accident in E and W and C overseas
- Or if C based here and is injured overseas, Spain, Portugal, Italy , Poland the US or elsewhere
- Who is D
- Who is the insurer
- What is the indemnity limit
- How used is the insurer to practices here
- In the ordinary course of events – if an accident in Europe will generally want to start here

## Evidence

- Assuming case is going to be run in England and Wales
- Still need evidence
- And if liability in dispute sooner rather than later
- Take an RTA
  - If serious the recon expert to go as soon as possible
  - Roads may change – harder to follow
  - Not actually so much more difficult than when at distance
  - If lay witnesses – use agents
  - Or make sure a good interpreter
  - And that statement is taken then translated

## **Evidence (2)**

- Police report
- Local criminal proceedings
- Limitation – interrupting if necessary
- But keeping on top of case in any event and making it timely
- Seat belt issues – preserving the car for examination
- May all point to using a local agent – especially in larger cases
- If liability contested then will want to know
  - What the local law is
  - Agent can help
  - But remember expert will generally need to be separate

# Experts

## ➤ Foreign law experts

- You want them to be expert ( *Farraj – 3 experts only one criminal – also needed to be experts in Sharia law*)
- Preferably in the area of law concerned ( not a business lawyer)
- May want to know about “soft” law e.g. guidelines as well
- Ideally with good English – but an interpreter at trial
- The detail of instruction is vital
- And if a case of significance meet with them to go through all
- Understand the nuances
- And remind them – the Court is applying the law of the foreign country
- Not seeking to get to the same result

# Experts

## ➤ Medical experts

- After *Wall v Mutuelle* conventional approach
- If a tariff or points based system (Portugal) may want to use a local expert to draw the case together in this sense
- Otherwise may want to approach it in much the same way as domestic
- Remember in this context as in liability not seeking to get to the same result as might apply in foreign country – whether Portugal, France Spain or elsewhere
- And if client overseas – consider what can be local and what needs to be sourced in E and W – and who flies where

## Going to Trial

- How will court approach the case
  - If a reverse burden of proof – should D start ?
  - Or may that give D a tactical advantage
  - How different is the law – e.g. on contrib ?
  - Is there a pragmatic approach
  - Often the rules will approximate to the rules in E and W
  - And much to be said for keeping it simple
  - Though reverse burden of proof may often assist
  - Remember that for insurer our approach may be quite different to what they are used to – costs

# Costs

- A mixed experience
  - But make sure Court is alert to difference in running a case overseas
  - The need for
    - Experts to travel distances – certainly the key ones
    - And the cost of that
    - Client consultations
    - Use of counsel who is familiar with the case
    - And make plain the difficulties e.g. in ADR and also at trial
  - Costs budgeting
    - A different test for proportionality ?
    - And no reason for a different quality of service
    - May lead to a premium on costs

# Valuation

- Will differ from case to case
  - But if money is to be spent overseas for a claimant injured here
  - Will need to adapt tools and seek expert evidence
  - As to discount rates
    - Different economic conditions
    - Different inflation
    - Maybe much lower costs – so far
    - But convergence of economies ...
    - And multipliers may be dramatically different
    - Negative discount rates
    - Helmot v Simon
    - Use of Periodical payments
    - Appropriate index linking



- Learning more
  - About the law
  - And practice
  - And which experts
  - And how to run a case
  - Get involved
    - PEOPIL
    - APIL
    - AAJ
    - Seminars
    - Reading

## **US cases**

- Quite different
- 50 states
  - Each with its own law
  - So venue may be important
  - Even within states- different counties may have nuances
  - And choosing the right lawyer more vital than ever
  - State or Federal Court ?
  - Enough for a whole seminar

## US venue

- Where is most favourable venue
  - What rules may limit recovery in different states – caps on non economic loss partic in Med Mal
  - *Forum non conveniens* as between states
  - 50 separate State Bars
  - May engage local lawyers but a more expert firm overseeing and running the case
  - *Pro hac vice* for the trial

# Liability

- Before liability – coverage
  - RTAs
  - Typically \$ 25,000 min coverage
  - No MIB
  - Many issues around vicarious liability
  - Issues for UK citizens driving in the US
- Liability – much as here
  - Duty of care
  - Breach
  - Injury
  - Causation

# Damages

- Vary from State to State
  - Theories much as here
  - Jury awards
  - Non economic loss may be much more
  - Wrongful death typically much more than here
  - Techniques of evaluation
    - Experts may include economists
    - And video evidence

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