Damages and the foreign claimant

How European law influences damages in Australian tort cases – the effect of Rome II

By Richard Royle

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The changes to the tort laws that occurred around Australia in 2002 raised the issue of having matters involving foreign claimants injured in Australia assessed under foreign law.

Traditionally, Australian practitioners have commenced proceedings in Australian courts on behalf of foreign claimants who have been injured in Australia. This appeared sensible, as the applicable substantive law is that of the *lex loci delicti*. The decision in *John Pfeiffer Pty Ltd v Rogerson*[1] concerns torts occurring within Australia and, in *Regie Nationale des Usines Renault SA v Zhang*,[2] the High Court extended the *lex loci delicti* rule to international torts heard in Australia.

However, the tort law changes have prompted a move to commence cases involving accidents in Australia in other jurisdictions. The English courts distinguish between the liability issues and quantification of damages. While substantive issues of liability are governed by the law of the place where the injury occurred,[3] assessment of damages is considered a question of procedure. This principle was reiterated by the House of Lords in the case of *Harding v Wealands*.[4]

HARDING v WEALANDS

The plaintiff was an Englishman rendered tetraplegic in a motor accident on a dirt road near Huskisson in NSW. Negligence was admitted, and the plaintiff litigated his matter in England. The UK High Court held that the damages provisions of the *Motor Accidents Compensation Act (NSW)* (MACA) were procedural law, which should be governed by UK principles. Consequently, the more advantageous common law assessment of damages in the UK applied. Generally speaking, a personal injury case assessed under current Australian law will achieve about 30 per cent less than an assessment under UK law.[5]

In *Harding v Wealands*, the defendant happened to be domiciled in the UK, so that he could be served within the jurisdiction. The recent case of *Cooley v Ramsey*[6] established that proceedings commenced in the UK could be served on an Australian defendant in relation to an accident occurring in Australia.

COOLEY v RAMSEY

In *Cooley v Ramsey*, the English plaintiff was a temporary resident of Australia on a two-year '457 visa', when he was severely injured by an Australian citizen in a motor vehicle accident. He was subsequently repatriated to the UK. Liability was admitted by the NSW insurer, and *ex parte* leave was granted to serve UK proceedings outside the jurisdiction.

The NSW insurer challenged the leave. At issue was whether the plaintiff had suffered 'damage' in the UK. The defendant argued 'damage' had been completed when the plaintiff was injured in Australia, and the economic loss, pain and suffering, etc, experienced in the UK was simply the consequences of the damage. Justice Tugendhat[7] followed the decision of *Booth v Phillips*[8] in deciding that economic loss counts as 'damage' within the meaning of the UK Civil Procedure Rules.[9] This is in line with the approach to 'damage' taken by the Australian High Court.[10]

In response to *Harding v Wealands*, Queensland and NSW parliaments have amended their respective motor vehicle legislation so that the damages restrictions are now substantive law, and any judgment in another jurisdiction that exceeds that which could be recovered under the relevant state law amounts to a debt that can be recovered from the claimant by the defendant insurer.[11] A legislative assertion that the damages legislation is substantive is unlikely to sway a foreign court. Indeed, such an assertion in other legislation has failed to impress the NSW Court of Appeal.[12]

Further, an insurer having paid a judgment registered in

Australia from a foreign court might seek to obtain its own judgment against the plaintiff for the difference between the foreign judgment and the theoretical NSW assessment. It remains to be seen if such a judgment would be enforced by the foreign court, since it would effectively override its own earlier decision!

ROME II

On 11 January 2009, *Regulation (EC) 864/2007*[13] on the law applicable to non-contractual obligations (Rome II) came into force in the UK and all European Union (EU) states. Where it applies, Rome II will replace the previous choice of law rules contained in the *Private International Law (Miscellaneous Provisions) Act 1995 (UK)*. This (1995) Act was the basis upon which the House of Lords permitted an assessment of damages under UK law in *Harding v Wealands*.

Rome II applies to all proceedings brought in the UK and other European Contracting States (EU countries), whether a conflict of laws arises in relation to a member state of the EU, or another country.[14] Therefore, it would apply to proceedings brought in England relating to an accident occurring in Australia.

> The preamble to the regulation includes the following: 'Uniform rules should enhance the foreseeability of court decisions, and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.
>
> The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.'[15]

The regulation reflects the European Commission's direction that it should have universal application, and be applied whether or not it is the law of a member state.[16]

THE PLACE WHERE THE DAMAGE OCCURS

Article 4(1) states a general rule that the law applicable in any tort or delict matter '*shall be 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*'.[17] To date, European rules have not defined whether the place in which '*the damage occurs*' (in relation to earlier legislation)[18] includes the place the damage was felt or where it was initiated.

In *Marinari v Lloyds Bank Plc*,[19] it was held that the '*place where the damage occurs*' could not be construed to the extent that it may '*encompass any place where the adverse consequences of an event that has already caused actual damage elsewhere can be felt*'.[20] In *Marinari*, economic loss was alleged to have occurred in many different jurisdictions. Thus, the European court was keen to restrict this definition to prevent the undesirable position of a right to litigate using the law of multiple jurisdictions.

Commentaries on Rome II appear to assume that pain and suffering and economic loss are indirect consequences of an event, and thus preclude assessment of *Harding v Wealands*-type claims under UK law. This would seem a fair interpretation of the preamble, which refers to the law of the place '*where the injury is sustained*'. It remains to be seen whether UK courts will follow this line, or interpret pain and suffering as a direct consequence of the event that caused it.

A recent guidance on Rome II provided by the UK Ministry of Justice[21] suggested that, in the context of claims for personal injury, the place of damage will generally be the place where the victim suffered the injury.[22]

An exception to the general rule is set out in article 4(2), which states: '*where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the same time when damage occurs, the law of that country shall apply*'.[23]

Article 4(2) is an inflexible rule and the only scope for argument is whether there is in fact common 'habitual residence'. Presumably, the case of *Harding v Wealands*, where both defendant and plaintiff were UK tourists in Australia, could rely on article 4(2) to claim common habitual residence in the UK, and thus invoke UK law. >>

A personal injury case assessed under current Australian law (MACA) is likely to achieve about 30% less in damages than under UK law.

An 'escape clause' for the general rule has been included, in article 4(3). The European parliament explains its need in the preamble, as follows:

> 'The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. This regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore this regulation provides for a general rule but also for specific rules and, in certain provisions, for an 'escape clause' which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/ delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict of law rules. Equally, it enables the court seised to treat individual cases in an appropriated manner.'[24]

Thus, individual courts can look at each case on its merits and consider whether that court is the most appropriate jurisdiction. Article 4(3) specifically states that if '*...the tort/ delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply*'. The article specifies that the manifestly closer connection with another country '*might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question*'.[25] In a personal injury context, it could be argued that a tourist, injured in a foreign country, by a person from a third country, who is repatriated to their habitual residence, may be able to show that their habitual residence is '*manifestly more closely connected*' to the tort than the country of the *lex loci delicti*.

Article 4(3) is in similar terms to s12 of the *Private International Law (Miscellaneous Provisions) Act 1995*, save that the word '*substantially*' in s12 is defined as '*manifestly*' in article 4(3). It is unclear whether this invokes a higher standard.

Article 15 sets out in specific terms what it governs. This includes '*the existence, the nature and the assessment of damage or the remedy claimed*'.[26] Interestingly, it also includes limitation law as being substantive.[27] It is unclear whether some of the processes of assessment of damages, which may be determined by practice rather than by law or rules, will fall to be determined as procedure or substance. Rome II does not apply to procedure and evidence.[28]

Tariffs or multipliers are arguably matters of procedure, and thus determined by the law of the forum. But nothing in article 15 makes this clear. Substantial powers still remain with the law of the forum, including provisions, that may apply in the country of the forum and are regarded as '*mandatory*'.[29] Further, the country of the forum may refuse to enforce any law that is '*manifestly incompatible with the public policy (ordre public) of the forum*'.[30]

CONCLUSION

There is no doubt that Rome II will significantly affect personal injury practice in some cases with a foreign element, particularly in relation to the assessment of damages. However, it is yet to be determined whether UK residents injured in Australia will be able to continue to benefit from the advantages of UK damages if they sue in the UK. Certainly Rome II is another attempt to reduce the incentive for forum-shopping.

The current state of the law would permit Australian cases to be heard in the UK, whether or not UK law applies. There will be circumstances where it is more convenient for a UK court to hear the matter and impose Australian law. Conversely, Australian courts will continue to hear matters involving foreign torts.

There is likely to be an increase in European courts applying foreign law. It is debatable whether this will simplify the courts' ability to deal with tort cases that have a foreign element. ■

Notes: **1** *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503. **2** *Regie Nationale des Usines Renault SA v Zhang* (2002) 76 ALJR 551. **3** See note 1. **4** *Harding v Wealands* [2006] UKHL 32 (House of Lords). **5** See comment of Lord Hoffman in *Harding v Wealands* [2006] UKHL 32 @ [18]. This is mainly due to the fact that the UK discount factor is 2.5% and there are no restrictions on care. **6** *Cooley v Ramsey* [2008] EWHC 192 (QB). **7** *Ibid.* **8** *Booth v Phillips and Others* 204 1 WLR 3292. **9** Part 6.20(8)(a). **10** See *Flaherty v Gergis* (1985) 63 ALR 466. **11** S57A *Motor Accidents Insurance Act (QLD)*, s123, *Motor Accidents Compensation Act (NSW)*. **12** *Hamilton v Merck & Co Inc* (2006) NSWLR 48. **13** Applies in respect to proceedings commenced from 11 January 2009 and, most likely, to events giving rise to damages that occur after 19 August 2007. **14** See article 3 of Rome II. **15** Preamble to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). **16** Article 3 of Rome II. **17** Article 4(1) of Rome II. **18** See Article 5(1) of the *Brussels Convention*, in relation to the appropriate jurisdiction in tort cases between contracting European States. **19** *Marinari v Lloyd's Bank Plc* [1996] QB 217. **20** *Ibid*, at para 14, p229. **21** Guidance on the law applicable to non-contractual obligations (Rome II) 9 February 2008. **22** Ibid, para 9. **23** Article 4(2) of Rome II. **24** See note 15 above. **25** Article 4(3) of Rome II. **26** Article 15(c) of Rome II. **27** Article 15(h) of Rome II. **28** Article 1(3) of Rome II. **29** Article 16 of Rome II. **30** *Ibid.*

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