A foreign affair

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provide a legal & medico-legal perspective of expert evidence in foreign applicable law cases

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IN BRIEF

- What evidence is needed in practice to assess a claim for personal injury damages under a foreign applicable law?
- How should you go about gathering this evidence in a foreign applicable law case?

It is well over two years since the Court of Appeal gave judgment in *Wall v Mutuelle de Poitiers* [2014] EWCA Civ 138, [2014] 3 All ER 340, but questions remain as to the appropriate approach to obtaining expert evidence in English court proceedings for personal injury damages when a foreign applicable law applies under Article 4.1 of Rome II (Regulation (EC) No. 864/2007).

The decision in *Wall v Mutuelle de Poitiers*

Mr Wall sustained a serious spinal cord injury following a motorcycling accident in France. The parties could not agree on how expert evidence should be provided to the English court under Rome II. Mr Wall argued for the plethora of experts (10 in total) one would usually expect to see before the English courts in a claim for catastrophic injuries. Contrast this with the French insurer's position: it was arguing that the case should be quantified with reference to the report of one expert alone in accordance with the French Procedural Code.

The Court of Appeal agreed with Mr Wall that the question of how expert evidence should be adduced is a question of "evidence and procedure" which falls to be assessed in accordance with the law of the forum under Article 15 of Rome II. So for a claim being pursued in the English courts, CPR Pt 35 would be relevant and Mr Wall would be entitled to rely on the evidence of a range of medical and non-medical experts to support his claim for damages.

The practical approach to obtaining evidence

In *Wall* the Court of Appeal said that "a narrow view of the law is inappropriate. If there are guidelines [relating to how damages are assessed under the foreign applicable law]…judges will tend to follow them".

The practical implication of the Court of Appeal's decision is that the experts instructed to deal with quantum related issues will need to have regard to wide-ranging provisions of the foreign applicable law and legal system to accurately determine the claimant's entitlement to damages, which may include:

- judicial guidance and conventions; and
- tables, tariffs and scales.

In many European countries, including Italy, Spain and France, different tables are used to help quantify the percentage of permanent and temporary harm and that assessment is then used by the judge to determine the award of damages. For instance, in Italy for psychological and psychiatric symptoms the most widely used tables are published in the textbook by Buzza & Vanini.

A separate set of tables, tariffs and scales may then be used by the lawyers to allocate a financial value to the percentage impairment the medico-legal expert has assessed.

"Foreign" or "English" expert evidence?

When an "English" medical expert (with "English" being a reference to their medico-legal reporting experience rather than nationality) is instructed to consider a claimant's level of disability and percentage incapacity under the rules of a foreign legal system there may be resistance from the expert, particularly if the case is pre-costs and case management conference (CCMC) and there is no court order requiring the experts to make that assessment. If the medico-legal expert is going to have to consider an array of "foreign" materials then the parties may be tempted to find a "foreign" expert who is familiar with the relevant provisions.

Whether the parties choose to instruct an "English" or a "foreign" medico-legal expert, in principle the assessment of the injury is likely to be very similar: the expert will consider the impact of pre-existing conditions, current functioning, impact on work, leisure, relationships and future prospects. However, there will be important differences depending on the expert's background and culture. For instance in Italy, under the court rules, the medico-legal expert is not expressly required to deal with treatment recommendations and further health risks. The assessment in Italy is completed only when the claimant is as good as s/he is going to get which means the expert is not required to consider rehabilitation which it is assumed has already taken place. This approach does not sit easily with that encouraged in England where the rehabilitation code is central to the aims of the pre-action protocol.

When obtaining evidence from an expert unfamiliar with Pt 35 of the CPR, the parties should ensure the expert has clear guidance on their duties as an independent expert to the English court and be confident that the expert would ultimately be able to give evidence in person in English proceedings if the case goes to trial.

Experts more accustomed to the rules of evidence in other jurisdictions must be carefully guided on the correct approach under the English CPR. For instance in Italy the experts instructed by the parties are not called in court and are not cross-examined (and they are not required to be impartial); the expert instructed by the court in Italy should, however, be impartial and can be called to court to clarify verbally anything that is unclear, however, questions are

agreed in advance. In Italy the medico-legal doctor may use extracts from the reports of the other experts the parties have instructed, no single joint expert, no joint statement or "hot-tubbing" is available and if the legal teams do not come to an agreement, the case goes to court and a new court-appointed expert is called; the parties can also then instruct new experts.

Experts from other jurisdictions should also be warned that their role is not to tell the court what the outcome should be in terms of damages. This is a particular risk when instructing foreign law experts to provide an opinion on how damages are assessed under a foreign applicable law and who may have a natural tendency to adopt the role of an advocate, contrary to para 2.2 of CPR Practice Direction 35.

The parties could instruct a medical expert who is a native speaker of the country in which the accident took place but who is familiar with preparing reports under CPR Pt 35. A native speaking expert may find it easier to become familiar with the tables used in that country when assigning a percentage of temporary and permanent disability based on the claimant's symptomatology and history. This would ensure that the English rules of evidence are followed and potentially provide a cost-effective route to securing the right evidence. Such experts undertaking medico-legal work are, however, few and far between.

Case management, costs budgeting & the appropriate order at CCMC

When a claimant is considering which expert evidence it should gather to support the claim, in the majority of cases questions of proportionality and costs are likely to be at the forefront of the decision making process. Under CPR, Pt 35.1, the court is required to restrict expert evidence to that which is reasonably required to resolve the proceedings.

When considering the appropriate case management directions in foreign applicable law cases, careful consideration needs to be given to the sequence in which expert evidence is obtained. Before asking the medico-legal experts to finalise their reports, the parties will need advice from a foreign law expert who can identify exactly which provisions the expert must have regard to when assessing the claimant's level of accident-related disability.

The parties should ask the experts to make the assessment of the claimant's injuries, including any percentage impairment under the foreign applicable law/guidelines, so that the court is not being asked at trial to determine issues which more properly fall to a medical expert but which provide the answer to how much damages the claimant should recover.

The case of *Syred v PZU* [2016] EWHC 254 (QB), [2016] All ER (D) 157 (Feb) illustrates the difficulties which can arise here. Polish law applied to Mr Syred's claim for damages for serious head injuries following a road traffic accident in Poland. The English High Court had extensive written and oral evidence before it on the approach to assessing general damages for pain and suffering under Polish law. The lower courts in Poland regularly had regard to an ordinance of the minister of labour and social policy when assessing general damages, even though the practice had been criticised by the Polish Supreme Court. The ordinance requires medical experts to assess the extent of the claimant's incapacity. The medical experts in Mr Syred's case had not done so and the parties invited the judge to make that assessment. He was prepared to assess damages with reference to the ordinance, even though this practice had been criticised by the Polish Supreme Court; the English judge held that it was part of the lawful practice of the Polish civil courts when assessing general damages for personal injury and he was therefore entitled to follow that approach.

At CCMC, the Master or District Judge may want to give clear guidance on the approach the experts should take, specifically ordering the experts to deal with placing the claimant under the tariffs or scales which form part of the binding or non-binding provisions of the foreign applicable law or directing the expert to assess the claimant's level of disability or incapacity under those provisions. The Master or District Judge may include specific questions in the case management order for the experts to consider so as to assist the court when assessing damages, thereby minimising the risk of the judge having to make an assessment at trial which more readily falls to the medico-legal experts in the case.

It is easy to see how the costs involved in obtaining expert evidence to support a claim using the benchmark guidance from the Court of Appeal in *Wall* can become a costly exercise. This is, however, an inevitable consequence of the harmonisation introduced by Rome II. Translation of foreign law evidence and the guidelines the experts need to use could quickly run into thousands of pounds. The approach the English courts may require experts to take will also lengthen the time taken in preparing reports and then in joint discussions as the experts strive to agree any joint statements, particularly given the potential for divergence between experts (even on the same side) when placing the claimant's level of incapacity/ disability using the "foreign" criteria. Those additional costs need to be factored into each side's Precedent H and the parties will need to be ready to provide a justification for the budgeted costs going above what might be considered the norm in any comparable domestic case where issues of foreign law do not arise.

Concluding thoughts

Those representing claimants will need to be pragmatic in their approach, building a bank of precedent documents, establishing close links with lawyers in other jurisdictions and, crucially, providing clear guidance when instructing experts to ensure claimants injured in accidents abroad are not prejudiced by both the substance and procedural application of a foreign applicable law, while at the same time managing the costs of the case proportionately.

Of course, depending on the substance of Brexit negotiations following the outcome of the Referendum, in years to come the complications of assessing personal injury damages under a foreign applicable law may fall away and we may see a return to the pre-Rome II position where the assessment of damages falls to the law of the forum. **NLJ**

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