JURISDICTION AND THE ENGLISH CLAIMANT: HEADING HOME OR STAYING 'DOWN UNDER'?

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An overview of the pertinent case law and practical implications for those advising English claimants injured in Australia and beyond.

It is estimated that just over half a million Brits visit Australia each year. For the vast majority, their trip will pass without incident. For the period 2012–2013, however, there were nearly two hundred hospitalisations and deaths combined.[1]

While those who suffer catastrophic injuries are undergoing their immediate care and rehabilitation, relatives who have flown out to be at the bedside often feel helpless and (in a move to do something constructive and meaningful) will often consult a local lawyer, whether of their own volition or perhaps at the suggestion of the British Consulate. Lawyers in other jurisdictions may assume that proceedings must be started in the place where the tort occurred. The current state of English law demonstrates, however, that this assumption is often incorrect. When faced with possible instructions from a catastrophically injured claimant who is habitually resident overseas, the requirement to act in your client's best interests and appropriately manage the risks inherent in any litigation practice are such that the door to proceedings outside of the country where the accident occurred must not be shut prematurely.

This article examines recent cases where the English[2] courts have accepted jurisdiction following an accident in Australia and highlights some of the key practice points to bear in mind when advising claimants who are resident overseas.

Establishing jurisdiction. What the English claimant must show in order to ground the claim in England

Under English law there are only limited circumstances in which the claimant for an overseas accident can bring proceedings in their home court. One clear example is where the defendant is also a resident of England and Wales. The most contentious provision relied on in claims for catastrophic personal injury is found at CPR[3] Part 6 PD B paragraph 3.1(9)(a) which allows the English court to exercise its discretion to hear the claim where 'damage was sustained within the jurisdiction'. The claimant must also show there is a real issue which it is reasonable for the English court to try (this will usually be the case in a claim for catastrophic personal injury damages) and overcome the *forum conveniens* argument i.e. demonstrate that the English court is the proper place in which to bring the claim.[4]

1. Foreign and Commonwealth Office British Behaviour Abroad Report 2013.
2. All references to England in this article apply equally to Wales.
3. References to "CPR" are to the English Civil Procedure Rules.
4. See *The Spiliada* [1987] AC 460 and CPR Part 6.37(3).

In addition, the claimant will need to show that they are habitually resident in England. The habitual residence point requires careful preparation on the part of the claimant and their legal representatives. In *Thomas v James Baker and The Insurance Commission of Western Australia(ICWA)*[5] Ms Thomas was injured when travelling in a vehicle which Mr Baker had purchased locally in Victoria and which had not then been re-registered before the accident happened over the border in Western Australia.[6] Initially her father instructed a lawyer in Western Australia who initially applied to ICWA, was rebuffed and then started pursuing the claim against the Traffic Accident Commission of Victoria.

After her repatriation to England, she instructed English solicitors, who identified that her claim could be brought in England, with the prospect of much higher damages recovery, as described further below. The claimant and her travelling companion had no fixed date for their return to England. Through witness statements and a review of the evidence, the claimant was able to establish England was the habitual residence for both her and the First Defendant. Not only did this enable her to establish jurisdiction, but she was then able to rely on the habitual residence exception under Rome II, such that English law should apply to all of the issues in the case.[7] These points could easily have been lost if the claimant had not consulted personal injury lawyers with experience of catastrophic accidents abroad.

Cases where the English courts have accepted jurisdiction following an accident in Australia

Cooley v Ramsey [2008] EWHC 129 (QB)

Shane Cooley sustained serious head and orthopaedic injuries in New South Wales, Australia and then returned to England where, as one would expect, he continued to incur losses associated with the tort. These included significant care costs. At the time of the accident Shane was living and working in Australia under a working visa where he also rented an apartment. The defendant insurer contended that he only returned to England six months after the accident because his parents chose to bring him back.

The English court held it had jurisdiction to hear the claim.[8] In reaching his decision the judge relied on the principle that the case should be heard in the forum which is most suitable for the interests of all the parties and justice. The fact that liability was admitted was a strong influential factor.

While the admission of liability was a weighty factor in *Cooley*, it was not the only tie which led the judge to conclude that England was the more appropriate forum. Shane Cooley was brought back to England as a "natural consequence of the injuries he sustained"[9]. His family lived here and he was reliant on them to meet his day to day care needs. Further, and this is a

5. Ongoing in the English High Court

6. This initially caused a dispute as to whether it was the TAC or ICWA who should indemnify. ICWA subsequently accepted it was responsible to indemnify in the circumstances, but was reluctant to concede the application of English law until proceedings were served.

7. Regulation (EC) No 864/2007 Art 4.2.

8. Tugendhat J upheld the decision of Teare J in *Booth v Phillips* [2004] EWHC 1437 (Comm) when determining whether damage had occurred within the jurisdiction for the test under the English CPR.

9. Paragraph 55.

point which featured heavily in the case of *Stylianou* (detailed below), the expert and lay witnesses that would be required to give evidence on the only outstanding issue of quantum were all based in England. For Shane Cooley to fully prepare his case he would need to be in close contact with his legal advisors.

From a practical point of view therefore it was better that the case proceed in England rather than the seriously injured claimant having the practical difficulty of liaising with legal representatives in New South Wales. This point may not carry as much weight in other countries where the time difference is less of an issue; the judge noted that "not only is the distance very great, but the difference in time means that telephone or video links are difficult to use effectively".[10] And those were comments made in an age where the courts are accustomed to video links and telephone conferences, as are legal representatives who specialise in international areas of law.

One of the more insightful factors that persuaded the judge that Shane Cooley's claim should be heard in England was the importance of knowing the local environment in which he would be spending the rest of his life. This is an important point; house prices in England differ significantly to those in New South Wales. An English resident claimant may struggle to persuade a NSW judge that such high future accommodation costs should be recovered from the defendant/their insurer even though those costs may arise as a direct result of the tort.

Stylianou v (1) Masatomo Toyoshima (2) Suncorp Metway Insurance Limited [2013] EWHC 2188 (QB)

The most recent case to add support to the proposition that an individual who is injured in Australia but who is habitually resident in England may establish jurisdiction to bring their claim in the English court is *Stylianou*. Here, Flora Stylianou sustained very serious injuries rendering her tetraplegic when the vehicle she was travelling in during a visit to Western Australia was involved in a collision. The outcome in *Stylianou* is perhaps surprising as proceedings were at an advanced stage before the District Court of Western Australia. Liability was admitted and the defendant insurer, Suncorp, had made voluntary interim payments.

A day before the three year limitation period expired, on 24 April 2012, Flora Stylianou issued a claim in the High Court in England. She was granted leave to serve Mr Toyoshima (a Japanese resident) at Suncorp's address in Brisbane. Suncorp subsequently applied to have that order set aside and the English proceedings struck out on the basis that Flora Stylianou had not sustained "damage" within the jurisdiction and that England was not the proper place for her claim to be heard.[11]

The Court disagreed with Suncorp and, in a decision steeped in pragmatism, it was held that the most real and substantial connection with the action was in England. As with *Cooley*, one of the factors which carried most weight was the fact that liability was admitted and the remaining quantum issues were closely linked to England, where the claimant lived and continued to suffer the consequences of her spinal injuries. Flora Stylianou was unable to

10. Paragraph 55.

11. Suncorp argued the claim did not fall within the requirements of CPR 6.36, 6.37 and 6 BPD.3.1(9)(a).

travel to Australia and so the Judge concluded it made sense for the trial to take place in England rather than all of the experts and the claimant having to travel to Australia.[12] It was held that video or deposition evidence was not an adequate substitute for the claimant and experts being able to appear in person at trial.

If liability was still in dispute one could see how the factors at play may have tipped the balance in favour of the Australian courts, especially with the proceedings already underway in Western Australia. The decision was a blow for the defendant insurer in circumstances where it had seemingly engaged in the proceedings and enabled some rehabilitation to take place through the making of interim payments. For those advising claimants, on the other hand, it demonstrates the English courts acting to ensure that the most convenient forum ultimately disposed of the claim and showing considerable sympathy for the predicament of catastrophically injured Brits.[13]

England v Australia: What difference does it make?

The hurdles a claimant must jump in order to establish the jurisdiction of the English courts are not necessarily easy. So why might an English resident claimant want to risk incurring the costs and delays of making the application with a view to grounding their claim in England? *Cooley* and *Stylianou* both demonstrate how the decision is likely to come down to the practicalities of pursuing a claim on the opposite side of the globe. The English claimant who has now returned home will find it much easier to liaise with a local legal representative and to negotiate their way through the English legal system than having to pursue the claim abroad where the time difference and prospect of travel may be a deterrent to making a claim at all. Perhaps of greater significance though are a number of compelling legal and procedural reasons as to why the catastrophically injured English claimant may prefer their home court. As these factors strike at the financial heart of the claim they are essential considerations when discharging the obligation to act in a client's best interests.

The discount rate

In England and Wales there is a fixed discount rate currently set at 2.5%. The English claimant is therefore able to predict with relative certainty how the court will approach the issue of assessing future loss. In addition the Ministry of Justice has recently consulted on the prospect of changing the discount rate, in part as a result of the Privy Council determining in the Guernsey case of *Helmot v Simon*[14] that to provide full compensation on a risk free basis the discount rate ought to be slashed to –0.5% for heads of loss connected to price inflation and –2% for loss of earnings, care and other claims that are related to earnings inflation. For political reasons and acknowledging the huge lobbying power of the insurance industry, only the most optimistic of claimant lawyers predict the Lord Chancellor going that low when he finally exercises his power to vary the rate, but most commentators do expect some reduction to reflect the current economy.

12. Paragraphs 111 and 112.

13. As well as the forum conveniens arguments, the English Courts are required to have regard to the overriding objective enshrined in CPR Part 1 which states that the Court should deal with cases justly and at proportionate cost.

The discount rate makes a huge difference to the damages the catastrophically injured claimant recovers. In Western Australia, for example, there are statutory caps to the discount rate which are set much higher than the default position under English law. In *Stylianou* it was argued that the discount rate of 6% applicable in Western Australia would prevent the claimant from recovering the damages required to meet her actual needs given the costs of future care, accommodation etc. in England. While the Court in *Stylianou* held that the discount rate was a matter of substantive law such that the Australian rate of 6% was to be applied, it is easy to see how significant this could be to the final award of damages. This is illustrated by the case of *Harding v Wealands* where application of the New South Wales discount rate (then 5%) would have resulted in the claimant recovering 30% less than he would have under English law. In that case the difference was estimated at £1.25–£1.5 million; similar differences would arise in many catastrophic injury claims. The difference in damages could be even higher if the claimant has a longer life expectancy, potentially leading to the deeply unsatisfactory position of serious under-compensation and the knock-on professional indemnity implications for the claimant's legal advisor.

Periodical payment orders

Periodical payment orders ("PPO") are more readily available in England and are now used increasingly in catastrophic personal injury claims. The advantage of a PPO is that any risk surrounding the claimant's life expectancy and mortality shifts to the paying insurer with the claimant receiving a regular lump sum, the value of which increases each year in line with inflation. The capitalised value of the highest PPO awards achieved in England, are now approaching £20 million.[15]

The decision to make a PPO is a procedural matter open to the discretion of the English courts. PPOs will therefore be available to claimants who choose to pursue their claims in the English courts in cases where, if they had chosen to proceed abroad, PPOs may not be recognised or be readily at the disposal of the Judge. Given that the PPO is procedural in nature, the option is there whether English law applies to the substantive issues in the case or not, providing security of funding can be shown.

Interim payments

When contrasted with many other jurisdictions, the procedure for interim payments under the English CPR is favourable to claimants where liability is admitted. While some interim payments had been made voluntarily in the case of *Stylianou* and *Cooley*, this is not always the case. Very often it is necessary to issue and serve court proceedings before the defendant insurer will engage.

Under CPR Part 25 the English resident claimant need only show that judgment on liability has been obtained or is inevitable to recover a substantial proportion of their damages. It is not unusual for the English courts to award interim payments of six or seven figures and this can be achieved within six to twelve months of the date of straight forward accidents.

14. [2012] UKPC 5.

15. http://www.stewartslaw.com/paul-paxton-partner-at-stewarts-law-wins-14m-award-for-girl-left-paralysed-after-car-crash.aspx.
http://www.stewartslaw.com/paralysed-sixth-former-awarded-record-17-5m-payout-after-car-accident.aspx

Further, by commencing proceedings and seeking an interim payment before the English courts, the claimant can overcome the constraints that may apply under the local law of the place where the accident occurred and also the problem of the defendant insurer seeking to maintain control over how the claimant spends the interim funding. The claimant can take control of the interim funding and, in conjunction with their case manager, progress their rehabilitation and avoid the delays they may otherwise face.

In the case of *Thomas*, ICWA sought to argue that the claim should be covered by its own "large loss" policy which limited the damages recoverable. To make the breakthrough needed to secure an interim payment under the CPR, proceedings had to be issued and served in the English courts, after which ICWA conceded that, not only were both the claimant and First Defendant habitually resident in England, but that English procedural rules applied and it was correct for an interim payment to be awarded in accordance with the CPR (and not the ICWA scheme or pursuant to the rules of the courts of Western Australia).

Contract and Consumer Credit card claims

If an English visitor to Australia pays for goods or services using an English credit card then, if those goods or services cause injury there may well be a viable action in England pursuant to section 75 of the Consumer Credit Act 1974. This provision allows a claim to be brought against the English credit card company rather than the supplier of the service. The value of the credit card transaction must fall between £100 and £30,000 and the claimant must establish that they would otherwise have had a claim for breach of contract or misrepresentation against the overseas supplier. Take, for example, the English claimant who sustains catastrophic injury at a hotel in Australia. The hotel was booked via the hotel's website using a credit card. If the hotel has directed their website towards overseas consumers then, subject to any choice of law clause in the terms and conditions, English law may even apply when determining liability and quantum.[16] Even if the booking/payment was made at the hotel and/or there were a choice of law clause, English proceedings could still be brought against the English credit card company, with or without joining the Australian hotel to those proceedings.[17] In those circumstances the local law may well be applicable, but the English claimant would still have the advantage of litigating in their home Courts against a deep pocket defendant. There may also be scope to argue that any restrictions pursuant to local law should not be applied if they limit liability for injury or death, as that would be contrary to the Unfair Contract Terms Act 1977.[18] The same would apply in relation to other goods and services, such as excursions booked via credit card.

16. Article 6.1 of Rome I (Regulation (EC) 593/2008 provides that the law of the country where the consumer has their habitual residence will apply if a professional pursues or directs their services to that country. The cases of *Pammer* and *Hotel Alpenhof* (European Court of Justice Cases C-585/08 and C-144/09 provide guidance as to when services are considered to be directed at the country where the consumer has their habitual residence, albeit in the context of Regulations15 and 16 of the Judgments Regulation (No 44/2001).

17. This was achieved successfully in *Grove v Amex Europe Limited* where the claimant booked a hotel in France using his credit card and sued the credit card company for injury sustained during his stay.

18. Article 6.2 of Rome I expressly provides that a choice of law clause must not deprive the consumer of protection that they would otherwise be afforded under the law of the country where they have their habitual residence.

All is not lost: The importance of the role of the local lawyer

By advising the English resident claimant who is injured abroad to take their case home and pursue it in the English courts, foreign lawyers would not be packing off otherwise good quality, lucrative work never to see the case again. Establishing good working relations with personal injury lawyers in England who specialise in accidents abroad can lead to a reciprocal relationship of referrals and cross-working. In the case of *Chavda, Sethi & Morgan v May and Suncorp Metway Insurance Ltd*[19] the defendant insurer was named as a party to the proceedings before the English court *ab initio*. The claimant's English solicitor worked closely with lawyers in Queensland,[20] to negotiate the complexities of the local law and secure a global final settlement of £5.25m; a settlement considerably in excess of what would have been achieved had the case been pursued in Queensland. In a similar fashion to the *Thomas* case, once English High Court proceedings were underway the Australian insurer was no longer able to limit the interim payments and rehabilitation measures by reference to Queensland law.

The need for guidance on aspects of the substantive local law is of heightened relevance following the introduction of Rome II which reversed the previous position under English law following the decision of the House of Lords in *Harding v Wealands*.

Mr Harding was seriously injured when his partner, Ms Wealands, lost control of the vehicle she was driving. Ms Wealands was Australian but had been living in England with Mr Harding for about one year prior to the accident. The accident happened while they were visiting her parents in New South Wales. The vehicle belonged to Ms Wealands and it was insured by an Australian company. The House of Lords held that the provisions of Chapter 5 of the Motor Accidents Compensation Act 1999 (MACA), which would have significantly limited the damages Mr Harding could recover compared with what English law would have permitted, were matters of substantive law. The court was not bound by MACA when deciding Mr Harding's entitlement to damages as this was a question of procedure to be determined in accordance with the law of the forum.[21]

Just two years later the Rome II Regulation[22] was enacted and varied the dividing line between substantive and procedural law in the European Courts. The default position is now that the law of the country where the accident occurred would apply to all of the issues in the case, most notably the existence, nature and assessment of damages.[23] Following *Harding*, the claimant in *Cooley* was able to benefit from the application of English law having also estab-

19. http://www.stewartslaw.com/stewarts-law-acts-for-victims-of-the-fraser-island-beach-crash.aspx http://www.stewartslaw.com/stewarts-law-recover-over-5-5m-for-british-claimants-injured-whilst-backpacking-in-australia.aspx

20. Turner Freeman

21. The House of Lords upheld the Court of Appeal decision that it was "substantially more appropriate" to apply English law under s.12 of the Private International Law (Miscellaneous Provisions) Act 1995 and that in any event the determination of the level of damages was a question of evidence and procedure under s.14(3)(b) to be determined in accordance with the law of the forum.

22. Regulation (EC) No 864/2007

23. Article 15(c).

lished jurisdiction in England. Post-Rome II it was unclear whether the fact the English court would be required to more readily apply a foreign law might have influenced its decision to accept jurisdiction. The outcome in *Stylianou* suggests that is not the case. Sir Robert Nelson indicated, obiter, that Article 4(3) of Rome II was only to be departed from in exceptional circumstances whereas the *forum conveniens* test did not carry the same constraints. The judge was able to consider a whole range of more practical factors when deciding whether the case should be heard in England, but this did not preclude the application of the law of Western Australia. In his view the tort was manifestly more closely connected to Western Australia rather than England and the general rule under Article 4(1) of Rome II was not displaced.[24]

The role of the local lawyer may shift from being advisory in nature to that of an independent expert to the English court as any given case progresses through the litigation. The local lawyer may go on to play an important part in the proceedings as an expert witness on local law.[25] There may also be liability investigations that need to be carried out locally and where it is more cost effective to involve a local lawyer.

Concluding comments: Conduct, cooperation and risk management

If there is a chance that the English courts may be a more appropriate forum and could have jurisdiction then failing to investigate that possibility when advising an English resident claimant could significantly alter the outcome of the claim and the damages the client recovers. The requirement to act in a client's best interests means that, not only are there potential conduct implications, but the failure to advise could impact on professional indemnity insurance. Increasingly, the English courts are making awards of anywhere between £5 and £20 million to spinal cord and other catastrophic injury claimants with significant care claims. If the claimant loses the opportunity to recover damages of this scale, then a professional negligence claim against the local lawyer's professional indemnity insurance for failing to advise on overseas law and procedure could be a significant seven figure sum.

Mr Harding, Ms Thomas and Miss Stylianou had all consulted local lawyers first. By subsequently abandoning proceedings in Australia the claimant can be left with a hefty wasted costs bill to pay which could ultimately erode the final award of damages. Close working relations, cooperation and reciprocal referrals with international colleagues can eliminate or minimise the likelihood of such costs issues. They can also create a platform for how to effectively work together, not just on the case in hand, but also in future cases.

The jurisdictional question should not be seen as a dilemma – of keeping the work on the one hand, or losing it to an English counterpart on the other. Rather, it should be viewed as an

24. Although it seems likely that the claimant will continue to argue for the application of English law and/or English remedies, as the judgment in question only determined jurisdiction.

25. Caution should be exercised with the choice of expert on local law if that lawyer has been involved with the case in an advisory capacity given the requirements of CPR Part 35 and the corresponding Practice Direction that the expert is independent and unbiased.

26. In *Stylianou* the defendant claimed to have spent AUS$60,000 on the defence of the claim and now have a costs order in this respect against the claimant.

integral part of new case investigation, risk management and best practice when advising a client who is habitually resident overseas.

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