

The Thursday Midday Webinar

Cross-border clinical negligence claims

The webinar will start shortly

Next time - 28th January - Cross Border Litigation after Brexit

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Issues for Discussion

- Which defendant(s)
 - Jurisdiction
 - Applicable law
- Applicable standards
 - Choosing experts
- Contribution claims

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Categorising cases

- Surgery 'packages'
- Non-package contract cases
- Emergency treatment abroad

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Surgery packages

- PT (etc) Regs 2018, S. 15(2)

The organiser is liable to the traveller for the performance of the travel services included in the package travel contract, irrespective of whether those services are to be performed by the organiser or by other travel service providers.

Defendant can include the “organiser”
(as well as the clinicians).

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Surgery packages

- PT (etc) Regs 2018, Reg. 15(2)
 - No contracting out (Reg. 30)
- Packages are defined by Regs. 2(5)-(6)

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Surgery packages

Packages are defined by Regs. 2(5)-(6)

- Combination of 2 of transport; accommodation; (vehicle hire)
- Combined by one trader before a single contract on all services is concluded; OR
- when purchased from a single point of sale and selected before the traveller agrees to pay; OR
 - offered, sold or charged at an inclusive or total price; OR
- advertised or sold under the term “package” or under a similar term

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Surgery packages

Packages are defined by Regs. 2(5)-(6)

- If combination includes only 1 of the “key” travel services it can still be a regulated package IF the surgery:-
 - Accounts for a significant proportion of the value; OR
 - Is advertised as an essential feature of the combination; OR
 - Is an essential feature of the combination

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Jurisdiction

- Brexit: impact on CPR 6.33 (this has been amended and further amendment is coming!).
- CPR 6.36 deals with service out of the jurisdiction where permission of the Court is required.
- Consider application requirements (CPR 6.37) and jurisdictional gateways (para 3.1, PD 6B).

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Jurisdiction

Anchor defendants

Consider: *Vedanta Resources PLC v Lungowe* [2019] UKSC 20

The Claimant must demonstrate:

- i) that the claims against the anchor defendant involve a real issue to be tried;*
- ii) If so, that it is reasonable for the court to try that issue;*
- iii) That the foreign defendant is a necessary or proper party to the claims against the anchor defendant;*
- iv) That the claims against the foreign defendant have a real prospect of success;*
- v) That, either, England is the proper place in which to bring the combined claims or that there is a real risk that the claimants will not obtain substantial justice in the alternative foreign jurisdiction, even if it would otherwise have been the proper place, or the convenient or natural forum.*

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Jurisdiction

Tort gateway

- Damage was sustained, or will be sustained, within the jurisdiction; or
- Damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction
- See *FS Cairo (Nile Plaza) LLC v Christine Brownlie* [2020] EWCA Civ 996

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Jurisdiction

Contract gateway

- (6) A claim is made in respect of a contract where the contract:*
- (a) was made within the jurisdiction;*
 - (b) was made by or through an agent trading or residing within the jurisdiction;*
 - (c) is governed by English law, or*
 - (d) Contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract.*
- (7) A claim is made in respect of a breach of contract committed within the jurisdiction.*

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Jurisdiction

Contract gateway

See: *Entores v Miles Far East* [1955], *Brownlie v Four Seasons*
[2017] UKSC 80

Offer and acceptance analysis [16] - *Entores*

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Jurisdiction

Consider:

- Multiplicity of proceedings;
- Location of witnesses;
- Potential for forum non conveniens arguments.

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Applicable law

Governed by Rome I and Rome II (even after Brexit)

- Regulated packages: “consumer contracts” provisions apply.
- Law of place of consumer’s habitual residence applies, providing:-
 - The other party pursues commercial or professional activities in that country, or
 - “by any means, directs such activities to that country or to several countries including that country”

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Applicable law

Governed by Rome I and Rome II (even after Brexit)

- Non- “package” contract cases:-
 - If none of the services are carried out in the place where consumer lives, the “consumer” provisions do not apply.

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Applicable law

Governed by Rome I and Rome II (even after Brexit)

- Non- “package” contract cases:-
 - If none of the services are carried out in the place where consumer lives, the “consumer” provisions do not apply.
 - Contract may specify applicable law
- Otherwise - law of service provider’s habitual residence applies
 - BUT “where it is clear from all the circumstances of the case that the contract 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.”

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Applicable law

Governed by Rome I and Rome II (even after Brexit)

- Non- contract cases: Rome II
 - General rule: applicable law is 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/ies in which the indirect consequences of that event occur).
- BUT where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a different country, the law of that other country shall apply.
 - Eg pre-existing relationship, such as a contract, closely connected to the tort.

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Applicable standards, experts

- A particular standard may be an express term of the contract (e.g. that standards will be at least those in the UK)
 - QV standards with the applicable law
 - If standard is one of reasonable care, it is necessary to consider whether “local standards” *may* be different
- Experts will need to be able to give evidence about standards in the country concerned.

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Contribution claims

Cases concerning corrective surgery/treatment abroad, where C has received initial treatment in the UK.

CPR 20.6(2)

A defendant may file and serve a notice under this rule -

(a) without the court's permission; if he files and serves it

(i) with his defence; or

(ii) if his additional claim for contribution or indemnity is against a party added to the claim later, within 28 days after that party files his defence; or

(b) at any other time with the court's permission.

Contribution claims

BUT bear in mind:

- Section 1(1) Civil Liability (Contribution) Act 1978: “...*may recover contribution from any other person liable in respect of the same damage...*”
- Section 1(3): limitation! If expiry of the limitation period extinguishes the cause of action, there can be no contribution claim.
- Jurisdictional gateway: para 3.1(4)

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