Insight 185

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

Welcome to this week's edition of Insight in which we report on cases relating to:

- Rome II and a public liability claim in France
- A reminder of the requirement to prove causation and liability
- What amounts to a lawful claim in respect of wrongful conception

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Public liability/ Rome II

Owen v Galgey and others (2020) EWHC 3546 (QB)

The claimant was a British citizen domiciled and habitually resident in England. He brought a claim for damages for personal injury sustained as result of an accident in France, when he fell into an empty swimming pool which was undergoing works at a villa ("the Villa"). The Villa was a holiday home owned by the first defendant, whose wife was the second defendant and they were also British citizens, domiciled and habitually resident here.

The third defendant was a company domiciled in France, and the public liability insurer of the first and second defendants in respect of any claims brought against them in connection with the Villa. The fourth defendant was a contractor which was carrying out renovation works on the swimming pool at the time of the accident, and the fifth defendant was its public liability insurer. The fourth and fifth defendants were both companies domiciled in France.

There was no dispute as to the jurisdiction of the English courts to determine the claim. It was agreed between the parties that French law applied to the claim claims against the fourth and fifth defendants.

The dispute was as to the applicable law in relation to the claims against the first to third defendants.

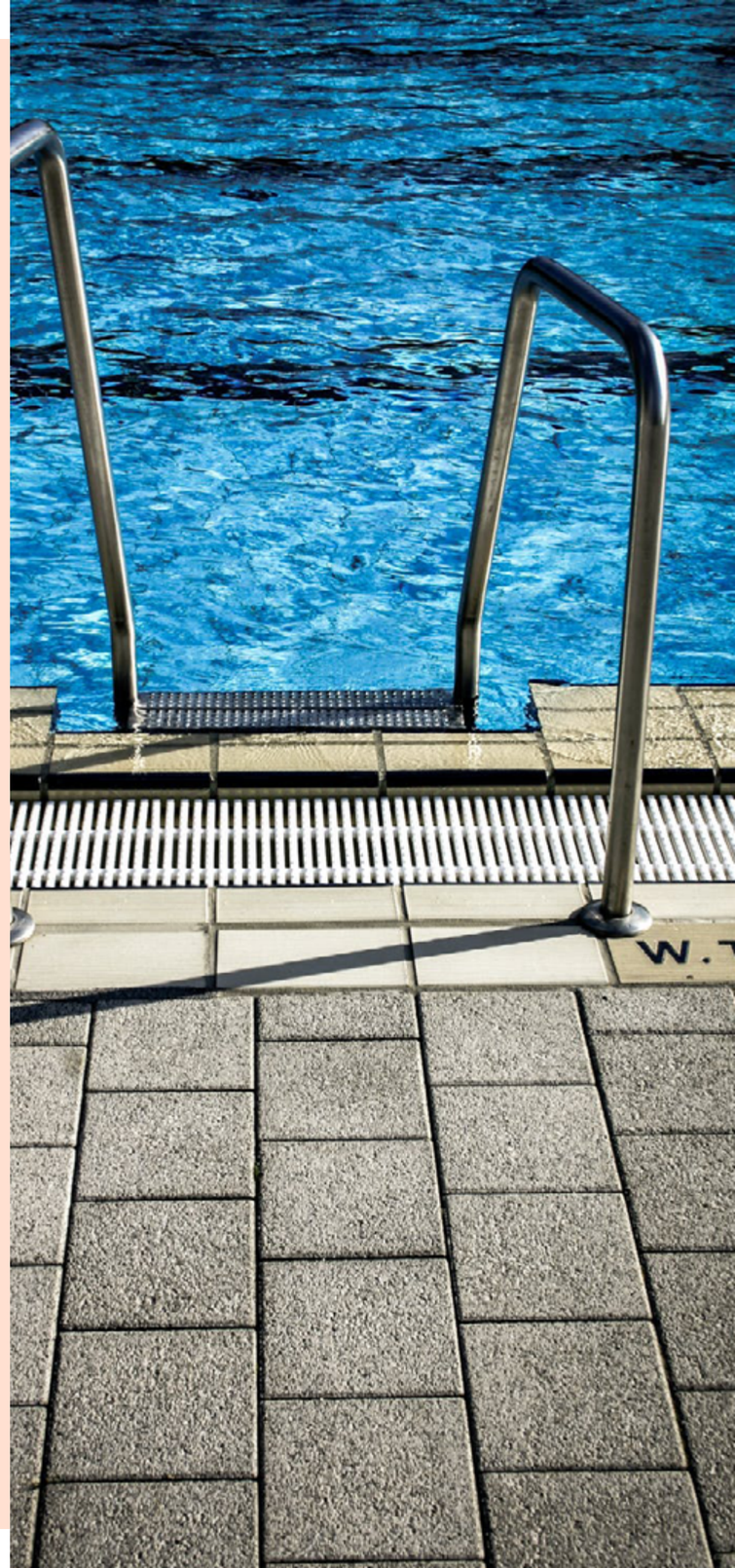
These defendants contended that, by operation of the Rome II Regulation, English law applied as the claimant and first and second defendants were habitually resident in England. The claimant contended that French law applied by operation of Article 4(3) the Rome II Regulation because it was clear that the tort in this case was manifestly more closely connected with France.

'…the tort/delict in the present case was manifestly more closely connected with France'

Finding in favour of the claimant, the High Court Judge held that it was clear that the tort/delict in the present case was manifestly more closely connected with France. France was where the centre of gravity of the situation was located and the preponderance of factors clearly pointed to that conclusion. That conclusion also accorded with the legitimate expectations of the parties.

France was also where the injury or direct damage occurred. The dispute centred on a property in France and it concerned structural features of that property and how the first, second and fourth defendants dealt with works on a swimming pool there.

Although these defendants denied that there was fault on the part of any of them, the first and second defendants said that the fourth defendant was responsible if the pool presented a danger and vice versa. The allegations of contributory negligence/fault also centred on the claimant's conduct whilst at the Villa in France.



The first and second defendants had a significant and long-standing connection to France, the accident occurred on their property and the works were carried out by a French company pursuant to a contract with them which was governed by French law. Their insurer, the third defendant, was a French company and they were insured under a contract which was governed by French law. The contract was to insure a property in France and covered claims under English and French law. It was also common ground that the claim against the fourth defendant, and therefore against the fifth defendant, also a French company, was entirely governed by French law and would require the court to decide whether the fourth defendant or, at least by implication, the first and second defendants were "custodians" of the property for the purposes of French law.

The situation in relation to the swimming pool which was said to have been the cause of the accident was firmly rooted in France and it resulted from works which were being carried out by the fourth defendant as a result of it being contracted to do so by the first and second defendants. Their liability, if any, would be affected by how they dealt with that situation, including by evidence about their dealings with the fourth defendant. That situation had no significant connections with England other than the nationality and habitual place of residence of the first and second defendants.

The court took the point that the claimant and the first and second defendants were habitually resident in England at the relevant time, that there was a pre-existing relationship between them, and that the claimant and his family came to be at the Villa as a result of an agreement made in England. But, applying an objective test the judge was not satisfied that this agreement, on the information available, was contractual in nature. Part of the difficulty in relation to this aspect of the first to third defendants' argument was that there was very little information before the court as to what precisely happened.

The agreement resulted from a casual conversation between social acquaintances in the context of mutual favours done in the past. It was informal - the claimant appeared to do some work as a favour and the first and second defendant invited him to the Villa in return.

If the judge had found there was a contract, he was also likely to have found it was governed by French law.

The tort/delict was much more closely connected to the state of the swimming pool which was part of a property in France and resulted from the French law contract between the first and second defendants and the fourth defendant. If any of the defendants was liable, that liability would be closely connected with this contract. Taken in combination with the other points this clearly outweighed the existence of any contract with the claimant relating to the Villa, even if it had been found there was a contractual relationship and even if it was governed by English law.

The claimant was represented by Pierre Thomas & Partners

The first to third defendants were represented by BLM

Generally, the applicable law is the law of the country in which the damage occurs (Art 4(1) Rome II). However. where a claimant and defendant both have their habitual residence in the same country at the time when the damage occurs that country's law will apply (Art 4(2)).

Exceptionally, if the tort is manifestly more closely connected with another country, that country's law shall apply (Art 4(3)). This case is a rare example of that exception applying.

Public liability/ causation

Norfolk County Council v Durrant (2020) EWHC 3590 (QB)

This was an appeal by Norfolk County Council ("Norfolk") against a decision of a Recorder who found Norfolk primarily liable in negligence for personal injuries suffered by the respondent (the claimant), together with a finding of 40% contributory negligence. The injuries were sustained during an incident when the claimant was a teaching assistant ("TA") at a school and a six-year-old child in her care at the school became upset when segregated from the classroom by the respondent and another member of staff.

The claimant made a modest claim for soft tissue injury to her left shoulder, chest, and limbs which healed within eight weeks but a much larger damages claim in respect of Post-Traumatic Stress Disorder.

The case for the claimant was put on the basis of common law negligence. She also pleaded provisions of the Management of Health and Safety at Work Regulations 1999, alleging a failure to make any suitable and sufficient risk assessment of the risks to health and safety of those working at the school, failure to provide information on risks, to take into account her capabilities when entrusting her with tasks, and failure to provide training.

The Recorder noted that following S47 of the Enterprise and Regulatory Reform Act 2013, breach of a regulation causing damage did not of itself give rise to liability, but might be relevant for establishing common law negligence, and held that the regulations provided context in which to assess an employer's performance of its common law duty of care.

The claimant's case was based on breaches of the employer's duties to her, including to provide a safe system work. It was alleged that the area in which the injury happened, the so-called Sunshine Room, a calming-down area for disruptive children, was an unsafe place of work in light of what was known at the time.

The claimant also alleged a failure by the school to operate their systems for monitoring and management of difficult pupils effectively. She pointed to the absence of a completed Pupil Specific Risk Assessment as evidence of - alleged non-identification of the relevant risks.

The central allegation became at trial that the child, known in the case as "J", "undoubtedly should have been escalated", that is, subjected to a graduated "Red Card system" operated at the school, of escalating concerns about behaviour and removed to "the Base"- a special mobile classroom that was a discipline facility at the neighbouring, more senior, school, at some point before the incident. It was also said he should have been referred to the Leadership Team at the school, and that the incident was quite foreseeable.

It was therefore the claimant's case that Norfolk had failed to take reasonable steps to provide her with a safe system of work, reasonableness being judged in the light of what was known at the time. Necessarily, she had to show on the balance of probabilities that the alleged failings would have prevented the incident or avoided the injury.

The argument by Norfolk on appeal was that the Recorder failed to ask herself what difference any breaches she found had made, in the light of what was known at the time and the safety measures and strategies there were already in place. Norfolk said that there was no actual finding on the question of causation in the judgment and argued no consideration or conclusion upon it might be inferred from the terms of the judgment. Norfolk argued that, properly applying the law, the evidence did not support a finding of negligence against them. No act or omission of Norfolk could be said to be causative of the injury to the claimant, whether directly or indirectly.

In addition to the failure to make findings on causation, Norfolk said the Recorder also made two unsustainable factual findings namely:

a. That there were other relevant incidents or concerns at the time that were not recorded or reported, and this resulted in.

b. A failure to provide an overall risk assessment.

The claimant accepted that no actual finding of causation was made by the Recorder but invited the appellate court to infer from the Recorder's reasoning read as a whole, that that is what the Recorder must have found.

It was not disputed that the claim fell to be considered within the framework of common law negligence, informed by the content of various regulations, nor that it had to be shown that any proven breaches of duty were causative of the claimant's loss.

The essential challenge from Norfolk was that the Recorder had not clearly identified material failures by the school, and nowhere said that any of the inadequacies she did find were causative, whether directly or indirectly, of the injury sustained by claimant.

The High Court Judge hearing the appeal held that applying the relevant legal principles, it was clear that unless she was able to spell out of the Recorder's judgment, a conclusion on causation, the finding that Norfolk were negligent, could not stand. She could find no cogent reasoning or a conclusion as to causation.

'It was impossible logically to spell out a finding that any of the failures found were breaches of Norfolk's obligations to the claimant or that such caused the damage whether directly or indirectly suffered by her'

In this case it was sometimes difficult to discern whether criticisms of the school amounted to findings of breaches of duties owed to the claimant and very difficult to find any developed consideration of the counterfactual - what would have happened if the alternative courses of action had been adopted. It was impossible logically to spell out a finding that any of the failures found were breaches of Norfolk's obligations to the claimant or that such caused the damage whether directly or indirectly suffered by her.

The Recorder did not find

a. The claimant was inadequately trained or prepared by the school;

b. The claimant was inadequately managed;

c. That steps taken following any of the J incidents, or the reflections after those events were wrongly or poorly made;

d. That the use of the Sunshine Room, in the circumstances of what was known at the time, constituted an unsafe system of work.

In addition, the Recorder did not say that the system of reporting behaviour was negligent in itself although she described it as convoluted and cumbersome; she nowhere set out the counterfactual as to what would have happened differently on the balance of probabilities, had a risk assessment form being completed, or a different system been in place; and the evidence reported and accepted by her did not support a finding that, but for the flawed system of reporting, the incident that injured the claimant would not have happened. Indeed, to the contrary, there was no witness who was able to say anything would have been done differently. That was so whether or not the processes and protocols had been followed to the letter.

The Recorder did not address her mind to the requirement for such faults and problems as she

found in the school's systems, as operated, to be causative of the loss, even if indirectly.

That the attack was unforeseeable and unprovoked must necessarily carry considerable weight: the evidence was that none expected or foresaw the flareup of the index event. Nobody suggested anyone would have acted differently or done anything differently with the benefit of hindsight.

The appeal judge confirmed that there was no finding of causation in the Recorder's judgment and agreed with the appellant that on the evidence, there could be none. She went on to say that having reassessed the materials and facts as found by the Recorder, there was also no breach of any duty owed and therefore no sustainable conclusion that the appellants were negligent and liable for the respondent's injuries.

The claimant was represented by Pabla & Pabla Solicitors

The defendant was represented by Browne Jacobson LLP

Within this judgment, the appellate judge neatly summarised the law. Breach and causation are essential elements of the tort of negligence. This requires findings of fact, an assessment of their relevance, and findings as to whether any breaches were causative of the loss in question, whether directly or indirectly and thus in law amount to negligence.

Where it is alleged that a risk assessment was not completed, or, as in this case, not reduced into writing, the court must be aware that an assessment failure can only give rise to liability if a suitable and sufficient assessment would probably have resulted in a precaution being taken which would probably have avoided the injury.

Lawful claim/ wrongful conception

Toombes v Mitchell [2020] EWHC 3506 (QB)

The claim was brought under section 1(1) and (2)(a) of the Congenital Disabilities (Civil Liability) Act 1976, which provided for civil liability to a child born disabled in respect of an "occurrence" which had affected either parent of the child in his or her ability to have a normal, healthy child.

A preliminary issue was tried as to whether the claimant had a lawful cause of action. The facts agreed for the purposes of the preliminary issue included that but for the defendant's negligence, the claimant would not have been conceived. The defendant contended that the claim was one of "wrongful life" which was excluded by the 1976 Act.

The claimant was born with a congenital developmental defect causing spinal cord tethering which she claimed was a result of her mother taking insufficient folic acid during pregnancy. She brought a claim against the defendant, her mother's general practitioner, on the basis that in a discussion with the claimant's mother on family planning he had failed, contrary to standard practice at the time, to advise the mother of the potential benefits of taking sufficient folic acid before conception and during the first trimester, or to warn her of any association between folic acid intake and the prevention of spina bifida, but had instead advised that it was optional and not prescribed it.

The preliminary issue was determined in favour of the claimant: a cause of action under section 1 of the Congenital Disabilities (Civil Liability) Act 1976 involved three components, namely:

1. a wrongful act;

2. an occurrence as defined in subsections 1(2)(a) or (b), and

3. a child born disabled as a result of the occurrence.

An "occurrence" on its ordinary meaning meant that something had happened, but the 1976 Act did not require that the occurrence involve a change or alteration in the mother's physiological state and it might not result in any actionable injury to the mother. Depending on the circumstances, the act of sexual intercourse itself could be a relevant occurrence. The 1976 Act drew a distinction between pre-conception occurrences, which were covered by section 1(2)(a), and occurrences which affected the mother during the course of her pregnancy, which fell within section 1(2)(b). The rider to section 1(2)(b), "so that a child is born with disabilities which would not otherwise have been

present", imported the assumption that, but for the occurrence giving rise to a disabled birth, the child would have been born normal and healthy, not that it would not have been born at all. However, no such rider was attached to section 1(2)(a).

On the agreed facts, the reliance of the claimant's mother on the negligent advice which she was given, in having sexual intercourse without the protective benefit of folic acid supplementation, was a relevant occurrence. It was sufficient for the purposes of a section 1(2)(a) claim that the claimant had, in fact, been born with a disability resulting from the occurrence and that a causal link between the circumstances of the sexual intercourse and the disability had been established.

All three elements required under the Act were present, namely, a wrongful act (negligent advice) leading to an occurrence (sexual intercourse in a folic acid-deficient state) which resulted in a child born with disabilities due to that deficiency of folic acid. Further, the Act resolved any difficulty in quantification of damages by providing that such a claim was one for personal injury arising from the child's disability to be assessed in accordance with conventional principles. It followed that the claimant had a lawful claim for damages for personal injury arising from her disability.

The claimant was represented by Moore Barlow LLP

The defendant was represented by Clyde & Co LLP

It is sufficient for the purposes of a claim under section 1(2)(a) of the Congenital Disabilities (Civil Liability) Act 1976 involving a pre-conception occurrence that a child has, in fact, been born with a disability resulting from the occurrence.

There is no additional requirement to prove that but for the wrongful act, he or she would still have been born.

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