OUTER HOUSE, COURT OF SESSION

[2018] CSOH 25

PD2099/14

OPINION OF LORD TYRE

In the cause

GEORGE DOCHERTY and OTHERS

Pursuers

against

SECRETARY OF STATE FOR BUSINESS,INOVATION AND SKILLS

Defender

Pursuers: Marshall, (sol adv); Thompsons
Defender: O'Brien QC; Clyde & Co

21 March 2018

Introduction

[1] Where a man, while working in Scotland, inhales asbestos fibres that cause injury to his body after he has become resident in England, which law is applicable to determine the admissibility of claims for damages made by his executors and relatives after his death?

[2] Mr James Docherty ("the deceased") died on 30 September 2011. A post mortem examination disclosed the presence of pleural plaques and indicated levels of asbestos exposure generally associated with asbestosis. It is averred by the pursuers that the deceased was a mechanical fitter who served an apprenticeship with Scotts Shipbuilding and Engineering Company in Greenock (for whose liabilities the defender is now

responsible) from about 1941 to 1947, during which time he was exposed to inhalation of asbestos dust. Between 1954 and 1979 the deceased worked for Imperial Chemical Industries Ltd (ICI) at their plant in Teesside, during which time he was again exposed to quantities of asbestos dust. In about 2003 he began to experience respiratory symptoms and continued to suffer from chest problems from time to time thereafter. In September 2009 he was admitted to hospital in Middlesbrough, where a CT scan showed *inter alia* basal bronchiectasis with fibrosis and mild pleural thickening. He continued to suffer respiratory difficulties until he died in 2011.

[3] The present action for damages was raised in 2014 by the deceased's widow, as an individual and as the deceased's executrix nominate, and by 23 other relatives of the deceased. The deceased's widow has since died and her executors have been sisted in her place. They are also now the executors of the deceased. Liability is not admitted.

[4] At the time when he began to experience respiratory symptoms, at the time of diagnosis and immediately prior to his death, the deceased lived in England. As the solicitor advocate for the pursuers acknowledged, the present action was raised in Scotland with a view to benefiting from the Damages (Scotland) Act 2011 which allows rights of action to relatives who would have no claim under English law. It is a matter of agreement that the only claims made in the present action that would be competent under English law are (i) the executors' claim for the deceased's non-pecuniary loss prior to his death, including loss of expectation of life; (ii) the executors' claim for the care provided by relatives to the deceased during his illness; and (iii) the deceased's funeral expenses.

[5] Following a Procedure Roll debate at which the present defender was not represented, Lord Boyd of Duncansby held ([2015] CSOH 149) that the action in so far as directed against ICI was irrelevant because it had proceeded under Scots law. The *locus*

delicti was England, and Scots law as *lex fori* did not recognise any specific right of action which was denied to the pursuer by the *lex loci delicti*. Lord Boyd put the case out by order to enable the pursuers to consider a minute of amendment to introduce a claim under the relevant English legislation. A minute of amendment was duly prepared, and at the by order hearing, the pursuer moved for amendment of the pleadings in terms of the minute of amendment and answers thereto by the then first and second defenders. Amendment was opposed by both defenders and, following a further hearing, Lord Ericht refused to allow the amendment to be made (see [2017] CSOH 54). By interlocutor dated 29 March 2017, Lord Ericht dismissed the action in so far as directed against ICI. He declined, however, to accede to a motion by the present defenders to dismiss the action against them, expressing the view that the appropriate place for such a discussion would be a debate on the Procedure Roll. Since then the pursuers' pleadings have been allowed to be amended to insert a claim by the executors against the present defenders on the hypothesis that the applicable law is English law. The pursuers, however, maintain their primary position which is that so far as these defenders are concerned, the applicable law is the law of Scotland. The case came before me on the Procedure Roll for debate of this matter.

The issues

[6] Three issues were debated before me:

(i) Whether the applicable law is determined by the Rome II Regulation (no 864/2007) on the law applicable to non-contractual obligations;

(ii) If so, what is the applicable law under the Regulation; or

(iii) If not, what is the applicable law under the common law of Scotland.

The Rome II Regulation

[6] Recitals 15, 16 and 17 of the Regulation state:

> "15. The principle of the *lex loci delicti* is the basic solution for non-contractual obligations in virtually all of the Member States, but the practical application of the principle where the component factors of the case are spread over several countries varies. The situation engenders uncertainty as to the law applicable.
>
> 16. 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 the 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…
>
> 17. 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."

[7] Chapter II of the Regulation is concerned with "Torts/Delicts". Article 4, entitled "General rule", provides *inter alia* as follows:

> "1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict 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.
>
> …
>
> 3. Where it is clear from all of the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1 or 2, the law of that other country shall apply. A 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."

In terms of article 2(3), "an event giving rise to damage" includes events giving rise to damage that are likely to occur, and "damage" includes damage that is likely to occur.

[8] Article 25(1) provides that where a state comprises several territorial units with their own rules of law in respect of non-contractual obligations, each unit shall be considered as a country for the purposes of identifying the law applicable under the Regulation. Under article 25(2), a member state is not obliged to apply the Regulation to conflicts between its own legal systems. The United Kingdom has, however, chosen to do so. The Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008 (SI 2008/404) provide (reg 3) that the Regulation shall apply in the case of conflicts between the laws of different parts of the UK as it applies in the case of conflicts between the laws of other countries. SI 2008/2986 contains an equivalent provision for England, Wales and Northern Ireland.

[9] Article 31 states that the Regulation applies to "events giving rise to damage which occur after its entry into force". The date of entry into force, according to article 32, was 11 January 2009.

Issue 1: whether Rome II Regulation applies

Argument for the defender

[10] On behalf of the defender, it was submitted that the Regulation applied to determine the applicable law. For the purposes of article 31, the deceased's death in 2011 was among the "events giving rise to damage". The article was badly drafted; the phrase "events giving rise to damage" included everything leading up to the occurrence of damage, and was not restricted to negligent acts. As article 2(3) made clear, it could include future events. In the present case, the diagnosis of respiratory disease, the subsequent symptoms, and the deceased's death occurred after the entry into force of the Regulation and it therefore applied. In the alternative, if death was not itself an event giving rise to damage, the post-

diagnosis symptoms were such an event, and that was sufficient for the Regulation to apply. Reference was made to *Lazar v Allianz SpA* Case-350/14; [2016] 1 WLR 835.

Argument for the pursuers

[11] On behalf of the pursuers, the primary submission was that the circumstances of this case did not give rise to any issue of conflict of laws. This was a straightforward claim in a Scottish court by relatives of a person who had become ill and died as a consequence of exposure in Scotland to inhalation of asbestos fibres. The only point of interaction between the deceased and the defender was at the stage of exposure; that was when the legal relationship between them was established. In any event, it was submitted that the Regulation drew a clear distinction between damage on the one hand and events giving rise to damage on the other. Article 31 was not poorly drafted: it had to be broad enough to cover all of the obligations within the scope of the Regulation. The only reasonable meaning of "events giving rise to damage" was events creating a legal obligation if they were allowed to happen; anything else was irrelevant. In the present case, the only events creating an obligation were events that exposed the deceased to asbestos. Those occurred long before the entry into force of the Regulation and it did not apply.

[12] If that was wrong, then this was a situation in which the court should apply article 4(3) and find that the delict is manifestly more closely connected with the law of Scotland than with the law of England. The breach of duty consisting of asbestos exposure had taken place in Scotland by a Scottish employer. The relationship between the deceased and the employer was more closely connected with the delict than the place where the deceased's body was injured or the place where he sustained material damage. It would make no sense

to apply any law other than Scots law determine whether there was negligence more than 70 years ago in Scotland.

Decision

[13] In my opinion the circumstances of the case do give rise to an issue of conflict of laws, but by virtue of the commencement provision in article 31, the Rome II Regulation has no application to it. The reference in article 31 to "events giving rise to damage" is clearly linked to the distinction drawn in article 4(1) between three separate concepts, namely (i) the event giving rise to the damage; (ii) the damage; and (iii) the indirect consequences of the event. In the present case, the damage consisted of the deceased's illness and death. The indirect consequences are the losses suffered by the deceased's relatives. The event giving rise to all of this was exposure to asbestos. One can test this by considering an action during his lifetime by the person who suffered the exposure. In that situation it can clearly be seen that the damage consists of material injury and that the event giving rise to the damage is the negligent exposure. It does not affect the analysis that there may also be indirect consequences which are the subject of claims.

[14] This interpretation is strongly supported by the judgment of the Court of Justice in *Lazar v Allianz SpA* (above). That case concerned a claim made in an Italian court by the Romanian relatives of the victim of a road traffic accident which occurred in Italy, caused by an unidentified vehicle. If Italian law was applicable, the Romanian relatives were entitled to an award of damages. Having referred to recital 17, the Court stated (paragraph 25):

> "It follows that, where it is possible to identify the occurrence of direct damage, which is usually the case with a road traffic accident, the place where the direct damage occurred is the relevant connecting factor for the determination of the applicable law, regardless of the indirect consequences of that accident. In the present case, the damage is constituted by the injuries which led to the death of Mr

> Lazar's daughter, which, according to the referring court, occurred in Italy. The damage sustained by the close relatives of the deceased must be regarded as indirect consequences of the accident at issue in the main proceedings, within the meaning of article 4(1) of the Rome II Regulation."

As the Court made clear, the damage in that case consisted of the injuries sustained by the victim of the accident. It follows that the event giving rise to the damage was the accident. Applying that distinction to the present case, the event giving rise to the damage was the allegedly negligent exposure to asbestos, which occurred before the entry into force of the Regulation.

[15] It is accordingly unnecessary for me to address the question of what the applicable law would be under the Regulation. It is also unnecessary for me to address the pursuers' submission that any choice of English law by virtue of article 4(1) should be displaced by applying article 4(3) and holding that the delict is manifestly more closely connected with Scotland. That appears to me to be a matter of some complexity and I prefer not to express an opinion on it when it is not necessary to do so.

Issue 2: applicable law at common law

[16] The Private International Law (Miscellaneous Provisions) Act 1995 amended the common law of both Scotland and England and Wales in relation to choice of law for determining issues relating to delict/tort. It is, however, common ground that that Act has no application to the circumstances of the present case because, in terms of section 14, it does not apply to acts or omissions giving rise to a claim which occurred before the commencement of the Act. The matter accordingly falls to be determined by the pre-1995 Act common law.

[17] In *Naftalin v London, Midland and Scottish Railway Co* 1933 SC 259 and again in *McElroy v McAllister* 1949 SC 110, it was held that Scots law would not recognise a right of action unless it was admitted by the *lex loci delicti.* In each of those cases the claim of a widow for *solatium* following the death of her husband in an accident in England was refused on the ground that English law, the *lex loci delicti,* excluded claims of that nature. There was, however, no difficulty in those cases in identifying the *lex loci delicti*: to borrow from the terminology of Rome II, the event giving rise to the damage (the accident) and the damage itself (the death) had both occurred in the same place. They do not provide a clear identification of the *lex loci delicti* where the harmful event occurs in one jurisdiction but the harm, consisting of physical injury, occurs in another.

Argument for the defender

[18] On behalf of the defender it was submitted that it was well recognised that there had to be concurrence of *injuria* (breach of duty) and *damnum* (occurrence of material harm) before a right of action in delict arose. The *locus delicti* was the place of such concurrence. That was consistent with the opinion of Lord President Cooper in *McElroy v McAllister.* Reference was made to the observations in *Rothwell v Chemical Insulating Co Ltd* [2008] 1 AC 281 of Lord Hope of Craighead at para 47 and Lord Rodger of Earlsferry at paras 83-88.

[19] On the facts of the present case, the concurrence of breach of duty and material harm occurred in England, when non-negligible asbestos-related damage was diagnosed. It followed that the *locus delicti* was England, and English law applied. Any claim under the Damages (Scotland) Act 2011 was irrelevant.

Argument for the pursuers

[20] On behalf of the pursuers it was emphasised that the position of the present defenders was distinguishable from that of ICI in that the allegedly negligent exposure to asbestos had taken place in Scotland. The critical question, once again, was not when concurrence of *injuria* and *damnum* had occurred; rather it was when the relationship between the defender and the deceased had subsisted. The fact that the deceased had moved afterwards to live in another jurisdiction was a matter of chance which ought not to determine the law applicable to a breach of duty in Scotland. Reference was made to *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 (PC), which was concerned with a question of whether the English courts had jurisdiction. Delivering the judgment of the Privy Council, Lord Pearson (at page 466) identified three possible interpretations of a New South Wales statute which referred to "a cause of action which arose within the jurisdiction", and chose to construe this phrase as meaning that the act on the part of the defendant which gave the plaintiff his cause of complaint must have occurred within the jurisdiction. By way of contrast, in *Durham v T&N plc* (Court of Appeal, 1 May 1996, unreported), it was held that an employee injured in Quebec by exposure to asbestos dust could not sue an English company in England after expiry of a limitation period under the law of Quebec, because the wrongful act had occurred in Quebec. In the present case the wrongful act took place in Scotland, and accordingly the applicable law was Scots law.

Decision

[21] In assessing the relevance of the authorities cited, it is important to guard against placing undue reliance on judicial observations made in a different context. Many of the authorities cited were concerned with issues of jurisdiction or limitation and not with the

question with which this case is concerned, namely identification of the *locus delicti*. I have, however, concluded that authoritative guidance is provided by *dicta* in cases concerning inhalation of harmful dust. In *Brown v North British Steel Foundry Ltd* 1968 SC 51, an employee who was exposed to siliceous dust between 1941 and 1949 was diagnosed in 1958 as suffering from pneumoconiosis. The pursuer could not prove that he had suffered from the disease prior to 1955, and his action for damages was held to be time-barred under the Law Reform (Limitation of Actions etc) Act 1954 as the cause of action had not arisen before the Act was passed. Lord President Cooper stated (pages 64-5):

> "…There was in fact no cause of action in 1949. To create a cause of action, *injuria* and *damnum* are essential ingredients. In the present case there is no evidence of any injuries to the workman's lungs in 1949. He had then merely a deposit of dust in his lungs, which might or might not subsequently create an injury. But, in addition, he had then sustained no *damnum*. He could not then have been awarded damages for any loss, because at that stage he had sustained no loss of wages and had suffered none of the discomforts and disabilities which, he avers, followed upon the onset of pneumoconiosis and which in fact flowed from the outbreak of that disease in 1955."

For present purposes, the first part of this observation is the more significant: the presence of dust in the pursuer's lungs was not of itself regarded as constituting injury.

[22] The passage above was cited by Lord Rodger in *Rothwell v Chemical & Insulating Co Ltd* [2008] 1 AC 281 (in which it was held that the development of pleural plaques as a consequence of asbestos exposure did not create a cause of action, a decision subsequently reversed by statute in Scotland) at paragraph 86. Lord Rodger continued (paragraphs 87 and 88):

> "87 In summary, three elements must combine before there is a cause of action for damages for personal injuries caused by a defendant's negligence or breach of statutory duty. There must be (1) a negligent act or breach of statutory duty by the defendant, which (2) causes an injury to the claimant's body and (3) the claimant must suffer material damage as a result.
>
> 88 In these cases the claimants do not suggest that the presence of the asbestos fibres in their lungs constitutes an injury…"

To similar effect, Lord Hope stated (paragraph 47):

> "It is well settled in cases where a wrongful act has caused personal injury there is no cause of action if the damage suffered was negligible. In strict legal theory a wrong has been done whenever a breach of the duty of care results in a demonstrable physical injury, however slight. But the policy of the law is not to entertain a claim for damages where the physical effects of the injury are no more than negligible..."

[23] Again it must be acknowledged that the point being addressed is not the one that arises in the present case. But it is clear from both of these *dicta* that, leaving aside the question of whether there has or has not been material damage, a cause of action in delict does not arise unless and until there has been both a wrongful act and resultant injury. Specifically, the presence of asbestos dust in an employee's lungs does not of itself constitute injury, and (subject to the Scottish statutory provisions regarding pleural plaques) no cause of action arising out of negligent exposure arises until it does.

[24] As the recitals to the Rome Convention recognised, use of the Latin phrase *lex loci delicti* is apt to create uncertainty because it is open to more than one interpretation. An English translation such as "the law of the place of the harmful event" does not take matters much further where the act or omission causing injury and the injury itself take place at different times in different places. It seems to me, however, that since injury is an essential ingredient of an actionable wrong, and since injury obviously cannot take place until after the breach of duty has occurred, the place of the harmful event (or *locus delicti*) is where the injury takes place and not, if different, where the antecedent negligent act or omission occurred.

[25] This conclusion is consistent with the decision in *Evans & Sons v Stein & Co* (1904) 7F 65, a defamation case in which an action for damages was raised in respect of slanderous statements about the pursuers made in two letters and a telegram sent by the defenders in

Scotland to the pursuers in England. As Lord McLaren explained (page 68), while Scots law awarded reparation for defamatory statements made to the party accused, English law gave no redress without publication to a third party. The pursuers' claim accordingly depended upon the applicable law being Scots law. Lord McLaren continued:

> "The Lord Ordinary has allowed an issue on the ground, as he states, 'that Scotland was the *locus delicti*, because the letters were written and posted and the telegram despatched in Scotland.'
>
> On the best consideration I have been able to give to the Lord Ordinary's reasoning on this subject, I am not able to concur in his opinion. It appears to me that it is of the essence of an injury of the nature of defamation, that the defamatory charge should reach its destination, or should at least become known to someone. While the letters complained of were in transit through Scotland they could not injure the pursuers, because their contents were as secret and as completely protected from disclosure as if they had been locked up in the defenders' desk. It was only when the letters were delivered at Wolverhampton that damage was done; but then the damage was of a kind that the law of England does not consider actionable."

Identification of the *locus delicti* was thus held to depend upon the place of occurrence of injury, as distinct from the sustaining of actionable damage, and not merely upon where the event giving rise to the injury had taken place.

[26] I am not persuaded to the opposite conclusion by the authorities relied upon by the pursuers. *Distillers Co (Biochemicals) Ltd v Thompson* was concerned with interpretation of the words "cause of action" in the context of a particular statutory provision. The Privy Council noted (pages 468-9) that the problem of deciding where in substance a wrongdoing occurred was a difficult one and found no need to express any opinion on it. Although the present case is on all fours with *Durham v T&N plc* in that the "wrongful act" in each case consisted of exposure to inhalation of asbestos dust, that does not fully answer the question that has to be addressed here, ie what was the place where the harmful event occurred, which is not necessarily, in my view, the same thing.

Disposal

[27] For these reasons I hold that the pursuers' claims for reparation for loss arising as a consequence of the allegedly negligent exposure of the deceased to inhalation of asbestos dust during his employment by the defender's predecessor fall to be determined according to English law. Their case, so far as based upon the Damages (Scotland) Act 2011, is irrelevant. I shall therefore dismiss the action against the defender at the instance of the second to twenty-fourth pursuers, and I shall exclude from probation the averments of the first pursuers in so far as these proceed on the basis of the provisions of the Damages (Scotland) Act 2011. I shall allow a proof before answer in so far as the first pursuers' case proceeds under English law, in terms of which their claim is restricted to the three items listed in paragraph 4 above. Expenses are reserved.