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Untangling cross-border traffic accidents in the European Union and the United States

Introduction

What happens if an Italian citizen on vacation in the Netherlands suffers a traumatic injury while driving through Belgium? Because the European Union's Member States (hereinafter 'MS') have different laws on damages, limitation periods and standards for medical evidence, the answer is not so clear-cut. Many Europeans are unaware of their legal rights when they are involved in a traffic accident in another MS.

According to Regulation EC No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II'), a victim is entitled to compensation according to the law of the country where the accident occurred unless both parties have 'their habitual residence' in another country or another country is 'more closely connected' with the tort.

Therefore an Italian injured by a Belgian driver on the streets of Belgium will apply Belgian law to her claim. This scenario has become more common with the growing mobility of EU citizens and an increase in the number of cross-border accidents. The EU has 27 MS with unique languages, cultures, histories and torts. This article highlights a few substantive and technical differences in the law of torts as applied to cross-border accidents.

In the United States, the largest number of tort cases derive from automobile accidents. The principle of *lex loci delicti* ('law of place where wrong occurred') is used in ten out of 50 states to decide which law to apply to an inter-state dispute. The majority of states, however, apply the law of the state with the 'most significant relationship' with the accident or the parties regardless of whether that state is where the accident occurred.

US courts applying the 'most significant relationship' test will examine: (i) whether the parties had a pre-existing relationship and, if so, in which state their relationship was 'centered';

(ii) where the parties are domiciled; (iii) where the vehicle is registered and insured; and (iv) which state has a stronger interest in applying its law to the accident.

Roughly 20 states have no-fault statutes that provide compensation for traffic accident injuries without requiring the victim to prove that another party was at fault in causing the harm. In half the states with no-fault statutes, injured parties can pursue legal action but they must repay insurers with any recovery. Other states with no-fault statutes bar injured parties from filing any tort actions in court such that no-fault insurance is their only remedy for compensation.

Specialisation of lawyers in the field of personal injury law

The development of an experienced and qualified personal injury bar makes a substantial difference in the enforcement of legal rights of traffic accident victims. In most European jurisdictions, the degree of specialisation in personal injury law is fairly low. This is not the case in England, Wales, Ireland, Scotland, the Netherlands, France or Switzerland.

The most formidable European organisation for personal injury lawyers is the Pan-European Organisation of Personal Injury Lawyers (PEOPIL) with members in all MS. PEOPIL is a non-partisan organisation, focusing on the dissimulation of knowledge of personal injury law, networking, and access to justice for victims. In the US, the personal injury bar is more developed with state-wide organisations such as Washington State Association for Justice and nationwide organisations such as the American Association for Justice (AAJ) with over 56,000 members. The majority of AAJ members are personal injury lawyers in firms with fewer than ten lawyers. AAJ holds annual conferences, sells practice materials, and provides directories to connect colleagues in different states.

Limitation periods

Limitation periods can prevent claimants from obtaining remedies if they act too late after suffering injuries. There are major differences among MS with respect to personal injury limitation periods. Not only do limitation periods vary in amount of time, but there are variations as to the beginning of a limitation period, procedural requirements for stopping the running of a limitation period, and application to minors, disabled people and victims.

In Spain the limitation period for road traffic accidents is one year. In Italy, there is a two-year limitation period for road traffic accidents. Germany has a three-year limitation period for actions in tort, but claims for pain and suffering have a limitation period of 30 years. Belgium has a limitation period of three years as well as a statute of repose with a limitation period of 30 years regardless of when the victim discovered his or her injury.

In all European jurisdictions the limitation period begins to run from the date of objective material occurrence of the damage, which is usually the date of the accident.

In Belgium, the Netherlands, Italy and Spain it is sufficient to send the defendant a registered letter with a written warning in which a victim unequivocally claims damages sustained as a result of the accident. It is not necessary to issue proceedings. In England, Wales, Ireland and Scotland, it is necessary to issue proceedings.

In the EU, courts apply the limitation period of the country where the accident occurred even if the lawsuit is filed in a different MS. The limitation period is generally considered to be a matter of substantive law except in the United Kingdom where there is uncertainty as to whether a court will apply the UK limitation period, as a matter of procedural law, instead of the limitation period of the country where the accident occurred.

Applying these principles to our hypothetical example, an Italian who was injured by another driver in Belgium and subsequently files a lawsuit in Italy will have her case managed by an Italian court that applies the Belgian limitation period. The need for lawyers in the EU to apply the limitation period of a different MS, that is where the accident occurred, demonstrates the necessity for a high level of cooperation among lawyers in different jurisdictions.

Because victims are often unable to pursue claims due to the expiration of limitation periods of which they were not aware, PEOPIL proposed a new EU-level regulation that would require an EU-wide limitation period for cross-border personal injury cases of four years from the date of the accident or the date of knowledge of the injured person. For minors, the limitation period would be four years from the date the minor becomes 18-years-old. The European Parliament passed a resolution embracing this proposal in 2006. The European Commission recognised in the Consultation Paper on the Compensation of Victims of Cross-Border Road Traffic Accidents of 26 March 2009 that varying MS limitation periods should be addressed with an EU-level regulation.

In the United States, statutes of limitations vary among the states. US courts apply the statute of limitations of the forum state where the court is based, regardless of whether the accident occurred in the forum state or in a different state. This practice encourages forum shopping by plaintiffs seeking favourable statutes of limitations.¹ Depending on the state, plaintiffs must either: (a) file a complaint in court; or (b) file a complaint in court and issue a summons within the statute of limitations period.

Protection of minors

In most MS, minors and disabled people are under-protected. In Italy and Austria, the limitation period starts to run from the appointment of a legal representative. In the Netherlands, the limitation period starts to run from the date a minor turns 18-years-old but there is no such protection for disabled people. In France, the limitation period starts to run from the age of 18. In France and Italy, the limitation period is suspended during a period of disability unless the disabled injured person is under the charge of someone capable of taking action.

In the United States, the treatment of minors varies. In some states, such as Texas, the statute of limitations does not run until the injured person turns 18-years-old under the theory that the minor has a 'legal disability' until becoming an adult. In Missouri, the statute of limitations does not run until the minor turns 21. Pennsylvania does not stop the statute of limitations from running for minors and treats them as adults.

Medical experts

Medical experts play an important role in case assessment and evaluation but there are wide differences with respect to requirements to act as medical experts, the form and content of medical reports, medical scales for the evaluation of injuries, and the use of experts and expert reports in court.

In most MS, there are no special courses or certificates for medical experts. The form and content of medical reports vary. In the Netherlands, Spain and Belgium experts report on injuries as well as the percentage of disability. In the Netherlands, experts are appointed by both parties or by the judge. Luxembourg courts frequently rely on foreign experts from France, Belgium or Germany. Some courts strongly rely on expert reports while others use them, only partially, to assist in reaching a decision.

In the United States, a unified standard for expert evidence is set forth by Federal Rule of Evidence 702 which allows for the admissibility of scientific, technical, or other specialised knowledge that will assist the jury or judge as long as the witness is qualified as an expert by knowledge, skill, experience, training or education.

The Supreme Court's decision in *Daubert v Merrell Dow Pharmaceuticals*, 509 US 579 (1993) further explains that a federal court considering the admissibility of a given expert's testimony or report may consider whether the expert's views were tested, whether his views were exposed to peer review and publication, the potential rate of error in the expert's technique, and the existence of any standards controlling operation of the expert's technique.

Roughly 30 state courts also follow *Daubert* or find it consistent with their own state rules. Although the parties generally provide their own expert testimony in support of their respective positions, a federal court may also appoint experts of its own selection under the authority of Fed R Evid 706.

Awards for pain and suffering

In different MS, the same kind of injuries with the same kind of impacts on victims' lives may lead to completely different compensatory awards. The highest awards for a 20-year-old female legal secretary suffering from burns, for example, may be found in Ireland, Italy, and Germany while the lowest awards may be found in the Netherlands, Sweden and Portugal. Some MS allow unlimited non-pecuniary losses while other MS apply caps, fixed tariffs, and legislative limits. The latter include Spain and Italy with respect to road traffic accidents. Denmark also has fixed maximum statutory awards.

In the United States, personal injury awards vary a great deal with lower median awards in Wisconsin and higher median awards in New York. Some states, such as Maryland, have statutory caps on non-economic damages. New York only allows automobile accident victims to sue in tort when they have sustained serious injuries. In December 2009, a New York jury awarded US\$100,000 in pain and suffering to an eight-year-old hit by a negligent driver. In May 2008, a Californian jury awarded US\$70,000 in pain and suffering to a 26-year-old who required surgery on her ankle due to an auto accident.

Conclusion

Compensation of damages for traffic accident injuries varies widely throughout the EU and the US on the basis of different limitation periods, substantive laws, caps, admissibility standards for expert opinions, and networks among plaintiff's lawyers. The US federal courts adhere to a unified standard for the admissibility of expert testimony, which is lacking in the EU. The MS might seek uniformity with EU-level policy reform. In the meantime, it is important for lawyers in both continents to be aware of procedural and substantive differences and seek assistance from colleagues where the accident occurred.

Note

- 1 Geoffrey Hazard, Jr, Colin C Tait and William Fletcher, *Pleading and Procedure: State and Federal*, (1999) Foundation Press, New York, 129.