Foreign Limitation Periods in England & Wales: Roberts v SSAFA

Written by Elijah Granet

When a British woman gives birth in a German hospital staffed with British midwives on a contract from the British ministry of defence, what law applies and to what extent? This seemingly simple question took Mrs Justice Foster, in the English and Welsh High Court of Justice, 299 paragraphs to answer in a mammoth judgment released on 24 April: *Roberts (a minor) v Soldiers, Sailors, Airmen and Families Association & Ors* [2020] EWHC 994 (QB). In the course of resolving a variety of PIL issues, Mrs Justice Foster held that the German law of limitations should be disapplied as, on the specific facts of the case, contrary to public policy.

Facts

The British military has maintained a continuous presence in Germany since the end of the Second World War. In June 2000, Mrs Lauren Roberts, the wife of a British soldier serving in Germany and herself a former soldier, gave birth to her son, Harry, in the Allegemeines Krankenhaus in Viersen ('**AKV**'), a hospital in North-Rhine Westphalia.

AKV had been contracted to provide healthcare for British military personnel and their dependents by Guy's & St Thomas's Hospital NHS Trust in London, which, in turn, had been contracted by the British Ministry of Defence ('**MoD**') to procure healthcare services in Germany. Midwifery care for British personnel and dependents, however, was supplied instead by the Soldiers, Sailors, Airmen and Families Association ('**SSAFA**'), a charity. These British midwives worked under the direction of AKV, taking advantage of the mutual recognition of qualifications under EU law.

Tragically, during the birth, Harry suffered a brain injury which has left him severely disabled. Mrs Roberts, who brought the action in her son's name, alleges that negligence on the part of an SSAFA midwife during Harry's birth caused these injuries. She further alleges that the MoD is vicariously liable for

this negligence. The MoD, in turn, while denying negligence on the midwife's part, asserts that, regardless, German law allocated any vicarious liability to AKV. These allegations have yet to be tried before the court.

The applicable law

Due to unfortunate procedural delays, the case, although begun in 2004, took until 2019 to reach the High Court. This meant that the 2007 Rome II Regulation was inapplicable, and the case instead was governed by English conflicts rules. The relevant statutory provision was the Private International Law (Miscellaneous Provisions Act). Section 11 of that Act lays out a general rule of *lex loci delicti commissi*, but s 12 allows this principle to be displaced where significant factors connecting a tort or delict to another country mean 'that it is substantially more appropriate' to use a law other than that of the location of the tort or delict. Counsel for Mrs Roberts argued that the s 12 exception should apply, given that *inter alia* Mrs Roberts was only in Germany at the behest of the Crown, had no familial or personal connections to Germany, moved back to England in 2003, and were being treated by English-trained midwives who were regulated by British professional bodies.

The authoritative text on English conflicts rules, *Dicey, Morris & Collins on the Conflict of Laws* (15th ed), provides that at para 35-148 that the threshold for invoking s 12 is very high, and that the section is only rarely invoked successfully. This is reinforced by *inter alia* the decision of the English and Welsh Court of Appeal, *per* Lord Justice Longmore, in *Fiona Trust and Holding Corp & Ors v Skarga & Ors* [2012] EWCA Civ 275. Mrs Justice Foster (at para 132) ruled (at paras 132–144) that this threshold was not met. Her Ladyship placed great significance on the fact that the midwives were required to learn basic German, follow the directions of German obstetricians, operate according to the rules of the German healthcare system, and provide care to military personnel who were living in Germany. Thus, German law was applicable.

The limitation period question

English jurisprudence addresses questions of foreign law as matters of objective fact to be determined through expert evidence. This can prove, as it did in this case, to an extremely complex task. For the purposes of this article, it is

sufficient to note that Mrs Justice Foster ultimately found (after extensive discusssion at paras 192–280) that, in light of various decisions of the German Bundesgerichtshof (Federal Court of Justice) on the application of both the old and new versions of §852 of the Bürgerliches Gesetzbuch (German Civil Code), the relevant limitation period of three years commenced in 2003, meaning that the claim issued in 2004 was within time.

More relevantly for PIL scholars, Her Ladyship also ruled that, in the alternative, any applicable German limitation period was to be disapplied. In English law, the disapplication of foreign limitation periods is governed by the appropriately-named Foreign Limitation Periods Act 1984. While the general rule is that foreign limitation periods displace English limitations, Section 2(2) allows for the disapplication of foreign limitation periods where their application would 'conflict with public policy to the extent that its application would cause undue hardship' to a party. This is, once again, a deliberately high threshold which is rarely applied; the authoritative English text on limitation, *McGee on Limitation Periods* (8th ed), provides (at para 25-027) that '[j]udges should be very slow indeed to substitute their views for the views of a foreign legislature'. Similarly, Mr Justice Wilkie, in *KXL v Murphy* [2016] EWHC 3102 (QB), para 45, warned that the entire system of private international law could collapse if public policy was too readily invoked, and the public policy test should only succeed where the foreign provision caused undue hardship which would be 'contrary to a fundamental principle of justice'.

After surveying the case law, Mrs Justice Foster concluded, at paras 181–184, that undue hardship must be a 'detriment of real significance', whose existence (or lack thereof) must be determined through a careful and holistic evaluation of the particular facts of any given situation. Thus, the question was not if the German limitation period *per se* caused undue hardship (and indeed, Mrs Justice Foster held at para 182 that it did not), but rather if the application of an otherwise unobjectionable provision to the unique factual matrix of the case would create undue hardship. Thus, Mrs Justice Foster ruled (at paras 185–6) that, if (contrary to her findings) the German limitation period commenced in 2001, this would be a disproportionate hardship given the disadvantages Mrs Roberts had as a primigravida unfamiliar with obstetrics who had given birth in a foreign country where she did not speak the language. Furthermore, the highly complex organisational structure of medical care, between the SSAFA, the MoD,

and AKV would mean that it would be unjust and disproportionate for the relevant 'knowledge' for the purposes of the §852 limitation period to have been said to commence in 2001.

Comment

This case demonstrates the complexities which arise when applying abstract rules of private international law to the realities of human affairs. Although the (by comparative standards) wide discretion accorded to judges in English law has its critics, in this case, the ability to disapply foreign law where it might lead to an unjust result was able to ensure that the Roberts family, for whom one must have the greatest sympathy, were able to proceed with their claim. It is hard to disagree with Mrs Justice Foster's conclusion that, on the facts, it would be a disproportionate hardship on the family. Both the case-law and texts are clear that this discretion should be applied only rarely, given that its overuse would be to the detriment of the principles of legal certainty and English conflicts rules, *Roberts* demonstrates that the common law preference for flexibility can, if used wisely, avert serious injustice in those rare circumstances where the general rules are insufficient.