The importance of being earnest….

CPB successfully represented a Greek insurer in the High Court, where the judgment underlines the importance of ensuring an expert guards against becoming a party's advocate. The full judgment is available at this link.

This personal injury claim was brought by an English national, Michael Ashton, who tragically suffered catastrophic injuries in a cycling accident whilst on holiday in Greece. He issued his claim in the English High Court against the Greek motor insurer, Eurolife. Greek law was to be applied to substantive matters, pursuant to Articles 4.1 and 15 of the Rome II Regulation No 864/2007. Expert evidence on Greek law, then, was key to enable the Court to interpret the relevant Greek legislation in a like manner to a Greek Court.

Due to the level of his injury, Mr Ashton would have been entitled to very significant compensation indeed, were he to have been successful. This meant that if the Court had found that even a small proportion of the blame was attributable to Eurolife's insured driver, insurers would have to pay a very substantial amount.

Background

The facts of the matter were simple: on a sunny September morning in 2019, Mr Ashton, a keen cyclist, went on a bike ride during an activities holiday in Greece. While riding down the straight section of a provincial road near his hotel, he failed to see a car that had been parked on his side of the road under the shade of a tree, for the driver to make a phone call. Mr Ashton crashed in to the back of the car, at a speed estimated as between 20 and 25pmh, tragically sustaining severe spinal injuries.

The reconstruction expert evidence was agreed, clear and concise: the car had been visible at a distance of 190 metres, and it had been plain that it was stationary from a distance of 120 metres. It followed that Mr Ashton (who had no recollection of the accident) must have cycled with his head down, without looking up, for some 8-10 seconds. Around 3.5 metres width of road was available from the driver's side of the car to the opposite verge of the road, leaving ample space for other road users, travelling in the same direction, to move around it.

The Greek law

The critical issue, then, was whether under Greek law, the driver had acted "*unlawfully and with fault"* in parking where he did, thereby incurring a tortious liability to Mr Ashton.

The parties' respective Greek law experts took opposing views – their Joint Statement alone ran to 56 pages. Whilst they (ultimately in Court) agreed in principle on a number of points, including on how liability was established under Greek law, they fundamentally disagreed on whether the driver

was in breach of essential provisions under the Greek Traffic Code ("GTC") and therefore potentially liable.

At trial, the essence of the experts' disagreement could be summarised as follows: did the car create an "*obstruction to circulation"* and/or a "*danger to persons"*? And, therefore, was the driver in breach of s.34(1) of the GTC, and potentially liable?

Mr Ashton's expert said an obstruction had been created - the driver was in breach and liable, as, contrary to the provisions of the GTC, the parked car left less than 3 metres to the *centre* of the road, thus forcing other road users into the opposite traffic lane and creating a danger. The insurers' expert (George Natsinas) disagreed - he said that the "3 metre rule" had no application, that there was no obstruction or danger under Greek law, and that no provisions of the GTC had been breached. In essence, his evidence was that the interpretation of the GTC by Mr Ashton's expert was wrong.

The question then, for the Court was which Greek law expert's evidence should be preferred.

The credibility of each expert was a factor in the Judge's findings. In this case, he was highly critical of the approach taken by Mr Ashton's expert, both in her Report and in the Joint Statement. His finding was that she had, in both instances:-

> "*… presumed to make findings of fact (which are for this court alone to make) and expressed herself more as an advocate rather than an independent expert …"*

She had also indicated an approach "*… that lacked the requisite independence and strayed impermissibly beyond her remit ..."* by suggesting new factual possibilities at the Joint Discussion stage, none of which were supportable by the factual evidence that was at that point available to her.

He found in contrast, Mr Natsinas for insurers had expressed his report carefully with a concern not to stray in to factual issues.

Of some consolation, was that whilst insurers had also contended that Mr Ashton's expert had an undeclared conflict of interest, in that she had not disclosed her own firm had acted for Mr Ashton in other aspects of the claim, the Judge was prepared to and did accept, her evidence that her failure to declare her firm's involvement was an "honest mistake".

The Judge ultimately preferred Eurolife's interpretation of how the law of Greece would be applied by a Greek Court. In doing so, he expressed sympathy for Mr Ashton, but found that the accident was not one for which Eurolife's driver was liable.

CPB Comment

Litigation is inevitably a risky business, particularly when a case concerns the Court interpreting how a law other than English law is to be applied. Much rests on the witness evidence, and more particularly the experts, often lawyers, giving evidence to the Court on how their own Courts would interpret and apply their own law.

Regardless of how clear the underlying law may appear, trials will always turn on the evidence. The weight the Judge attributes to the witnesses giving evidence may alter the prospect of a case dramatically. This case illustrates that this is true, not only for witnesses to fact, but also for the professional expert witnesses.

Even if familiar with the English legal system, experts on foreign law will be used to operating in a different system. They may very well have trained and practiced as advocates in their home jurisdictions. Moreover, they may operate under professional standards that duties are to their clients rather than the Court.

Whilst the principles illustrated in this case are not novel, the case serves as a timely reminder of the importance of not being complacent when preparing for trial. The legal team must ensure that their evidence is properly prepared - this includes ensuring that expert witnesses fully understand and comply with their duties to the Court under CPR Part 35.

Any legal team likes to hear that their client has a strong case; however, presented with a helpful expert report, they should nonetheless ensure the expert's evidence is tested thoroughly, that weaknesses are identified and that it *is* truly independent.

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Any questions

If you have any questions regarding the insurance-related issues highlighted in this article, please get in touch with Bernadette or Lisbeth.

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