



When Statutes have Overriding or Mandatory Effect: Contributing to the Discussion

Introduction

Does the Civil Liability (Contribution) Act 1978 (the “1978 Act”) have overriding or mandatory effect so that it applies to all contribution claims in England and Wales? This was the question which the Supreme Court had to answer in *The Soldiers, Sailors, Airmen and Families Association – Forces Help v Allgemeines Krankenhaus Viersen GmbH*.¹ Lord Lloyd-Jones, giving a judgment with which the other Justices agreed, answered that question in the negative. Thus, the 1978 Act applies only when domestic choice of law rules indicate that the contribution claim in question is governed by English law.

Facts

These may be shortly stated.² The claimant was born at a military hospital in Germany and, as he alleged, suffered an acute hypoxic brain injury as a result of negligence on the part of the attending midwife. In consequence, the claimant sued the defendant,³ the midwife’s

1 [2022] UKSC 29 (hereafter, “SSAF”).

2 The facts are set out at [2–5] of Lord Lloyd-Jones’ judgment in SSAF.

3 In actual fact, there were two defendants (the second defendant being the Ministry of Justice) but no distinction is drawn between them for present purposes.

employer. The defendant denied liability to the claimant but brought a claim for contribution against the third party, who operated the military hospital. It was common ground before the Supreme Court that the claimant’s claim against the defendant was governed by German law, as was any liability of the third party to the claimant. The parties also agreed that, applying English choice of law rules, German law would apply to the contribution claim unless the 1978 Act had overriding effect. Were the contribution claim governed by German law, it would be time-barred; if the 1978 Act had overriding effect, the contribution claim would not be so barred.

The Supreme Court’s Answer

Disagreeing with both Soole J at first instance⁴ and the Court of Appeal,⁵ the Supreme Court concluded that the 1978 Act “does not have overriding effect ... [and so] does not apply automatically to all proceedings for contribution brought in England without reference to any choice of law rules”.⁶ On the facts, therefore, the defendant’s contribution claim against the third party was time barred.

4. [2019] EWHC 1104 (QB), [2020] QB 310.

5. [2020] EWCA Civ 926, [2021] QB 859.

The Supreme Court’s Reasoning

There are several points of importance which emerge from the reasoning of the Supreme Court in SSAF.

First, the Supreme Court confirmed that the correct starting point for the exercise which it had to undertake was to identify the law governing the contribution claim by reference to the relevant choice of law rules.⁷ In order to identify that law, the Supreme Court characterised a claim for contribution under the 1978 Act as being *sui generis* but closely analogous to a restitutionary or quasi-contractual claim.⁸ This was supported by Section 2(3) of the 1978 Act. Even so, the analogy, while useful, was not perfect and should not be pushed too far.

Second, and in disagreement with the courts below, the Supreme Court held that the 1978 Act nowhere stated that it had overriding effect. In those circumstances, it was necessary to ask whether the provisions of the 1978 Act supported a conclusion that Parliament had implicitly intended for the 1978 Act to have overriding effect.⁹

6. SSAF, [84].

7. SSAF, [27].

8. SSAF, [33].

9. SSAF, [38].



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The answer to that question, too, was in the negative. At best, said the Supreme Court, the provisions of the 1978 Act were “neutral” on this point.¹⁰

Third, and most important, the Supreme Court was persuaded that the 1978 Act did not have overriding effect for two main reasons. In the first place, and in disagreement with David Richards LJ in the Court of Appeal, it was incorrect to conclude that, where the liabilities of the defendant and the third party to the claimant were governed by foreign law, the chance of domestic choice of law rules “leading to the application of English law to the [contribution claim] would be vanishingly small”.¹¹ Relying on the work of Professor Glanville Williams,¹² Lord Lloyd-Jones concluded that there “will be many situations in which a contribution claim will be governed by English law, notwithstanding the fact that the underlying liabilities are governed by foreign law ... [in particular] where there exists a special relationship” between the first defendant and the third party. In the second place, there was no good reason why Parliament would be legislating so as to fix a defect in foreign law and there was nothing to suggest, in the 1978 Act, that this was its objective.¹³

Points for the Future

It is submitted that there are two points, in particular, which may well merit further review in the future.

Most obviously, for parties and judges dealing with the question of whether a statute has overriding effect, the Supreme Court has affirmed the need to concentrate on the wording of the legislation in question. Of course, all the judges who heard the case had this in mind, with Soole J and the Court of Appeal relying on their construction of the provisions of the 1978 Act to justify their conclusion; the Supreme Court doing the same to justify its own answer. In short though, clear wording or, in its absence, at least some clear justification as to why Parliament would intend legislation to have overriding effect is required in order to substantiate the conclusion that legislation does have that effect. Neither of these things existed in *SSAF*, at least in the mind of the Supreme Court.

Perhaps less obviously, but no less importantly, future cases may well explore the question of when the contribution claim will be governed by English law and, in particular, when there will exist between the defendant and the third party a “special relationship”. While Lord Lloyd-Jones gave certain examples of when such a relationship might exist,¹⁴ he set nothing in stone. Doubtless, cases will offer contributions on this topic in the time to come.



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10. *SSAF*, [80].

11. *SSAF*, [42] and [85].

12. *Joint Torts and Contributory Negligence* (London: Stevens & Sons; 1st edn (1951)).

13. *SSAF*, [83].

14. *SSAF*, [43].