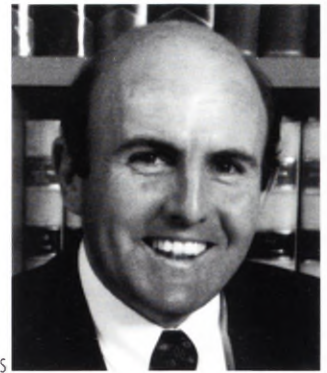


Injuries when travelling or working interstate

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Francis Bacon once said of travel: "Travel, in the younger sort, is a part of education; in the elder, a part of experience" In light of the various different laws applying in the States and Territories throughout Australia, if a traveller or person working interstate is injured, complex issues can arise as to what type of compensation is available.

Claims for damages for injuries arising out of motor vehicle accidents or work accidents are governed by an unfettered common law system in some jurisdictions such as the ACT and, as I understand it, to a large extent in Queensland. If for example an ACT resident is working in New South Wales or another jurisdiction or is travelling on holidays in New South Wales or another State and suffers injury, the question which arises is whether that injured person can still seek common law damages in a Court in the ACT. The same question may arise, for example with a Queensland resident travelling or working in New South Wales or another State.

An injured person can bring a claim in one State or Territory for an accident causing injury (whether work or motor vehicle) occurring in another State or Territory so long as the plaintiff can satisfy the test outlined by Brennan J (as he then was) in *Breavington v Godleman* (1988) 169 CLR 41 at 110 that is:

1. *The claim arises out of circumstances of such a character that, if they had occurred within the territory of the forum, a cause of action would have arisen entitling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce, and*
2. *By the law of the place where the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind which the plaintiff claims to enforce."*

Therefore, before the Court in which the action is brought determines what law

to apply to a claim, the Court must be satisfied that the action is maintainable in that Court. In the ACT Supreme Court Master Connolly in *Rogerson v John Pfeiffer Pty Limited* (delivered 24 April 1997) at page 4 summarise the situation as follows:

"Where an interstate tort is the subject of a claim in an Australian Court, the Court hearing the claim is able to apply the law of the forum to determine the claim, provided the claim is maintainable in that Court."

In that case Master Connolly referred to the comments of Dawson J in *Gardner v Wallace* (1995) 184 CLR 95 at 98 where he summarised the matter helpfully as follows:

"An action could be maintained in a State, other than that in which the tort occurred and that the law, procedural and substantive, to be applied in resolving the action was the law of the State in which the action was heard, that is to say the law of the forum."

Applying these principles, therefore, it is clear that if the ACT resident is injured in a car accident in New South Wales or a work accident in another jurisdiction, they may still be able to receive common law damages if they can properly bring their claim in the ACT as, once the action is maintainable in the ACT, it appears that the procedural and substantive law of the Territory will apply and the common law damages available in the ACT or other common law jurisdiction will be available.

What type of claim can therefore be commenced in the ACT (or other common law jurisdiction)? In the ACT there are two Courts namely the Magistrates Court which is given jurisdiction and authority by legislation namely the *Magistrates Court (Civil Jurisdiction) Act* and the Supreme Court which is superior Court with inherent jurisdiction. An action can be commenced in the ACT Supreme Court as in other Supreme Courts and served interstate even if the cause of action giving rise to the claim occurred in another State. This appears to

be possible because of the provisions of the *Service and Execution of Process Act*. Any action commenced in that way may be subject of an application to cross vest, but at least in the ACT, it is clear from recent decisions, that it will be difficult for a defendant to cross vest a matter from the ACT Supreme Court in circumstances where a plaintiff is either resident in the Territory, or has received some treatment in the Territory or has some other connection to the Territory. A full exploration of the cross vesting laws is beyond the scope of this paper. Many injuries whether work or motor vehicle accident caused, however, may not justify damages recoverable in the Supreme Court. The Magistrates Court only has jurisdiction in circumstances prescribed by the *Magistrates Court (Civil Jurisdiction) Act*. That Act provides that there is only jurisdiction in circumstances where the defendant is resident in the ACT at the time of service or in circumstances where there was a material part of the cause of action arising in the ACT. I assume that there are similar provisions in other States confining jurisdiction for some Courts. It is suggested that in many cases a plaintiff will be able to argue that a material part of the cause of action has arisen in the ACT (or other State) where there has been treatment or other special damage in that Territory or State. It is suggested that a material part of the cause of action occurs when the plaintiff suffers (damage). The matter was considered by the Court of Appeal in New South Wales in *Flaherty v Girgis* [1985] 4 NSW LR 248. In that case McHugh JA suggested that the word "damage" is not "necessarily confined in the immediate consequences of the negligent act or omission of the defendant". That authority and other authorities were dealing specifically with Part 10 of the New South Wales Supreme Court Rules but it is suggested that the "damage" which forms part of the

cause of action in negligence can be interpreted in light of those decisions. (See also *Brix-Neilsen v Oceaneering Australia Pty Limited* [1982] 2 NSW LR 173).

The matter was also considered by the High Court. In the case of *Williams v Milotin* (1957) 97 CLR 465 at 474 the Court dealt with the argument that part of the cause of action in negligence occurs when the damage is suffered in a particular jurisdiction. The Court said:

"When you speak of a cause of action you mean the essential ingredients in the title to the right which it is proposed to enforce. The essential ingredients in an action for negligence for personal injuries include the special or particular damage - it is the gist of the action - and the want of due care."

There was also a somewhat colourful consideration of the issue by Cross J in the New South Wales Supreme Court in *Challenor v Douglas* [1983] 2 NSW LR 405 at 408 where he said:

"Damage is damage. It may be, at least in part, bodily injury eg, in motor vehicle or industrial accident cases. It may be financial loss as eg, in breach of contract. It may be for outraged feelings or diminished reputation as eg, in false imprisonment or defamation. It may be direct; it may indirect; it may be consequential. It is still all damage..... Damage includes both injury and loss; it also includes consequential damage whether by way of bodily injury or financial or economic loss. Consequential loss is as much "damage" as normal or direct loss."

In my submission it is therefore clear that a person injured in a motor vehicle accident or industrial accident in a State or Territory other than the ACT may still be able to commence proceedings in the ACT Supreme Court or Magistrates Court particularly if the injured person is a resident of the Territory and also in circumstances where there has been some medical treatment, hospitalisation or financial loss suffered within the ACT. In such circumstances in my view there is a strong argument that the action could be brought in the Supreme Court or the Magistrates Court. It is likely that similar arguments could be used in other common law jurisdictions.

What law will apply in relation to such actions? Since the High Court decision in *Stevens v Head* (1993) 176 CLR 433 it has been assumed in the ACT Supreme Court and indeed in jurisdictions throughout

Australia that the law relating to damages in the forum will be applied if the action can properly be brought in that jurisdiction. As stated above such a situation was confirmed by Dawson J in *Gardner*. It must be remembered, however, that a claim for common law damages must be maintainable also in the State or Territory where the tort actually occurred. This will involve a close consideration of the particular provisions applying to claims in other jurisdictions. For example, as is well known, the Court of Appeal in New South Wales in the case of *Thompson v Hill* (1995) 38 NSW LR 714 held that an action for common law damages was not maintainable in Victoria because of the provisions of Section 93 of the *Transport Accident Act* in Victoria. In those circumstances, a claim for common law damages in New South Wales could not be maintained because the second leg of the test in Breavington could not be satisfied.

Notwithstanding that, if an ACT resident, for example, is travelling in New South Wales or Queensland or another State where there has not been an abolition of common law damages, they can successfully bring a claim in the ACT, bearing in mind the abovementioned comments concerning jurisdiction, and if so, *Stevens and Head* dictates that common law damages will be available.

It is suggested that the same principles would apply to a plaintiff in the ACT claiming damages for an injury which occurred in another jurisdiction during the course of employment. In a recent decision in the ACT Supreme Court and Federal Court of Australia it has been confirmed that the principles set out in *Stevens and Head* apply equally to an industrial accident. In the decision of *Rogerson v John Pfeiffer Pty Limited* (Master Connolly 24 April 1997, Full Supreme Court 3 December 1997 and Full Federal Court 9 July 1998) the plaintiff was a New South Wales resident who was injured in New South Wales. The action was commenced in the ACT Supreme Court. The Master at first instance referred to the rule in Breavington as set out above, and ultimately decided that the principles in *Stevens v Head* applied to an industrial accident in the same way that they did to a motor vehicle accident. He found at page 7 of his Judgment as follows:

"I can see no relevant difference between the provisions examined in Stevens v Head and the relevant provisions in the Workers Compensation Act 1987. I am bound to follow the law as set out in Stevens v Head and so having established primary liability, I find that the law to apply in relation to the quantification of damages is the common law applying in the Australian Capital Territory."

This decision was subsequently upheld by the Full Court of the Supreme Court where the Court distinguished the provisions interpreted in *Thompson v Hill* and found that the provisions of the *Workers Compensation Act* were quite different from those contained in Section 93 of the *Transport Accident Act* in Victoria which had been interpreted by the New South Wales Court of Appeal in Thompson's case. The Full Court found that the New South Wales Workers Compensation Act provisions were similar to those in Section 97 of the *New South Wales Motor Accidents Act* and that the principles in *Stevens and Head* had been correctly applied. Finally the five Judges of the Federal Court who heard the subsequent appeal in the matter on 9 July 1998 dismissed the appeal and upheld the earlier decision. The Court found that the provisions in the New South Wales Workers Compensation Act restricting damages were "correctly characterised as being procedural in their operation".

I therefore suggest that where an injured plaintiff can successfully satisfy the jurisdiction tests and commence a claim in a common law jurisdiction such as the ACT, no matter which Court the claim was commenced in, common law damages are likely to be available to that injured plaintiff so long as there was a right to bring at least some common law action in the place where the injury occurred. As can be seen by the different results in *Thompson and Hill* and the *Rogerson* case referred to above, it will be necessary to examine carefully the provisions of the legislation applying in the place where the injury occurred. It clearly can be said, however, that until the High Court examines the question again, interstate travellers and workers can still in some circumstances claim common law damages. ■

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