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The end of forum shopping?

A recent High Court decision has established that where a tort proceeding is brought in a forum different from where the tort occurred, the law to be applied is the law of the place of the tort. This article explains the legal position prior to this decision, analyses the decision in detail and the ramifications it will have for Plaintiffs.

One of the hardest, most technical and intractably obscure areas of Australian law has now been made simple. In *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36 the High Court held that where tort proceedings are brought in a State or Territory other than the State or Territory where the tort occurred the substantive law to be applied is the law of the place of the tort. The only application for the law of the forum is in relation to procedural matters which are confined to matters such as court procedures and the rules of evidence. The effect of the decision is to significantly reduce the ability of plaintiffs to avoid statutes which cut down their entitlements to common law damages.

The law before *John Pfeiffer*

In a series of cases prior to *John Pfeiffer* the High Court had applied the double actionability rule enunciated in *Phillips v Eyre*.[1] As explained in these cases double actionability required that in order to be actionable in a court of a jurisdiction other than that in which the events occurred (1) the events must have been such that they would have given rise in the forum to a civil action of the kind sought to be enforced and (2) by the law of the place of the wrong they gave rise to a liability of the kind the plaintiff sought to enforce. There was confusion as to whether this was a precondition to the exercise of jurisdiction or whether it was a choice of law rule which determined the substantive law to be applied in such a case.

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In determining the second limb of the double actionability test a distinction was drawn between procedural matters and matters going to the substance of the liability. If there was a procedural bar to an action in the place of the wrong the second limb could still be satisfied because the substantive liability still arose even if recovery could not occur for procedural reasons. In applying this test the High Court had defined matters of procedure broadly and found that matters relating to limitation periods and quantification of damages were procedural matters.

This obviously created the potential for properly advised plaintiffs to choose a forum where limitation periods were most favourable and where statutes cutting down a plaintiff's right to damages did not apply. For example, motor accident and workers compensation cases arising in New South Wales but litigated in the ACT avoided the legislation cutting down an injured plaintiff's right to damages.

John Pfeiffer – the facts

The worker was injured on a building site in Queanbeyan when he tripped over some fencing. He brought proceedings against his employer in the ACT Supreme Court for damages for negligence. Negligence was proved. The question was whether or not to apply the provisions of the *Workers Compensation Act* 1987 (NSW) (ss 151F-151G) to the quantification of damages. If the NSW law was to be applied the respondent would receive substantially less than if the unmodified common law of the ACT applied. The Master determined in accordance with *McKain v RW Miller & Co (SA) Pty Ltd*[2] and *Stevens v Head*[3] that the provisions of the *Workers Compensation Act* 1987 (NSW) relating to the quantification of damages were procedural matters and not substantive matters and that therefore the worker should be awarded damages in accordance with the laws of the ACT. The employer appealed this decision to the Full Court of the Supreme Court of the ACT and thence to a bench of five judges of the Federal Court before seeking ▶

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special leave to appeal to the High Court. The express intention of the application was to invite the Court to reconsider its decisions in *McKain* and *Stevens*.

The decision

The employer was resoundingly successful in the High Court. Its application for special leave was granted and its appeal was unanimously allowed. Three judgments were delivered. The principal judgment is that of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ. Kirby J and Callinan J wrote separate judgments.

The principal judgment

The principal judgment identified a number of reasons for reconsidering *McKain* and *Stevens*. These were

- the departure in *McKain* and *Stevens* from the result in the previous decision of *Breavington v Godleman*;[4]
- the fact that neither *McKain* or *Stevens* involved federal jurisdiction;
- the decision in *Lange v Australian Broadcasting Corporation*[5] which held that the common law must adapt to the Constitution;
- the fact that no issue arose as to the applicability of the double actionability rule in either *McKain* or *Stevens*.

The judgment identifies the issue in relation to courts exercising federal jurisdiction. In such cases the jurisdiction of the tort and the jurisdiction of the court are the same, each within a single jurisdiction – Australia. As a result the only task of the court is to identify which law governs the consequences of the tort. No issue of double actionability can arise.

Courts exercising federal jurisdiction are required by ss 79 and 80 of the *Judiciary Act* 1903 to apply the laws of the States or Territories in which they are sitting. That in turn means that, if the laws of the forum are applied, the outcome of a case may depend upon where the court is sitting. The judgment describes this result as "odd or unusual". "That is because although the source of power to decide is constant, the content of the rights and duties to which the court gives effect may vary according to where the power to decide is exercised in the federation."[6]

Having found this justification for reconsideration of the issue the judgment says that such reconsideration should not be limited to reconsideration of the question of choice of law in relation to federal jurisdiction since federal jurisdiction depends to a large extent on the parties rather than on the nature of the acts giving rise to tortious liability.

The judgment then (purportedly in accordance with the decision in *Lange v Australian Broadcasting Corporation*) decided that "the common law with respect to the choice of law rule for tort should be developed to take into account various matters arising from the Australian Constitutional text and structure" including

- the existence and scope of federal jurisdiction;
- the position of the High Court as the ultimate court of appeal;
- the impact of s 117 and 118 on any "public policy exception" to a choice of law rule;
- the predominant territorial concern of the statutes of State and Territorial legislatures;
- the nature of the federal compact.

The judgment says that these matters "favour the adoption of a single choice of law rule consistently in both federal and non-federal jurisdiction in all courts in Australia."[7] It expressly left open the question of whether any aspects of the choice of law rules were constitutionally entrenched as a result of the listed factors.[8]

The judgment then considers the various options for a choice of law rule–application of the law of the forum (lex fori), the law of the place of the wrong (lex loci delicti) or the "proper law of the tort". This latter approach was rejected because of the practical disadvantages that the uncertainty of application of such a rule. That left the choice between the lex loci delicti and the lex fori. Application of the lex loci would fix liability and make it certain. Application of the lex fori would make the existence, extent and enforceability of liability vary according to the different forums in which the claim may be brought or, in the case of federal jurisdiction, in which the court was sitting. The application of a single rule in federal and non-federal jurisdiction and giving effect to the "predominant territorial concern of the statutes of State and Territory legislatures" warranted preferring the lex loci over the lex fori.[9]

As a result of this decision it was possible for the Court to discard the double actionability rule. In federal jurisdiction the rule simply did not apply because there was but one jurisdiction. In non-federal jurisdiction the question was whether or not State and Territory courts should be obliged to grant a remedy when the laws of the forum provided that if the event had occurred in the forum no remedy would be given. This question was answered in the affirmative largely because of the federal nature of the Constitution and the operation of s 117 and 118 preventing courts from refusing on public policy grounds to give effect to the laws of another polity within the federation. The judgment said:[10]

> "within the federal system, it is appropriate that each State and Territory recognise the interest of the other States and Territories in the application of their laws to events occurring in their jurisdiction. Accordingly, any requirement for double actionability in non-federal jurisdiction should be discarded."

The only exception noted was where the absence of an entitlement to sue for a wrong in the forum indicated that it was a "clearly inappropriate forum" in which to sue.

Finally the judgment dealt with the distinction between substance and procedure. Obviously if the choice of law rule applies the lex loci delicti, that rule cannot apply to force the courts of the forum to apply the rules and procedure of another court but rather a party invoking the jurisdiction of the court must take it as it finds it. Similarly a plaintiff cannot ask

a court to grant relief which its empowering statute does not permit.

While the precise application of these principles might be required to be worked out in later cases it was clear to the majority judges that "the application of any limitation period" and "all questions about the kinds of damage or amount of damages that may be recovered" are questions of substance to be governed by the lex loci.[11]

Kirby J

Kirby J wrote a judgment which came to the same result for largely the same reasons. However, His Honour more clearly addressed the relevant issues placing less emphasis on the issue of federal jurisdiction or the purported dictates of the decision in *Lange*. His Honour's reasons identify a number of factors leading to his conclusions

- the difference between a Federation and different states in international law which made the principles adopted in an international context inapplicable;
- the increased mobility of persons, goods and services giving rise to a different context in which the question of choice of law needed to be determined;
- the unfairness of allowing plaintiffs to select a venue in a manner that seriously prejudices the rights of defendants;
- the fact that a narrow definition of what is procedural will reduce the potential for choice of venue to affect the rights of others;
- the desirability of a rule that was certain and predictable.

For all these reasons his Honour thought that the choice of law rule should be reconsidered. Interestingly His Honour retreated from the position he took when on the NSW Court of Appeal and held that s 118 did not dictate a particular choice of law rule but rather that the common law should be developed in a manner "harmonious to the text and character of the Constitution".[12]

His Honour formulated a series of rules that clearly identify the process which a court must engage in when determining an intra-national tort claim.[13] In determining whether there is jurisdiction no question of double actionability arises. The substance of the claim is dealt with in accordance with the common law as modified by the statute law of the place of the wrong.

Callinan J

Callinan J dealt with the matter on a more limited basis. His Honour held that the laws in question should be classified as substantive rather than procedural. That was enough to entitle the employer to succeed. His Honour confined the notion of what was procedural to those laws "which are reasonable and necessary... for the conduct of the action only".[14] His Honour did not consider it necessary or desirable to formulate a different rule to the double actionability rule and it was not necessary to consider the application of s 118 in order to resolve the case.

Comment

There can be no argument with the reasons for the decision in this case on the basis of legal policy. Whilst forum shopping is no doubt of great benefit to plaintiffs the reasons advanced in the judgments for adopting a uniform and predictable rule are compelling. The only criticism of the principal judgment is that it provides another example of the obsession that some members of the Court have about federal jurisdiction and it represents a significant expansion of the basis upon which the common law may be developed in accordance with the Constitution that was outlined in *Lange*. There was no need to place such emphasis on these issues in order to justify a departure from the Court's previous authorities. Rather the approach of Kirby J, who adopted a relatively restrained approach that squarely addressed the policy issues arising in relation to choice of law, was preferable.

At a more practical level the case demonstrates the importance of framing pleadings in both tort and contract. In *John Pfeiffer* the worker had been originally employed in the ACT, the employer had its base in the ACT and the worker had done most of his work in the ACT. Although the High Court found that the case had been pleaded in tort only,[15] it would clearly have been open to plead it in contract and there would have been a good argument that the proper law of the contract–that with the closest and most real connection–was that of the ACT. The implied term of the contract that employers take reasonable care for the safety of employees would have been breached by the conduct which amounted to negligence and the worker would have been entitled to damages for breach of contract calculated in accordance with the law of the ACT. Furthermore, as a result of the decision of the High Court in *Astley v Austrust Ltd*[16] contributory negligence would not have been a defence. Whilst the ability to plead cases in contract will only be of benefit in a small minority of cases it will provide an escape route from the inflexible application of the lex loci in some of the cases where to do so would give rise to a clear injustice. PL

Footnotes:

1. (1870) LR 6 QB 1. The earlier cases were *Koop v Bebb* (1951) 84 CLR 59; *Anderson v Eric Anderson Radio and TV Pty Ltd* (1965) 114 CLR 20; *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; *Stevens v Head* (1993) 176 CLR 433.
2. (1991) 174 CLR 1.
3. (1993) 176 CLR 1.
4. (1988) 169 CLR 41.
5. (1997) 189 CLR 520.
6. [2000] HCA 36 at [59].
7. [2000] HCA 36 at [68].
8. [2000] HCA 36 at [70].
9. [2000] HCA 36 at [86].
10. [2000] HCA 36 at [96].
11. [2000] HCA 36 at [100].
12. [2000] HCA 36 at [142]
13. [2000] HCA 36 at [152]-[161].
14. [2000] HCA 36 at[192]
15. [2000] HCA 36 at [5],[150], [204].
16. (1999) 197 CLR 1.