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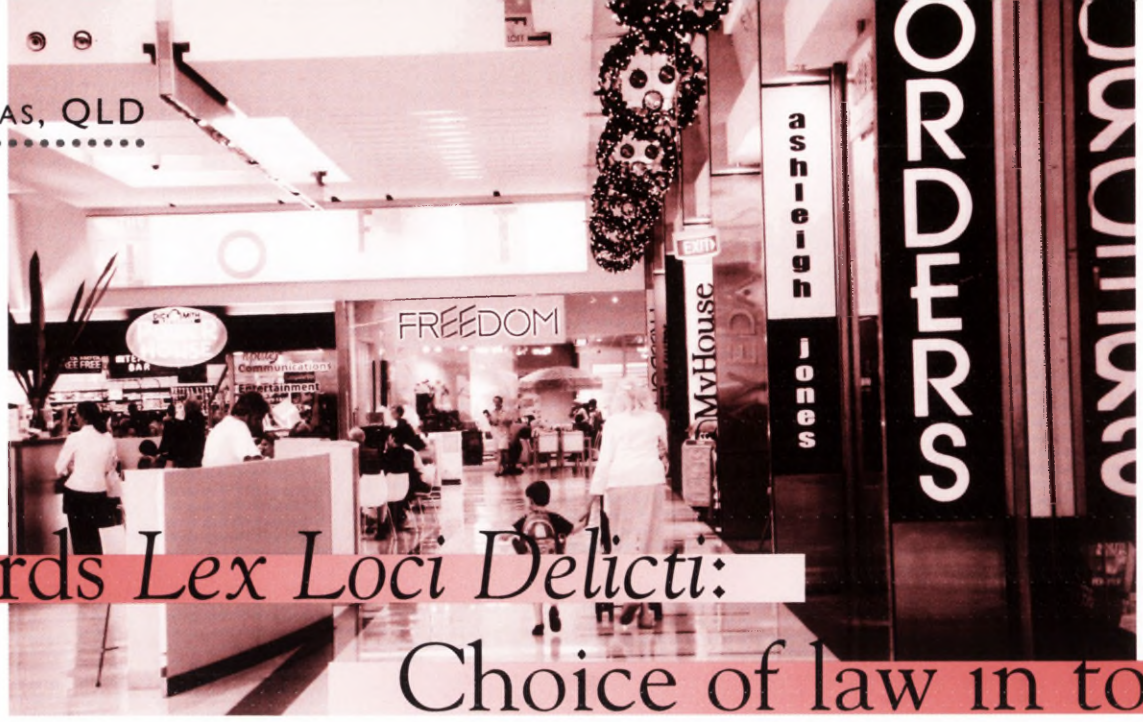

Towards *Lex Loci Delicti*: Choice of law in tort

Two decisions of the High Court, *Pfeiffer v Rogerson*[1] in 2000 and *Regie National des Usines Renault SA v Zhang*[2] in 2002 have marked a phased withdrawal from the complexity surrounding the choice of law rules which are appropriate when a tort action, commenced within one jurisdiction, involves an extra-jurisdictional or 'foreign' element.[3] The paradigm scenario of such situations is where a tort is committed in one jurisdiction, but the plaintiff (usually for forensic advantage) has commenced the action in a different jurisdiction.

Historically, the problematic nature of the choice of law has arisen in both intra-national torts (where the jurisdictional boundaries involved are state or territory borders) and extra-national torts. These issues have been shown to be more complicated when viewed within a federal, rather than a unitary context, and further problematised in the Australian context by the existence of the 'full faith and credit' provision of the Constitution at s118.

In addition, the characterisation of specific provisions of the 'foreign' jurisdiction as procedural (and therefore traditionally ignored by the court in which the action is brought) or substantive (where they will be given effect if the 'foreign' jurisdiction provides the *lex causæ*)[4] has created difficulty where the relevant laws have related either to limitations periods or to the existence of certain heads of damage and the method of, or limitations placed on, quantification of specific heads of damage.

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Background

Pfeiffer, although a special leave application, was heard instanter as both a leave application and the substantive appeal by the Full Court of the High Court. The plaintiff/respondent was employed by the defendant, a company whose principal business office was in the Australian Capital Territory. The injury occurred when the plaintiff tripped on some webbing while at work at the Queanbeyan District Hospital in New South Wales. The plaintiff brought the action in the ACT, where damages awards were governed by the more generous provisions of the common law, whereas the *Workers Compensation Act* 1987 (NSW) would have severely limited the damages which might be recovered for non-economic loss had the action been governed by substantive provisions of New South Wales law.

The issues before the High Court were firstly, what choice of law rule should apply where a tort was committed in Australia but contained an interstate (or 'foreign') element, and secondly, whether statutory provisions relating to limitations on the recovery of damages were procedural or substantive in nature (thus determining whether they would be given effect if the local court applied 'foreign' law).

Choice of Law

While in many areas of law, such as contract or the recognition of foreign marriages, there is little dispute as to the choice of law, choice of law for tort has attracted a range of possible rules and their accompanying theoretical justifications. The *lex fori*[5] has been advocated on the basis of 'local law theory' – that the law of the forum enforces an obligation of its own creation, as close as possible to the obligation which exists in the place where the wrong occurred. Preference for the *lex* ▶

loci delicti[6] has reflected the 'vested rights' theory, that the law in the place where the tort occurred gave rise to an obligation which, thereafter, followed the tortfeasor, and was actionable wherever the person might be found. The 'proper law of the tort', favoured at times in the United States although now largely abandoned, is a more flexible approach which accommodates some of the anomalous situations which have come before the courts, and is sustained by reference to the discovery of the existence or otherwise of a governmental interest in the application by a foreign court of the policy underlying the relevant statute law.

The position as to choice of law for tort in Australia derives from the English decision in *Phillips v Eyre*,[7] as adopted in *Koop v Bebb*[8] and further considered in a sequence of Australian cases. The current formulation was framed by Brennan J in *Breavington v Godleman* in the following terms:

'[a] plaintiff may sue in the forum to enforce a liability in respect of a wrong occurring outside the territory of the forum if - 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 in which the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind which the plaintiff claims to enforce.'[9]

Known as the 'double actionability rule', this has been the subject of ongoing debate as to whether it represents simply a threshold test dealing only with the existence in the forum of a relevant cause of action, or whether it contains, within one or both of its limbs, a choice of law rule which mandates which law is to apply in the case of 'foreign' torts.

Overlaid on the basic double actionability rule is the possibility of a flexible exception (along the lines of the US interests analysis or the more limited exception in *Chaplin v Boys*[10]) with respect to international torts. *Chaplin v Boys* concerned a motor vehicle accident which occurred on Malta. Both the plaintiff and the defendant were British servicemen, normally resident in England but stationed temporarily on the island. The defendant's car was insured with an English company. Lord Wilberforce indicated that there needed to be some form of 'flexible exception' where, as in that case, the jurisdiction in which the tort was committed had 'no interest in applying [their] rule to persons resident outside it, or denying the application of the English rule to [the] parties'.[11]

In Federal Jurisdiction

Neither *Koop v Bebb* nor the subsequent cases had specifically addressed the operation of the double actionability rule within the context of federal jurisdiction (although Wilson and Gaudron JJ had, in *Breavington*, been of the view that a choice of law rule should 'take account of the existence of federal jurisdiction as delineated in Ch III of the Constitution').[12]

While recognition of the scope of federal jurisdiction renders any consideration of the double-actionability rule otiose so far as intranational torts heard in courts exercising federal jurisdiction, the federal jurisdiction is not inherently homogenous. While such jurisdiction extends seamlessly in a geographical sense, such that no court exercising federal jurisdiction in relation to an intranational (but interstate) tort could ever be said to be dealing with events occurring outside its law-area, the possibility of forum shopping within the federal jurisdiction remains open.

As the majority observed in *Pfeiffer*,[13] ss 79 and 80 of the Judiciary Act together provide that courts exercising federal jurisdiction in a state or territory will be governed by the laws of that state or territory, supplemented by the common law as it is modified by the Constitution and the statute law of the state or territory.

If a choice of law rule were to reference the *lex fori* as the choice of law rule, the effect of ss 79 and 80 of the Judiciary Act would be to fix the applicable substantive law of a court exercising federal jurisdiction by reference to the geographic location in which the court were sitting. Such a result, described by the majority as 'odd or unusual'[14] in the context of the uniform source of the power to adjudicate within the federal jurisdiction, warranted reconsideration of the applicable law in matters involving federal jurisdiction.

The Result

In allowing the appeal, the majority (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ delivering a joint judgment) held that the choice of law rule for intra-national situations – whether heard in a federal or a non-federal jurisdiction – should be that of the *lex loci delicti*. The court rejected the existence of any 'flexible exception' as far as wholly intra-national torts were concerned, accepting that there were practical difficulties in allowing courts to choose the governing law on the basis of impressionistic criteria such as 'significance', and that parties (and specifically, insurers) would experience difficulty in ordering their affairs on the basis of the unpredictable outcomes which might arise from the application of a rule susceptible to such exceptions.

As between the choice of the *lex fori* and the *lex loci delicti*, the court acknowledged that the characterisation of the place in which the tort occurred might well prove difficult in some situations (such as libel actions where publication occurs in national publications), and fortuitous in others (such as where a driver falls asleep near a state border). However, they identified, in the choice of law as the *lex loci delicti*, the desirable qualities of a liability fixed in advance by reference to geography and meeting the expectations of the parties, subject only to the possible difficulty of identifying the place itself.

By contrast, adopting a choice of law rule fixing on the *lex fori* would expose a tortfeasor to a range of laws imposing potentially differing liability, depending on where the plaintiff elected to commence the action. In short, the choice of the *lex*

fori encouraged forum shopping on the part of plaintiffs to gain the maximum compensation.

The choice of the *lex loci delicti* had the additional desirable quality of recognising and giving effect to the territorial concerns and interests of the state and territory parliaments as they are manifested in statutory modification of the common law, thereby satisfying the constitutional 'full faith and credit' provision. Conversely, the *lex fori* privileged the local law, and denied operation, in the federal context, to the law of an extra-jurisdictional state or territory, despite the events occurring within its state or territory jurisdiction.

In non-federal jurisdictions, the application of the *lex loci delicti* negated any possibility of a court allowing a remedy where the law of the place in which the tort was committed would not allow recovery. The only possible application of the double actionability rule, therefore, would be where a court was called on, *via* the application of the *lex loci delicti*, to grant a remedy where no such remedy was available in the forum itself. The only basis on which a court was free to refuse to enforce a foreign right was generally where 'some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal' would be violated if the foreign right were enforced. The federal context excluded such policy considerations, for, within the federation, it was not, in the majority's opinion, appropriate that a court of one state should say of another state's law that it violated such fundamental principles. Section 118 of the Constitution, the 'full faith and credit' provision, further buttressed the opinion that the operation of a double actionability rule was unsuitable to the organisation of the Australian federation.

The Procedural/Substantive Question

The characterisation of specific provisions of 'foreign' law as either procedural or substantive has long been recognised as an often artificial or arbitrary, but necessary, distinction which, despite a considerable history of judicial consideration, has not yielded up any unifying principle governing the characterisation.

Traditional approaches to the questions of limitations periods have focussed on the question of whether they bar the remedy or the right. If the right remains, but the statute merely bars recovery, then the provision has been regarded as procedural (and therefore not considered by the court in which the action is brought, even when the action is governed by the law of the other jurisdiction). Conversely, if the provision expunges the right itself, it is considered substantive.

The procedural/substantive distinction with respect to provisions impacting on damages have distinguished between those which refer to whether a head of damages is available at all (which are, as such, substantive), and those which control in some way the quantification of damages (which are procedural).

The majority in *Pfeiffer* observed that as far as both limitation periods and damages were concerned, all provisions relating to limitation periods could affect whether a plaintiff recovered at all, and all provisions about damages could affect the amount that a plaintiff could recover. As such, limitations and damages provisions were capable of altering the rights of plaintiffs and the obligations of defendants. Adopting the formulation of Mason CJ in *McKain v RW Miller & Co (SA) Pty Ltd*[15], the majority concluded that the characterisation of provisions in 'foreign' statutes as 'procedural' should be confined to rules which merely directed 'to governing or regulating the mode of conduct of court proceedings'. Since limitations and damages provisions were matters that affected the 'existence, extent or enforceability' of the rights and duties of the parties to an action, they should be classed as substantive, and therefore governed by the *lex loci delicti*.

Intra-National Torts – Summary

The majority opinion in *Pfeiffer* establishes two propositions settling areas of long-standing confusion in relation to choice of law in tort. Firstly, where an intra-national tort has a 'foreign' element, the law to be applied by the court is the *lex loci deliciti*, to which no flexible exception is admitted. Secondly, so far as statutory provisions in other jurisdictions relating to limitations periods or recovery of damages are concerned, they are to be treated as substantive, rather than procedural law, and therefore given full effect.

International Torts – *Renault*

Similar questions were raised in the 2002 High Court case ▶

of *Regie National des Usines Renault SA v Zhang*, although in that case the tort was an international, rather than an intra-national one. The plaintiff had been involved in a motor vehicle accident in New Caledonia, in which the roof of the car had been crushed down into the passenger compartment, as a result of which the plaintiff had suffered substantial injuries. He was treated in hospital in Noumea, and returned to Australia severely and permanently disabled. Because of the continuing nature of the injuries, the plaintiff's action (for negligence by Renault in the design and manufacture of the car with roof and roof supporting structures insufficient to protect the occupants) was commenced in the Supreme Court of New South Wales, invoking the 'long arm' jurisdiction of the court pursuant to the Supreme Court Rules of New South Wales.

Choice of Law in International Torts

The appellants (Renault) sought to extend the principle as to choice of law in tort enunciated by the High Court in *Pfeiffer* to international torts. The majority judgment in *Pfeiffer* had left open the question of choice of law for torts where the *locus delicti* was an international (i.e. truly foreign) jurisdiction, thereby leaving in place the reformulation of the double-actionability rule from *Phillips v Eyre* given by Brennan J in *Breavington* and adopted by the majority in *McKain* as the basis for the choice of law in tort.

After considering in some detail the complexity and confusion surrounding the interpretation of the double-actionability rule, the majority concluded that the rule should be abandoned not only for intra-national torts (as had been done in *Pfeiffer*), but also for international torts. To the extent that the first limb of the rule operated as a control mechanism favouring domestic policy concerns, it was unnecessary in so far as such concerns could be (and should be) appropriately dealt with as a preliminary issue on an application for a stay of proceedings either under statutory provisions (as was the case in *Renault*) or under the common law doctrine of *forum non conveniens*.

As to the choice of law component of the rule, the majority re-iterated in the international context the desirability of a choice of law rule which promoted certainty. Despite the lack of the federal context which, in some part, supported the choice of law rule of the *lex loci delicti* in intra-national torts, the majority adopted the same reasons which they (similarly constituted as the majority in *Pfeiffer*) had then expressed for now extending the choice of the *lex loci delicti* to both intra- and international situations.

The Procedural/Substantive Distinction in International Torts

The reasons given by all seven judges in *Pfeiffer* for classifying statutory limitations and damages provisions as substantive rather than procedural were expressed in universal and absolute terms. The majority had adopted the narrow conception of procedural rules from *McKain*, under which both damages and limitations provisions were outside the test for procedural rules as governing the mode of conduct of proceedings. Kirby J had used similar language to categorise both types of provision as substantive, while Callinan J (in agreement on this point) utilised even more emphatic language, observing that '[i]n any realistic and practical sense the application of a statute of limitations will have the most profound of impacts upon the rights of parties [and that] with almost equal force the same may be said of provisions limiting either heads of damages or measures of damages'.[16]

Such language might be thought to have foreclosed the possibility that, in the international context, any other result might be possible. Nevertheless, the majority judgment left open the question of whether their conclusion in *Pfeiffer* should be extended to the status of limitations and damages provisions in international torts, in deference to possible complexities which might arise with respect to maritime and 'aerial' torts.

Summary

Taken in concert, *Pfeiffer* and *Renault* establish that for all actions in tort brought in any Australian jurisdiction which contain a 'foreign' element, the appropriate choice of law is that of the *lex loci delicti*. This is now the case whether the 'foreign' component arises in relation to an intra-national jurisdiction, an illusory 'foreign' component within the federal jurisdiction, or within a truly foreign or international context. In neither case is there room for the operation of any flexible exception to the choice of the *lex loci delicti* as the appropriate law to be applied in the forum.

In the case of torts which do not extend beyond the Australian jurisdiction, it is now also clear that laws within the *lex loci delicti* which go to limitations of actions, or the existence of particular heads of damage or measures of damages, are substantive law and should be given effect as part of the *lex causæ*. PL

Footnotes:

1 (2000) 203 CLR 503; (2000) 172 ALR 625.
2 (2002) 187 ALR 1.
3 The use of the term 'foreign', in this context, includes other Australian jurisdictions.
4 In private international law, the term *lex causæ* refers to the 'law of the cause' – that is, the substantive law with is applied to determine the rights of the parties at trial.
5 *Lex fori* refers to the law of the forum in which the action is brought.
6 *Lex loci delicti* refers to the law of the place at which the wrong occurs.
7 (1870) 6 LR QB 1.
8 (1951) 84 CLR 629.
9 (1988) 169 CLR 41 at 110-11.
10 (1971) AC 356.
11 *Chaplin v Boys* at 392.
12 (1988) 169 CLR 41 at 86.
13 (2000) 203 CLR 503 at 529-30.
14 (2000) 203 CLR 503 at 532.
15 (1991) 174 CLR 1.
16 *Pfeiffer* at 574.