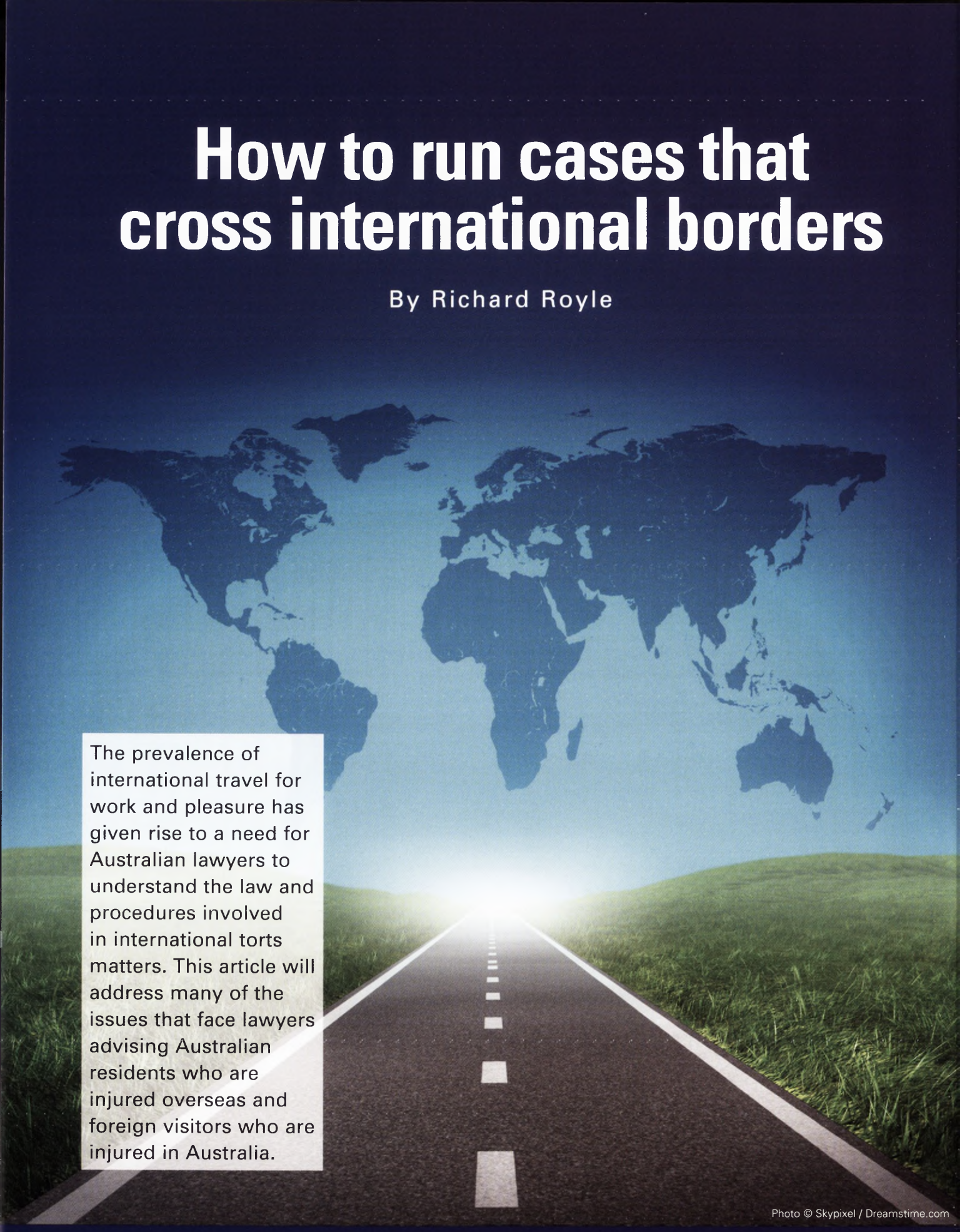
How to run cases that cross international borders

By Richard Royle



The prevalence of international travel for work and pleasure has given rise to a need for Australian lawyers to understand the law and procedures involved in international torts matters. This article will address many of the issues that face lawyers advising Australian residents who are injured overseas and foreign visitors who are injured in Australia.

CHOICE OF THE GOVERNING LAW

Although the default position in most countries is that the applicable law is the law where the tortious act or omission occurred (*lex loci delicti*), there are still occasions where a plaintiff may gain advantage by commencing their action in a particular forum. In *John Pfeiffer Pty Ltd v Rogerson*,[1] the High Court ruled that the *lex loci delicti* applies to all intranational torts,[2] and has extended this rule to all international torts.

> '…the rule adopted in *Pfeiffer* for the determination of the rights and liabilities in respect of intranational torts extends to international torts.'[3]

The *lex loci delicti* **is** applied by courts in Australia as the law governing all questions of substance to be determined in a proceeding arising from an international tort, and 'laws that bear upon the existence, extent or enforceability of remedies, rights and obligations should be characterised as substantive and not as procedural laws'.[4]

Neilson v Overseas Projects Corporation of Victoria Ltd

There are occasions where the substantive law of the country where the injury was sustained provides an option for a plaintiff to avail himself or herself of the law of another jurisdiction. In *Neilson v Overseas Projects Corporation of Victoria Ltd*,[5] Mrs Neilson (an Australian citizen) was injured in Wuhan, China, when she fell over the edge of a staircase in the flat occupied by her husband. Her husband was entitled to the flat under his contract of employment with his employer (a Victorian-based company). The plaintiff was a long-term resident of West Australia (WA) and sued her husband's employer in the West Australian Supreme Court. The WA Supreme Court looked to the law of China to decide substantive matters, including the relevant limitation law.

Article 136 of the *Code of Civil Procedure of the Peoples Republic of China* stipulated a one-year limitation period for commencing proceedings, and this period had expired. However, Article 146 of the Code stated that where both parties are nationals of the same country (relevantly Australia), the law of their own country *may* be applied. Since it is the Court of the forum that decides the applicable law, the High Court had to consider the dilemma that faced the WA

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Supreme Court as to whether to apply the substantive law that extinguished Mrs Neilson's right to claim (the limitation rule) or presume a Chinese judge would apply West Australian law (under Article 146 of the Code), in which case the longer limitation period would apply. The High Court stated that where foreign choice of law rules are discretionary, the Australian court must resolve, as a question of fact, how the discretion will be exercised by a court in a foreign jurisdiction.

> '…if the evidence shows that the foreign court would be likely to apply Australian law by reason of its choice of law rules or discretions, then the Australian common law of torts should govern the action.'[6]

The High Court concluded that the whole of the law of the Republic of China was to be applied (including Chinese *choice of law* rules) and that a Chinese judge would apply Australian law. Mrs Neilson therefore recovered damages under West Australian law.

This decision is significant for cases where a foreign country's *choice of law* rules leads to the application of a law conflicting with that country's own internal law. *Neilson* suggests *choice of law* will be considered before applying internal substantive law. However, the limits of this judgment are yet to be tested. Consider these facts: an Australian national, residing in NSW, is in a car accident in Samoa. The Statement of Claim is filed in the NSW Supreme Court and served on the Samoan defendant after the limitation period of one year stipulated by Samoan law has passed.[7] However, the substantive law in Samoa is English common law. Under English common law, limitation rules are procedural, and >>

Sometimes the substantive law of the country where the injury was sustained provides an option for plaintiffs to avail themselves of the law of another jurisdiction.

therefore for the law of the forum.[8] This directs the case back to NSW. The limitation period is longer in NSW,[9] meaning the plaintiff's claim is valid.

Neilson appears to be good authority for this reversion back to NSW law known as '*renvoi*'. However, in *Neilson* the specific choice of law rule dealt exclusively with civil relations involving foreigners. It was a statutory exception to the normal substantive statutory law position. In the Samoan example, the question is whether the courts would prefer a general substantive common law position that states that limitation matters should be governed by the law of the forum or the statutory limitation period.

SCOPE OF THE GOVERNING LAW

Whereas the *lex loci delicti* generally determines the substantive law, the law of the forum determines the procedural law. However, what is procedural and what is substantive may vary, depending on the location of the forum. In Australia, substantive law includes laws that bear upon the existence, extent or enforceability of remedies, rights and obligations,[10] and this includes limitation laws, damages, etc. Such a test, in effect, makes a matter substantive if it influences the outcome in litigation. This does have the potential to conflict with the test for procedure being '*the mode or conduct of court proceedings*'.[11]

Most jurisdictions take a similar view to Australia and consider damages and limitation rules to be part of the substantive law; however, the UK common law position is that damages and their assessment are matters of procedure.[12] If the law of the forum determines damages, the type of those damages has to be part of the law of the place where the tort occurred.

AVAILABILITY OF OPTIONS FOR THE GOVERNING LAW

The reason for most jurisdictions taking a common approach to the choice of the governing law is largely motivated by a desire to discourage 'forum shopping'. However, there are occasions where the particular forum may determine the governing law, not the place where the tort occurred.

The member states of the European Community (EC) have recently introduced regulations[13] – known as 'Rome II' – that stipulate that the law of the member state will apply even where a tort occurred outside the EC. Thus, where a European tourist is injured in Australia, there are circumstances where s/he can avail himself or herself of the more generous damages law of his own country. Under Article IV of Rome II, the substantive law of a European state will apply if the defendant and plaintiff are habitually resident in the same European state, or if the tort is '*manifestly more closely connected*' with that state.[14]

In some circumstances, the choice of law and forum are determined by contractual agreement between the parties. The established approach is that courts should interpret such contractual terms broadly and beneficially.[15]

Aside from the law of the forum and the law of the place where the tort was committed, a third option to determine the governing law is the 'close connection' test. This may be relevant where the place of the tort is unclear. Such a situation can occur in product liability cases where a product is made in one place, sold in another place and consumed or used in another place. In *Distillers Co (Biochemicals) Ltd v Thompson*,[16] Lord Pearson sought to resolve the issue by holding that:

> '...the right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question, where in substance did this cause of action arise?'[17]

LIMITED CHOICE OF FORUM

What of Australians injured overseas? There are often good reasons for Australian residents who have returned injured from overseas to want to commence action in their home country.

Part 11.2 of the *Uniform Civil Procedure Rules* (UCPR) permits the serving process outside Australia in circumstances referred to in Schedule 6.

In particular, Schedule 6(e) permits service outside the jurisdiction:

> 'If the proceedings, wholly or partly, are founded on, or are for the recovery of damages in the respect of, damage suffered in NSW caused by a tortious act or omission, wherever occurring.'

The Australian authorities interpret 'damage' as going beyond the damage inflicted at the time the tort was committed. The NSW Court of Appeal held:

> '..."damage"... means loss or harm occurring in fact, whether actionable as an injury or not, and includes all the detriment which a plaintiff suffers as a result of tortious conduct of the defendant'.[18]

Whereas a plaintiff may commence action in an Australian court on the basis set out above, a defendant may seek to have the statement of claim 'set aside'[19] if it can show that the forum is '*a clearly inappropriate forum*'.[20] In adopting this test, the High Court rejected the test set out by the UK House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd*,[21] which has gained wide acceptance in other Commonwealth countries.[22] Australian courts will also set aside a claim that is not '*clearly inappropriate*' if the proceedings are 'oppressive' or 'vexatious' in the traditional sense.[23]

The choice of forum involves consideration of evidentiary issues. For instance, the location of most of the potential witnesses to a trial, or the ability to readily subpoena witnesses to attend or produce documents, may be important. The expense of bringing witnesses (particularly expert witnesses)

from overseas requires consideration. Evidence can be taken by videolink,[24] but this can be inconvenient due to time differences, particularly in Europe. The court in Australia may order that witnesses be examined in their own country by way of taking evidence on commission.[25]

CHOICE OF DEFENDANT/CHOICE OF FORUM

In most circumstances, the defendant is the primary tortfeasor, but what if the tortfeasor is a foreign national without assets or insurance?

In some circumstances, particularly where travel has been arranged in Australia, there may be an opportunity to join the company which organised travel arrangements. For instance, where a person arranges and pays for travel in NSW with a local tour operator including bus travel, and suffers injury in Europe as a result of negligence by the bus driver, the person can sue the travel company for breach of implied warranty under the Australian Consumer Law (formerly the *Trade Practices Act*).[26] Similarly, where a package tour to China was bought in Hong Kong, the Privy Council (approving Canadian authority) found that where a tour operator sub-contracts services, they must be supplied with reasonable skill and care.[27]

ENFORCING THE JUDGMENT

Before bringing an action in Australia against a defendant who is resident overseas, it is important to know if an Australian judgment is enforceable against the defendant. If the defendant has a base or assets in Australia, this may not be a problem, but in most cases it will be necessary to enforce the judgement overseas.

The *Foreign Judgments Act* 1991 (Cth) and associated Regulations sets out reciprocal arrangements between Australia and certain countries for the enforcement of judgments.[28] An Australian judgment can be registered in the court of that foreign country, so that the judgment has the same force and effect as a judgment of that foreign court.[29] For a judgment to be recognised, it must be made by a court that has 'international jurisdiction', be a final judgment for a fixed sum, and the parties must be identical.

When representing an Australian resident injured overseas, it is worthwhile checking for the existence of any travel insurance, not least because many such insurance policies now provide legal cost benefits. Further, it is possible that an insurer may be willing to assist in the finance of any litigation against a tortfeasor if it can recover monies paid out under that policy.

If it is necessary for an Australian court to apply foreign law, it is customary to assist the court by obtaining expert evidence on the appropriate law. This is generally undertaken by engaging a lawyer who is well-versed in that law to provide a report.

FOREIGN NATIONALS INJURED IN AUSTRALIA

If the plaintiff is a foreign national injured in Australia, it remains important to consider where to sue: a recent case is instructive. AG is a French national who was injured in the Northern Territory (NT) when travelling as a passenger in a motor vehicle. He was rendered a paraplegic in the accident, and has returned to Paris to be with his family. If AG commences an action in Australia, he will receive very little damages because of the xenophobic provisions of the Northern Territory motor accident legislation. The NT legislation will not permit compensation for medical rehabilitation, attendant care costs, and special appliances, etc, if the person leaves Australia, even if they have to return to their home country.[30]

If AG commenced an action in France against the driver, he would be subject to NT law, as France is a signatory to the *Convention of the Law Applicable to Traffic Accidents*, signed in The Hague in 1971.[31] However, AG may make a claim in France as a 'victim' through the *'Commission Indemnisation de Victims D'Infraction'* (CIVI). As such, he will be assessed under French law, a system that provides more compensation than any Australian state or territory.

CONCLUSION

In most cases where an Australian is injured overseas or a where foreigner is injured in Australia, the law of the country where the accident occurred will apply. However there are sufficient exceptions to make it essential to investigate the legal options. ■

Notes: **1** *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503. **2** *Ibid.* **3** *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at [121]. **4** *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [102]. **5** (2005) 223 CLR 331. **6** *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at [261]. **7** Section 21, *Limitation Act* 1975 (Samoa). **8** *Black-Clawson Ltd v Papierwerke AG* 1975 AC 591 at [630] per Lord Wilberforce. **9** Section 18A(2), *Limitation Act* 1969 (NSW). **10** *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [102]. **11** See Reid Mortensen, Richard Garnett, Mary Keyes, *Private International Law in Australia,* 2nd edn, 2011 at p207. **12** *Black-Clawson Ltd v Papierwerke AG* (1975) AC 591 at [630] per Lord Wilberforce. **13** Regulation (EC) No 864/2007 of the European Parliament. **14** Article 4 of Regulation (EC) No 864/2007 of the European Parliament (Rome II). **15** *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at p165. **16** 1971 AC 458. **17** *Ibid* at [468]. **18** *Flaherty v Girgis* (1985) 63 ALR 466. **19** See Rule 11.7 UCPR (NSW). **20** *Oceanic Sun Line Shipping Co Inc v Fay* (1988) 165 CLR 197. **21** [1987] AC 460. **22** The *Spiliada* principle has been adopted in Canada, Fiji, New Zealand and Singapore. **23** *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ. **24** See, for example, Rule 31.3 UCPR NSW. **25** Rule 24.3 UCPR NSW. Note: The taking of evidence on commission is not available in NSW motor accidents subject to a CARS assessment. **26** *Insight Vacations Pty Ltd t/as Insight Vacations v Young* (2009) NSWDC 122. (Appealed to the High Court on different grounds.) **27** *Wong Mee Wan v Kwan Kin Travel Services Ltd & Ors.* (1994) 4 ALL ER 745 and *Craven V Strand Holidays (Canada) Ltd* (1982) 142 DLR (3d) 31. **28** Participating countries and courts are set out in the Schedule to the Foreign Judgments Regulations. **29** Note: New Zealand judgments can now be enforced under the *Trans-Tasman Proceedings Act* 2010 (Cth). **30** Sections 17(6), 18(5)(b) and 18(6) *Motor Accidents Compensation Act* 2007 (NT). **31** See Article 3 and 8 of the *Convention of the Law Applicable to Traffic Accidents.*

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