Choice of law in intranational torts — MOVING THE GOALPOSTS

The High Court has reformulated the choice of law rules for intranational torts, including a change to the definition of substantive and procedural laws. The decision may have far reaching implications in claims for injuries sustained outside of a plaintiff's state of residence.

In *John Pfeiffer Pty Ltd v Rogerson*[1], the High Court held that the law of the place of the commission of the tort is the governing law for torts committed in Australia which have an interstate element. All questions of substance will be determined by the law governing the place of the commission of the tort. Questions of procedure will be governed by the law of the forum.

In determining whether a law is procedural or substantive, all laws are to be classified as substantive, apart from those directed to governing or regulating the mode or conduct of Court proceedings.

The Issues in *Rogerson*

The plaintiff sustained an injury in a workplace accident in New South Wales in 1989. He was working as a carpenter for the defendant at the Queanbeyan District Hospital when he sustained the injury. The proceedings were commenced in the ACT Supreme Court, primarily on the basis that the plaintiff was employed under a contract with the defendant company based in the Territory.

New South Wales law governs the place where the accident occurred. Restrictions imposed by the workers' compensation legislation on the recovery of damages precluded the plaintiff from recovering damages under certain heads.[2]

A Master of the Supreme Court of the ACT found that the defendant failed to provide a safe system of work and was liable to the plaintiff. He concluded that the decision of the High Court in *Stevens v Head*[3] bound him to hold that the law of the ACT applied to determine the allowable quantum of

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damages to be allowed. The New South Wales cap on damages did not apply.

The difficulty the High Court sought to resolve was that if a Court of a State or Territory was required to apply its own legislation in deciding the existence, extent or enforceability of rights and obligations, but the Courts of another State or Territory would not give effect to the rules found in that legislation, the parties rights and obligations would differ according to where the litigation was conducted. There would be different outcomes dependent on where the plaintiff filed suit.

Expressed in the traditional language of private international law "if the forum does not give effect to the law of the place of the commission of the tort (the *lex loci dilecti*), but instead applies the law of the forum (the *lex fori*), there will be different outcomes according to the jurisdiction in which the proceeding are brought".[4]

Choice of Law Prior to *Rogerson*

Prior to *Rogerson*, the choice of law rules were confusing. Kirby J considered that:

"The present rules for the choice of law within Australia in respect of claims for civil wrongs ... subject courts to "mental convolutions" and parties to uncertainties and injustices that are inappropriate."

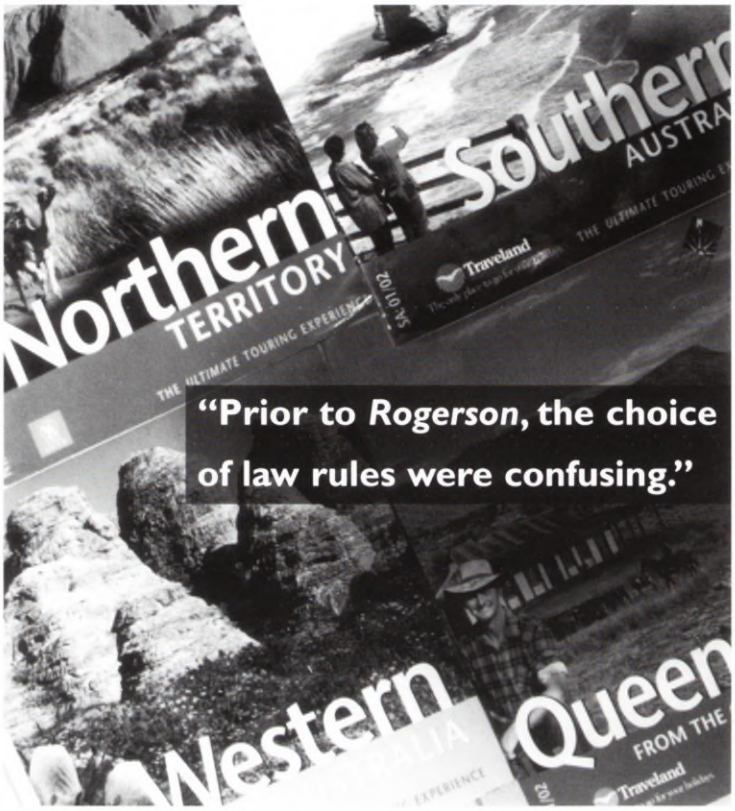
One of the major difficulties was that the double actionability rule did not assist or itself identify the appropriate choice of law rule to be applied by a court in determining a claim. Earlier decisions of the High Court were inconclusive. In *Breavington v Godleman*[5], Wilson, Gaudron and Deane JJ concluded that in intranational tort cases, the *lex loci dilecti* should be the applicable choice of law. Brennan J, however, concluded that the applicable law was the *lex fori* albeit in a form possibly modified in accordance with the provisions of the *lex loci delicti*. Mason CJ proffered a choice of law rule for both intranational and international torts in which the substantive law to be applied by the courts to determine the case was the *lex loci delicti*, subject to an exception requiring the application of the law of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection.

Conversely, the majority of the Court in *McKain v R W Miller & Co (SA) Pty Ltd*[6] appears to have concluded that the applicable law was the law of the forum.[7]

The unsatisfactory nature of the law was exemplified in *Stevens v Head*.[8] The plaintiff was injured in New South Wales. She sued the driver of the vehicle in the District Court in Queensland. The defendant argued that the restrictions in section 79 of the *Motor Accidents Act* 1988 (NSW) applied and restricted the amount that she could recover for damages.

Although the Court concluded that the applicable law was the *lex loci delicti* (NSW), the provisions relating to the quantum of damages were procedural and not substantive, and therefore the law of Queensland in respect of the assessment of damages applied. The quantum of the plaintiff's damages was therefore determined by her choice of jurisdiction.

The Australian Law Reform Commission described the choice of law rules as redefined by the majority of the High Court in *McKain v R W Miller & Co (SA) Pty Ltd* as engendering "confusion, uncertainty, injustice and forum shopping".[9]



The Commission recommended adopting as the primary rule of choice of law the application of the law of the place of the wrong as the sole determinant of the liability of the defendant.

The Commission also proposed that, in circumstances where the place of wrong had no real connection with the parties or the subject matter, that the primary rule be subject to a "rule of displacement" in favour of the application of the law of a place other than the place of wrong. This "rule of displacement" would apply where the circumstances of the claim or question arising in relation to the claim had a substantially greater connection with such place and, if both places are within Australia, the purposes of the law in force in both places would be promoted if the matter was determined in accordance with a law in force in the other place.[10]

In the case of motor accidents, the Commission specifically proposed that in determining whether the rule of displacement should apply, the court have regard to the residence of the parties to the proceedings and the place where the vehicles involved were registered or insured. In addition to any tort claim that a person might have under these proposals, the right of a party to non-fault compensation under a scheme in force in the place of residence, the place of registration or accident, should be preserved.

The Findings in *Rogerson*

Ultimately, the High Court adopted the *lex loci delicti* as the ▶

primary choice of law rule for torts in Australia. That is, in the case of an intranational tort, the law of the place where the acts or omissions occurred that gave rise to the civil wrong is the applicable law and not the law of the forum or the law of an area determined by reference to some more flexible rule.

The Court considered that law reform in this area and in the rules in respect of double actionability was long overdue and that the new approach was consistent with the organisation of Australia as a federation. It was also important that the common law developed to take into account various matters arising from the Australian constitutional text and structure.[11]

Importantly, the Court expanded and reformulated the distinction between substantive and procedural laws. The Court recognised the convoluted history that lay behind the distinction made it "very hard, if not impossible, to identify some unifying principle which would assist in making the distinction in a particular case".

The Court identified two guiding principles, which should be seen as lying behind the need to distinguish between substantive and procedural issues:

> "First, litigants who resort to a court to obtain relief must take the court as they find it. A plaintiff cannot ask that a tribunal which does not exist in the forum (but does in the place where a wrong was committed) should be established to deal, in the forum, with the claim that the plaintiff makes. Similarly, the plaintiff cannot ask that the courts of the forum adopt procedures or give remedies of a kind which their constituting statutes do not contemplate any more than the plaintiff can ask that the court apply any adjectival law other than the laws of the forum. Secondly, matters that affect the existence, extent or enforceability of the right toward duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance not with issues of procedure. Or to adopt the formulation put forward by Mason CJ in *McKain*, "rules which are directed to governing or regulating the mode or conduct of court proceedings" are procedural and all other provisions or rules are to be classified as substantive.
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> These principles may require further elucidation in subsequent decisions but it should be noted that giving effect to them has significant consequences for the kinds of cases in which the distinction between substance and procedure has previously been applied. First, the application of any limitation period, whether barring the remedy or extinguishing the right, would be taken to be a question of substance not procedure (which is the result arrived at by the statutes previously referred to). The application of any limitation period would, therefore, continue to be governed (as that legislation requires) by the *lex loci delicti*. Secondly, *all* questions about the kinds of damage, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the *lex loci delicti*."[12]

"...the common law developed to take into account various matters arising from the Australian constitutional text and structure."

Substance and Procedure

The consequences of the change in definition of substantive and procedural laws may be far reaching. The immediate impact on cases such as *Stevens v Head* is obvious: damages will now be assessed in accordance with the *lex loci delicti*, not the *lex fori*. Similarly, the limitations law of the *lex loci delicti* will apply. But the line between substance and procedure will not always be easy to draw, particularly in the context of statutory schemes with mandatory pre-court procedures and subsidiary obligations. These pre-court "procedural" rules may not be simply regarded as "rules which are directed to governing or regulating the mode or conduct of court proceedings".

A simple example demonstrates the problem. A male and female travel from New South Wales to Queensland on holiday. Their vehicle is registered in New South Wales. Their vehicle collides with a tree as a consequence of the negligence of the male driver. The female is not wearing a sear belt and suffers injury. The female files a Notice of Claim in accordance with the New South Wales motor vehicle legislation. The claim is delivered to the New South Wales insurer. The parties negotiate, fail to resolve the action, and proceedings are issued.

The choice of law in respect of contributory negligence, time limitations and damages is clear. These matters are now to be regarded as substantive law. The applicable law will be the law of Queensland. But what of the law relating to the obligations to provide rehabilitation? Or the law relating to pre-court procedures prior to the issue of proceedings? Or the law relating to costs payable on a claim?

Section 39(5) of the *Motor Accidents Insurance Act* 1994 (Qld), provided, prior to 1 October, 2000, that a claimant "may bring a proceeding in court for damages based on a motor vehicle accident claim" only if certain preconditions were met.

In *Young v Keong*,[13] the Queensland Court of Appeal held

that section 37(1) and section 39(5) of the *Motor Accidents Insurance Act* 1994, were in terms mandatory. Legal proceedings could not be commenced where a plaintiff had failed to comply with those preconditions.

In *Horinack v Suncorp-Metway Insurance Limited*,[14] the Court of Appeal confirmed that the failure to comply with the pre-court procedures rendered proceedings issued in reliance upon them a nullity. It remains uncertain whether compliance goes "to the validity of the title to enforce the liability" or merely to "the mode of enforcing it, or the fulfilment of a preliminary procedural condition".[15]

In either case, it is arguable that the rules go beyond the regulation of the mode or conduct of court proceedings and are in fact substantive. By way of comparison, the Queensland and Victorian WorkCover legislation specifies that provisions relating to pre-court assessments and procedures are substantive.

The argument was raised in an analogous context in *Reid v Agco Australia Limited*.[16] The plaintiff filed proceedings on 17 December 1999 in Victoria for injuries that occurred in South Australia. He sought an extension of the limitation period pursuant to section 36(1) of the *Limitation of Actions Act* 1936 (SA) so as to permit him to bring the proceedings for a cause of action, which accrued on 9 March 1994.

Section 48(4) of the *Limitation of Actions Act* 1936, however, provided that proceedings must be "instituted in the normal manner, but the process by which it is instituted must be endorsed with a statement to the effect that the plaintiff seeks an extension of time pursuant to this section".

The case was commenced by writ, but it was not endorsed with the required statement. Nor was anything alleged in the Statement of Claim concerning section 48. The second and third defendants argued that the necessity to endorse the writ was substantive not procedural and the law of South Australia applied. The failure to endorse the writ was therefore fatal.

Ashley J concluded that the failure to endorse the writ was non-compliance with the South Australian court rules: it was open to the plaintiff to seek leave to amend the writ to add the statement to which section 48(4) referred and for the court to grant such leave. Even in South Australian law, the failure to endorse was not fatal. Ultimately, it was unnecessary to decide whether the provision was substantive or procedural. Despite that conclusion, it appears the defendant's argument had considerable merit.

Conclusion

Following *Rogerson*, practitioners representing clients in cases with interstate elements need to look carefully at the law of the place of the commission of the tort. Many statutory regimes governing motor vehicle accidents, and, for that matter, workers' compensation law, contain provisions which may now be regarded as substantive in nature under the new test promulgated in *John Pfeiffer Pty Ltd v Rogerson*. Pre-conceived notions that certain regulatory laws will be procedural and other substantive will not always be correct. A failure to comply with essential pre- court procedures may be crucial in establishing and framing an enforceable cause of action. The evolution of cases in this area must be carefully monitored. PL

Footnotes:

1 [2000] HCA 36; 74 ALJR 1109.

2 See sections 151F, 151G and 151H *Workers' Compensation Act* 1987 (NSW).

3 (1993) 176 CLR 433.

4 *Rogerson* at paragraph [17].

5 (1988) 169 CLR 41.

6 (1991) 174 CLR 1.

7 See also *Anderson v. Eric Anderson Radio and TV Pty Ltd* (1965) 114 CLR 20.

8 Ibid.

9 ARC Report No 58, Choice of Law, para 6.14, as extracted in Nygh J *Conflicts of Laws in Australia*, (6th Edition), Butterworths (1995), page 349.

10 Para 6.27, Law Reform Commission Report, Nigh at page 350.

11 *Rogerson*, para [67].

12 *Rogerson*, paras [99]-[100]

13 (1999) 2 Qd R 335.

14 [2000] QCA 441.

15 *Austral Pacific v Air Services Australia* (2000) 74 ALJR 1184 at 1192 citing *Harding v Lithgow Corporation* (1937) 57 CLR 186 at 195.

16 [2000] VSC 363.