

# LAWS2018:

*Private International Law A*

Semester 2 2017

## TOPIC 1: SCOPE OF PRIVATE INTERNATIONAL LAW

- Forum/lex fori: place/law of place where court sitting
- Choice of law (which system of law should the court apply?)
- Personal jurisdiction (is the defendant subject to the authority of the court, and, if so is there a discretionary ground on which the court may decline to exercise jurisdiction?)

Some common law issues are governed by the lex fori

- Procedural issues governed by lex fori
- Liability in tort is governed by lex loci delicti (law of place where tort was committed)
- Liability in contract is governed by the proper law of the contract (the law agreed by the parties or, in the absence of agreement, the legal system with which the contract has its closest & most real connection)

International & Federal (Intranational) PIL

- *International* – country outside Australia
- *Intranational* – connected with another State/Territory of Australia

### (A) Transnational Legal Problems: 2 Case Studies

*Oceanic Sun Line Special Shipping Co v Fay* (1988) CLR

- ⇒ Resident of Qld
- ⇒ Booked Greek cruise through travel agent in NSW
- ⇒ Greek Island cruise to be operated by Greek shipping company in Greece
- ⇒ Greek registered ship entirely conducted in Greek territorial waters
- ⇒ Fay received exchange order saying - 'This exchange order will be exchanged for a ticket when passenger boards ship in Greece' (this happened)
- ⇒ While in Greek territorial waters – Fay engaged in firing clay target off stern of ship but shotgun defective & discharged into his abdomen causing injury → Fay evacuated & ICU & repatriated to Australia but in first instance, Fay didn't go to home in Qld but to NSW for specific purpose of undergoing surgery
- ⇒ If one had looked at ticket, there were 2 provisions: (1) in event of claim by passenger against carrier w.r.t personal injury, liability of carrier limited to \$5000 USD and (2) in event of any claim made by passenger against carrier, Courts of Athens had exclusive jurisdiction.
- ⇒ Fay commences proceedings against Oceanic in NSWSC
- ⇒ 1<sup>st</sup> potential issue – personal jurisdiction
- ⇒ Basis found – if plaintiff suffered any tort damage in NSW (extreme basis for extraterritorial jurisdiction) – loss/damage experienced in NSW was medical expenses
- ⇒ Also, even though Oceania served in Greece by NSWSC, they don't have a reputation etc.
- ⇒ Greek defendant made application in NSW for permanent stay of proceedings
- ⇒ Greek defendant argued there was an exclusive Greek jurisdiction clause &, in breach of that, Fay is bringing proceedings in NSW
- ⇒ On choice of law, anterior question as to whether parties have reached consensus, is matter determined in NSW Court with reference to NSW law not by reference to legal system which constitutes proper law of contract (Greek law)
- ⇒ But anterior question which is not governed by proper law of contract & that is whether a particular provision/statement constitutes a term of a contract (decided by reference to NSW law – *lex forai*)

*Venter v Ilona MY* [2012] NSWSC

- ⇒ Critical issue revolved around topic of substance & procedure
- ⇒ Thailand has territorial sea of 12 nautical miles from low water mark
- ⇒ Fatal accident occurred onboard Aussie registered ship
- ⇒ Engineer killed in accident with helicopter part falling on him
- ⇒ Venter = surviving spouse of deceased – brought 2 forms of tort claim against owners of ship (1<sup>st</sup> – tort claim in respect of psychiatric injury she suffered as result of husband's death, 2<sup>nd</sup> = compensation to relatives claim under *NSW Compensation to Relatives Act 1897*)
- ⇒ Wife was member of crew
- ⇒ Owners of Ilona = resident in NSW
- ⇒ Legal question concerned entirely with choice of law
- ⇒ Factual issue which was critical to outcome was 'where was ship when accident happened' – either just within or just outside territorial waters of Thailand (i.e. – either on High Seas (outside jurisdiction of any State) or Thai territorial waters)

- ⇒ If on High seas, this ship would be treated as NSW b/c of place of registration of ship but if ship was within territorial waters of Thailand, where tort committed on board ship within territorial waters of coastal state, place of tort is that coastal state
- ⇒ Problem for Venter turned on issue of substance & procedure – concerned limitation of actions
- ⇒ Trend in Aussie law whereby statutes of limitation are treated as substantive
- ⇒ Venter commenced action in NSWSC within 3 year limitation period for a personal injury/compensation to relative claim but after expiry of 1 year limitation period under law of Thailand
- ⇒ If tort committed in NSW, only law relevant in litigation in a NSW court is NSW law. If a local tort, regardless of any foreign connection of the parties, if tort is identified as tort committed in NSW, then only law relevant is the law of NSW (procedural law of NSW is always so but also applicable substantive law is law of NSW)
- ⇒ Expiration of limitation period in Thailand would extinguish any claim
- ⇒ Venter's claim against owners of Ilona settled before Judge delivered judgement → not Venter's claim any longer but claim we look at (ship owner's bought 3<sup>rd</sup> party claim against German manufacturer of helicopter (door killed Venter))
- ⇒ Contract b/w German manufacturer & ship owners – expressed to be governed by German law
- ⇒ This was a claim for contribution from German manufacturer on ground that they were another tortfeasor that if sued by Venter would have been liable to her
- ⇒ First ground is where proceedings are brought in NSW in breach of an exclusive foreign jurisdiction clause (German manufacture contended there was an exclusive jurisdiction clause) but anterior issue in contract formation was whether this provision which German manufacturer maintained was a term of the contract was in fact a term of the contract
- ⇒ Contentious issue as to whether the contract, which was governed by German law, also included provision as to exclusive German jurisdiction
- ⇒ German law has significant difference to that of NSW – in German law, requirement that provision such as exclusive jurisdiction clause would constitute term of contract, if and only if, German manufacturer's T&Cs of trading were physically attached to its quotation & that had not occurred
- ⇒ Thus, which law decides whether term is/isn't a term of the contract – determined by reference to *lex fori* – which in this case was law of NSW
- ⇒ NSWSC granted permanent stay of 3<sup>rd</sup> party proceedings against German manufacturer
- ⇒ NB: Aussie court approaches exclusive jurisdiction clauses with a strong bias in favour of giving effect to it

## **(B) Some Concepts & Persistent Issues**

### **Overview**

- Private international law - need relevant connection with another legal system (private law questions with a relevant international connection)
- Under Australian private international law, we apply our own law if a problem arises b/w 2 international citizens from same legal system (e.g. – 2 Kiwis)
- NB: in contract, relevant governing law of contract is one identified in contract
- PIL concerned with interplay of legal systems
- US is not a state for purposes of PIL

- For the purposes of PIL, a country is nothing other than a geographical area with its own legal system
- Liability in tort governed by law of tort in place it is committed (lex loci delicti)
- Liability in contract governed by legal system identified as proper law identified in contract

## TOPIC 7: CHOICE OF LAW IN TORT

### (A) Foreign Torts & Local Torts; Maritime Torts & Aerial Torts

#### Foreign Torts & Local Torts

- Local tort is simply a tort committed in NSW
- If tort committed outside of NSW, it is a foreign tort
- If other state/territory of NSW = intra-national tort
- If outside of Australia = international tort
- If tort committed in NSW, then only law relevant in litigation in a NSW court is NSW law (regardless of any foreign connection of parties) (procedural law & applicable substantive law of NSW)

#### (i) The Role of the Lex Fori; Where is a Tort Committed?

*Szalatnay-Stacho v Fink* [1947]

- ⇒ If tort is local tort, only local law is relevant to determination of liability
- ⇒ Plaintiff was member of diplomatic service of Republic of Czechoslovakia
- ⇒ Defendant was senior government official of Republic of Czechoslovakia
- ⇒ Defendant wrote letter in course of job which concerned plaintiff addressed to President of Republic of Czechoslovakia (then resident in England) → published
- ⇒ Claim for tort of defamation
- ⇒ Plaintiff claimed letter contained material defamatory of plaintiff
- ⇒ Place of tort of defamation is place/s where defamatory statement is published, regardless of medium used for publication
- ⇒ No doubt place of tort was England
- ⇒ Potential choice of law problem = distinct difference b/w Czech & English law w.r.t defences for claim of defamation
- ⇒ Czech law = D immune from suit in sense he had defence of absolute privilege b/c of course of official correspondence
- ⇒ English law = no such defence of absolute privilege but much lesser defence of qualified privilege
- ⇒ Which legal system governs defence available to defendant?
- ⇒ Law of Czech not relevant at all as this was a local tort, committed in England & notwithstanding significant connection of parties & background material of letter to Czech, fact that place of tort was England concluded discussion that only English law was relevant

Where is a tort committed?

- Single tort applied for determining place of tort – derived from opinion of Privy Council in 1971 on appeal from NSWCA – *Distillers v Thompson*

*Distillers Co (Biochemicals) v Thompson* [1971]

- ⇒ PC endorsed what had been said by Primary judge & NSWCA
- ⇒ Distillers test = applied throughout common law world
- ⇒ Plaintiff born in NSW with serious disabilities – allegedly attributable to fact that during first 3 months of pregnancy, her mother had consumed drug Distaval
- ⇒ Marketed as mild sedative – particularly suitable for children & elderly
- ⇒ Drug manufactured in England – packaged in form that drug would reach ultimate consumers
- ⇒ Claimed to be safe & harmless side effects with no side effects
- ⇒ Consumed on prescription by Thompson's mother
- ⇒ For daughter, tort claim only b/c she had no contract with Distaval
- ⇒ Problem of personal jurisdiction rather than with choice of law b/c problem confronting plaintiff was that Distillers company
- ⇒ Ownership of assets in NSW is not a basis of common law jurisdiction (despite Distillers company owning NSW property)
- ⇒ Personal jurisdiction relies on defendant being present in NSW or defendant's voluntary submission to NSW jurisdiction
- ⇒ Corporation present in NSW for purposes of personal jurisdiction only if corporation carrying on business in NSW
- ⇒ Even though drug being sold in NSW, Distillers company not carrying on business in NSW as sold by importers/distributors
- ⇒ Distillers did not submit to voluntary application of NSW jurisdiction
- ⇒ So plaintiff must turn to statutory provisions
- ⇒ S 18(4) said can be served outside Australia if proceedings found on cause of action arising in NSW (applies to both tort & contract)
- ⇒ Question was whether plaintiff's cause of action in tort had arisen in NSW – translates as was tort committed in NSW?
- ⇒ Negligence being alleged
- ⇒ Tort of negligence not necessarily committed in place where plaintiff suffered damage
- ⇒ Damage is an essential element to complete cause of action for tort of negligence. But tort of negligence is not necessarily committed in place where plaintiff suffered the damage.
- ⇒ Lord Pearson states Distillers test in 2 slightly different forms: place of tort is place of act/omission on the part of the defendant which gives the plaintiff his/her cause of complaint in law / When the tort is complete, look back over the series of events constituting the tort & ask where in substance did the cause of action/omission arise?
- ⇒ Here, plaintiff careful to say this is not a product liability claim – nothing negligent in manufacturing process – more in nature of negligent misrepresentation case – plaintiff's argument was that negligence of defendant was misrepresentation to her mother (either by what defendant said 'safe & harmless sedative with no side effects' or what defendant didn't say)
- ⇒ Misrepresentation can only occur at point when representation made to representee – statement is made at place where misrepresentation is communicated to representee (& representee here was plaintiff's mother in NSW)
- ⇒ Therefore, service of originating process in England & tort occurred in NSW
- ⇒ Case settled
- ⇒ Professional view in NSW was that if any court was likely to recognize existence of DoC to unborn, it would be an Aussie court – while English tort law was much less likely to find a duty of care owing to an unborn

⇒ By establishing NSW jurisdiction on NSW tort, choice of law problem solved – law applied at trial is law of NSW as *lex fori*

*James Hardie & Co v Putt* (1998)

**Facts:** ⇒

**Judgement:** ⇒

*Amaca v Frost* [2006]

**Facts:** ⇒

**Judgement:** ⇒

*Dow Jones & Co v Gutnick* (2002)

- ⇒ Addressed question of where tort of defamation committed where medium of publication is the interest
- ⇒ HCA points out internet doesn't affect basic principles of tort of defamation – regardless of medium used, place of tort of defamation is place of publication
- ⇒ Place of publication is place where material downloaded & read/heard in comprehensible form – won't be place where material is uploaded onto defendant's server
- ⇒ Defamatory material which called Gutnick a 'money laundered & liar' uploaded onto Dow Jones webserver in New Jersey
- ⇒ About 300 subscribers in Victoria
- ⇒ Material downloaded by number of persons who knew Gutnick in Victoria & sold 14 print copies in Victoria
- ⇒ Dow Jones didn't carry on business in any parts of Australia so plaintiff had to establish extra-territorial basis of jurisdiction
- ⇒ Victoria is place of tort under basis of personal jurisdiction
- ⇒ At trial, defamation law applied would be law of Victoria – practical significance of this is that law of NJ was favourable to defendant

## (ii) Maritime Torts Torts in the Territorial Sea

*MacKinnon v Iberia Shipping Co* (1955)

- ⇒ Court of Scotland
- ⇒ Under customary international law at time of this case, territorial sea of Dominican Republic was 3 nm
- ⇒ British merchant ship registered in Glasgow
- ⇒ Engineer injured in engine room of ship – not in contention that cause of accident was negligence of ship owner
- ⇒ MacKinnon returns to his home in Scotland & brings 'common law negligence action'
- ⇒ Sought to recover money for pain & suffering & future earning capacity
- ⇒ In civil law systems (like Dominican Republic), no such head of damage as pain & suffering

- ⇒ Issue = in common law claim in Scotland, can plaintiff recover damages for pain & suffering? In law of Scotland, damages for pain & suffering not recoverable in Scotland unless those heads of damages recoverable in law of place where tort committed
- ⇒ Hence, led to question of where tort was committed
- ⇒ MacKinnon said tort wholly within British ship registered in Scottish court, hence he thought it should be tort committed in Scotland b/c registered there but held b/c tort committed in territorial sea of DR, it is a tort committed in DR, therefore claim, insofar as pain & suffering is concerned, fails – succeeds w.r.t future economic loss
- ⇒ **Law of flag state governs torts committed on high seas & confined within/internal to a single ship**

*Union Shipping NZ v Morgan* [2001]

- ⇒ Accident on NZ registered ship carrying coal from NZ → NSW
- ⇒ Injured in workplace incident on ship
- ⇒ Brought a common law action in NSWSC
- ⇒ No liability in tort/contract for workplace injury in NSW or NZ
- ⇒ Place of tort was NSW – local tort & only law relevant was law of NSW, notwithstanding what might appear to be significant connections to NZ
- ⇒ Supposed a ship was engaged in innocent passage of coastal state to which ship had no connection should it make any difference that ship was merely exercising right of innocent passage through territorial waters? Seems to suggest it is irrelevant.
- ⇒ Vessel had reached its destination – fulfilling core purpose for which voyage had been undertaken – unloading imported coal onto NSW soil
- ⇒ + Continuous nature of unloading operation & function in delivering coal onto NSW
- ⇒ **Where a tort is committed on, & confined wholly within, a foreign ship moored & in the course of unloading operations at its NSW port of destination, the place of commission of tort is NSW. Accordingly, NSW law, not law of the flag of the ship, is the governing law in respect of tort liability**
- ⇒ **Torts committed on board a ship on the high seas are governed by the law of the country where the ship is registered (law of the flag)**

*Saldanha v Fulton Navigation* [2011]

- ⇒ Applies *MacKinnon* & *Union Shipping v Morgan*
- ⇒ Territorial sea of UK adjacent to coast of England & Wales
- ⇒ Merchant ship registered in Marshall Islands

**Torts on the High Seas**

High Seas

- Pragmatic answer – where a ship is upon High Seas, then for choice of law purposes, ship is treated as part of its country of registration (flag state)
  - (1) Tort committed on ship & confined wholly within that ship – place of tort considered as place of registration of ship
  - (2) Collision on high seas – choice of law principle in Australian private international law, is application of *lex fori*, does not matter where ships were registered (same as if collision with inanimate objects)

- *Submarine Telegraph Company v Dixon* – collision b/w Swedish ship & submarine cable on High Seas – litigation in England, applicable law is English law as *lex fori*
- In event of litigation arising out of condition of ships colliding in High Seas, law is *lex fori* (law of place where forum being litigated – incl. general principles of maritime law)
- A tort committed on board a ship on high seas is treated as being committed under law of registration of that ship
- 2 situations –
  - 1) Torts committed on high seas & confined within/internal to single ship (locus delicti deemed to be flag state/country of registration)
  - 2) Torts involving high seas collision b/w 2 or more ships (*lex fori* (incl. *lex fori*'s principles of maritime law)

*The Esso Malaysia* [1975]

- ⇒ High Seas collision off NE Coast of US – b/w supertanker registered in Panama & trawler registered in Soviet Republic of Latvia (all 24 members of Latvian trawler killed)
- ⇒ Fatal accident claim brought in English High Court for benefit of surviving members of families of crew members
- ⇒ English-based insurers
- ⇒ Application of *lex fori* – English fatal accidents legislation applied

*Parker v The Commonwealth* (1965)

**Facts:** ⇒

**Judgement:** ⇒

*Blunden v The Commonwealth* (2003)

**Facts:** ⇒

**Judgement:** ⇒

*Roerig v Valiant Trawlers* [2002]

- ⇒ Fatal incident off coast of NW Africa on trawler
- ⇒ Crew member (Dutch national) killed – compensation to relatives claim brought in England
- ⇒ Roerig = wife, bringing claim for benefit of herself & children
- ⇒ Other legal system potentially relevant was law of Netherlands
- ⇒ Fishing expedition set off from port in Netherlands & was to return to port in Netherlands
- ⇒ 'Dutch fishing expedition'
- ⇒ Trawler registered in England → consequently, applicable substantive law was English law
- ⇒ Although there were other connections with Netherlands, it was common ground that *lex loci delicti* was English law

*Amdur v Zim Israel Navigation Co* (1969)

- ⇒ Claim for alleged negligent medical treatment provided by ship's doctor in course of voyage from Israel to NY
- ⇒ Resident of NY
- ⇒ Israeli-flagged cruise ship being carried to NY
- ⇒ Issue was applicable substantive law → Israeli law as ship registered there and tort being internal to ship occurring on High Seas
- ⇒ Israeli flag vessel, negligent medical treatment from ship's doctor
- ⇒ **Held Israeli law as law of flag governed plaintiff's tort claim**

*Submarine Telegraph Co v Dickson* (1864)

- ⇒ Collision b/w Swedish ship & submarine cable in English channel
- ⇒ Both cases, applicable law was same as if it had been collision of 2 ships – application of lex fori

*Oceanic Steam Navigation Co v Mellor* (1913)

- ⇒ British registered ship & iceberg on High seas
- ⇒ Both cases, applicable law was same as if it had been collision of 2 ships – application of lex fori

*CMA CGM v The Ship "Chou Shan"* [2014]

- ⇒ Collision in East China sea involving ship registered in UK & ship registered in Panama
- ⇒ Litigation occurs in Western Australia
- ⇒ Law is WA – that law includes general maritime law (in essence what is being applied here is not so much Australian law but GENERAL MARITIME LAW)
- ⇒ Novel point that arose was that place of collision was 100nm out from PRC (has EEZ of 200nm) – EEZ of a coastal state beyond 12nm territorial sea is part of the High Seas under the UN Convention on the Law of the Sea coastal state has certain rights w.r.t exploitation but that doesn't transform EEZ beyond 12nm into any part of sovereign territory of coastal state therefore 100nm seaworthy clearly on high seas

**Crimes at sea compared**

- Legislation extends extraterritorially Cth criminal law to crime committed on Aussie registered ship anywhere in the world, particularly Cth criminal code & applies to crime committed by Aussie national on a foreign ship wherever that ship may be

*R v Anderson* (1868)

- ⇒ Crime of manslaughter committed on British registered ship 45 miles up river at Bordeaux
- ⇒ CCA held by reference to common law principles, English CL applied
- ⇒ Rightly charged with manslaughter
- ⇒ Manslaughter – offence committed on British flag ship in French territory
- ⇒ Prisoner amenable to British law
- ⇒ With crime committed in foreign state, possibility of concurrent criminal jurisdiction of flag state & France (Concurrent criminal jurisdiction is a common phenomenon)

⇒ A tort (e.g. – trespass to the person) committed on a forum flag ship in the territorial or internal waters of a foreign country is treated for private international law purposes (jurisdiction & choice of law) as a tort committed in the foreign country. However, if the tort also is a crime (e.g. – manslaughter), the criminal courts of the forum will have common law jurisdiction in respect of the offence.

*R v Disun; R v Nurdin* (2003)

⇒ Tampa incident in 2001 involving Norwegian container ship which rescued at sea individuals brought to Australia on-board Indonesian fishing vessel which sank on High Seas

⇒ Tampa entered Aussie territorial sea adjacent to Christmas Island

⇒ Disun & Nurdin members of Indonesian crew arrested after Aussie military forces boarded ship & removed them

⇒ Question which arose in subsequent criminal prosecution was whether/not Aussie forces (SAS & AFP) had entered territory of Norway when arresting 2 crew members

⇒ Indonesian nationals & crew members of Indonesian fishing vessel

⇒ Rescued by Tampa – Norwegian registered vessel

⇒ Appellants contended that their arrest was unlawful b/c MV Tampa was part of Norway

⇒ While Tampa was in Aussie territorial waters it was in Aussie territory & was not part of Norwegian territory

⇒ General rule of international & municipal law is that a State possesses jurisdiction in virtue of its territorial sovereignty over the persons & property of foreigners found within its territory

⇒ Limitations & exceptions incl. foreign warship & its crew will be accorded extra-territorial immunity while in territorial waters

⇒ Tampa was not a foreign warship nor was it in Australian territorial waters with consent of Australia – was private vessel which sailed into Aussie waters against express request that it not do so

⇒ Defendants argued that Tampa, whilst in territorial sea of Australia, was to be treated as floating part of Norway & there is an extradition treaty b/w Norway & Australia

⇒ Since within Aussie territorial waters, not to be considered as a floating part of Norway

⇒ **For purposes of a criminal jurisdiction, in particular the arrest of an offender, a foreign ship in Australian waters is in Australian territory & is not a “floating island” of its flagstate**

- NB: Italian seaman murdered another member of crew of Norwegian registered ship at sea
- No evidence as to precise position of ship at time of offence
- “some six days steaming from a British port”
- Committed in Norwegian jurisdiction whether/not the ship was, at relevant time, on high seas or in territorial waters of a third state. In latter event, there would be concurrent jurisdiction of the third state & the state of registration of the ship.

### (iii) Aerial Torts

#### Aircraft on the ground & in flight

- Same rules apply on aircraft as in ships

- Exclusive regime establishing liability of air carriers for bodily injury & death of passengers – established by Warsaw Convention & Montreal Convention (hence claims of that kind do not fall within domain of tort law)
- Claim by passenger against manufacturer of aircraft does fall within ambit of tort law
- Principles are in essence same as apply to maritime torts making necessary modifications
- If aircraft in flight over High Seas or Antarctica (outside territory of any state) – place of tort for choice of law purposes is place of registration of aircraft
- Likewise if air on ground within territory of country or in flight over country or in flight over territorial sea of coastal state, then as with a maritime tort, place of tort is the state over which aircraft is flying or landed
- Academic literature that aerials torts governed by similar principles to those obtaining in relation to maritime torts
- Place of tort committed in & internal to an aircraft on ground or in & internal to an aircraft in flight over land or over the territorial sea of a state is place in/over which aircraft was located at relevant time & not place of registration of aircraft as such
- Where tort committed in & internal to aircraft in flight over the high seas or any other place outside jurisdiction of any state (e.g. – Antarctica), place of tort may be deemed to be place of registration of aircraft
- If tort arises out of collision b/w 2 aircraft over high seas, lex fori is applicable law
- Warsaw Convention & Montreal Convention – regulate liability of *air carriers* for the death or bodily injury of passengers
- However, the ordinary principles of private international law apply in respect of the liability of the *manufacturer* of an aircraft in respect of the death or bodily injury of passengers in the course of air carriage

*Lazarus v Deutsche Lufthansa* (1985)

- ⇒ Action for defamation brought by resident of NSW against Lufthansa
- ⇒ Lazarus was passenger on flight from Germany to NSW
- ⇒ Aircraft made scheduled stop at New Delhi & Lazarus contended while aircraft was on ground in India, he was defamed by member of the crew
- ⇒ Insofar as it might be relevant, location of tort was New Delhi – meaning either federal law operative in New Delhi or Indian law generally
- ⇒ Passenger on flight from Germany to Australia – aircraft ground at New Delhi – defamed & assaulted by member of defendant's crew – Court held place of commission of alleged tort was India even though alleged tort was internal to German registered aircraft

*Georgopoulos v American Airlines* (1993)

- ⇒ G was resident of NSW – passenger on AA flight from Sydney to Honolulu
- ⇒ After aircraft took off & whilst in flight over Aussie territorial sea adjacent to NSW, door next to G commenced to open

- ⇒ Suffered post-traumatic shock (psychiatric injury at sudden sensory perception of imminent death)
- ⇒ Long line of authority that says psychiatric injury is not bodily injury for purposes of Warsaw or Montreal Conventions – strict liability regime in Australia suffered as result of incident of air carriage is not within these Conventions
- ⇒ But point as to location of tort is correct – Court said, if it was necessary to determine locality of incident, then locality would be treated as NSW b/c incident in Aussie territorial sea adjacent to NSW
- ⇒ Constitutional settlement b/w State & territories & Cth which extends state jurisdiction seaward to a degree
- ⇒ Sydney to Hawaii flight – plaintiff suffered PTSD when door of aircraft opened in flight
- ⇒ Ireland J held locus delicti was Australia b/c aircraft in flight over Aussie territorial sea
- ⇒ NSWCA – held “bodily injury” in Warsaw Convention did not include psychological injury & hence, place of tort of no consequence

*Smith v Socialist People’s Libyan Arab Jamahiriya* (1997)

- ⇒ Lockerby, Scotland – American Flight 103 destroyed in flight by terrorist bomb & everyone killed & people upon whom wreckage fell
- ⇒ Tort claim brought in US by Smith in respect of the death of his wife
- ⇒ Claim brought against sovereign state of Libya (regime of foreign state immunity similar to that of Australia – general rule of foreign state immunity subject to exception in US (same largely exists in Australia under s 13 *Foreign States Immunity Act* – torts exception), if there was death/bodily injury caused by act of foreign state within territory of US
- ⇒ Argument was that US flagged aircraft in flight 31000ft above Scotland was to be treated for choice of law purposes as part of territory of US
- ⇒ USCA said US flag aircraft might be subject to US jurisdiction in number of ways such as criminal act on-board subject to US criminal jurisdiction but DID NOT make aircraft notionally part of flying territory of US
- ⇒ Bomb destroyed US flag aircraft over Scottish town of Lockerbie (flight b/w London & NY)
- ⇒ Claimed damages against Libya on basis that Libyan government agents were alleged to have carried out the bombing
- ⇒ Principle of foreign state immunity, Libya immune from US jurisdiction unless the tort in question had occurred in US
- ⇒ **A US flag aircraft in flight over foreign land is not in the territory of the US**

**(B) Historical Background**

(i) **The Rule in *Phillips v Eyre***

- Intermediate appellate Court before CoA
- Case which informs choice of law in tort in other common law jurisdictions such as Singapore
- Arose out of incident in Jamaica during period of British colonial rule in 1865
- 1865 – insurrection against British colonial rule – suppressed with extreme violence by local authorities – 439 local inhabitants executed by British military
- Under governance of Edward John Eyre (Colonial Governor)

- Alexander Phillips was a local inhabitant of Jamaica – brought proceedings for trespass to person
- Phillips subject to extreme physical violence
- Conduct of Eyre constituted state torture in terms of criminal code in Australia now but in 1865 best language to describe conduct was ‘trespass to person through form of battery, assault & false imprisonment’
- Eyre had been recalled by English government so subject to personal jurisdiction of UK
- Problem was to identify circumstances in which a foreign tort claim can be brought in the forum (i.e. – England)
- Willis J stated what came to be known as the Rule in *Phillips v Eyre* – (see page 32) – 2 branches/limbs of rule & BOTH parts must be satisfied before a foreign tort claim is made claimable
- Willis J starts off by saying 2 conditions are these:
  - 1) **In order to bring claim in forum w.r.t foreign tort, conduct in question must be of such a character if committed in forum it would constitute a tort under the law of the forum; (informing principle is to exclude exotic foreign torts – civil wrongs of a character unknown to law of the forum); AND**
  - 2) **What was in fact done in foreign country must not have been justifiable under the law of that place.**
- Prefaces rule by saying “As a general rule...”
- After insurrection subsided, retrospective law passed validating & justifying & rendering unquestionable any act done by Eyre in suppression of the rebellion so that by time being heard, what had occurred in Jamaica was now valid & unquestionable under the law of that place & had been retrospectively so rendered
- Hence, claim failed – passed 1<sup>st</sup> part of rule but failed on 2<sup>nd</sup> part
- NB: it is a rule concerned with justiciability (threshold rule) – rule to determine in what circumstances a claim in respect of a foreign tort can be brought in the forum (for our purposes, NSW) BUT law in *Phillips v Eyre*, doesn’t state the law to be applied
- Threshold rule as to justiciability – once satisfied, applicable substantive law is *lex fori*