7 CHOICE OF LAW IN TORT

A. *FOREIGN TORTS AND LOCAL TORTS; MARITIME TORTS AND AERIAL TORTS*

(i) The lex fori for local torts; lex loci delicti for intranational and international torts; the Distillers test for determining the place of the tort

Local torts: committed in NSW

- If a tort is committed in NSW, the only relevant law is NSW law. Regardless of any foreign connection of the parties – regardless even of any foreign connection the tort might have – if it is committed in NSW, the applicable substantive law is that of NSW.
    - **Example**: Two NZ citizens in a car accident in NSW. From an Aus perspective of PIL, it is irrelevant from a choice of law perspective that the parties are from NZ: NSW law applies.

Foreign torts: committed outside of NSW

- *Intranational* foreign torts: within another Australian state or territory
- *International* foreign torts: outside Australia

Lex loci delicti commissi: The place where the tort occurred (*lex loci delicti* – LLD) is the Australian choice of law rule for all multi-state torts.

- In the context of *personal jurisdiction*, the originating process of the NSWSC may be served outside Australia '*if the proceedings are founded on a tort committed in NSW*': UCPR 2005 (NSW) Rule 11.2 and Sch 6 para (d).
- In the context of *choice of law*, the applicable substantive law for foreign torts (i.e. torts committed outside the forum) is the *lex loci delicti*.
    - See, for intranational torts: *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503
    - And, for international torts: *Regie Nationale des Usines Renault SA v Zhang* (2002) 187 ALR 1.
- If the LLD is the forum, the applicable substantive law is the *lex fori*, irrespective of any foreign connections that the parties might have: *Szalatnay-Stacho v Fink* [1947] KB 1.

- In that case, the Czechoslovakian govt (invaded by Germany in 1938) were in England. The P was part of the Czechoslovak diplomatic service; the D was a senior govt official in the Czech govt (chief prosecutor in the CA). In the course of official duties, the D wrote a letter concerning the P, addressed to the President of Czechoslovakia in exile in England. P brought a defamation claim against the D. **Choice of law issue**: the place of the tort of defamation is *the place where the defamatory statement is published, regardless of the medium* (could be multiple places). Here, it was clearly England. The problem here was that under Czech law, the D was immune from suit via a defence of absolute privilege of govt officials in official correspondence. But no such defence existed under English law – instead, a lesser defence of 'qualified privilege'.
    - **Held**: Law of Czechoslovakia was not relevant at all. It was a local tort, committed in England – notwithstanding the significant connection of the parties to their homeland, the place of the tort was, conclusively, England: *lex loci delicti* applied.

- **Test for determining the LLD**: 'the basic test to be applied is the same' whether the issue arises in personal jurisdiction or choice of law (*Nygh*, 20.6 at 481). Where all relevant elements of the tort are confined within one country, the *locus delicti* (LD) is that country. Difficulty is where there is a transborder dimension e.g. negligence cases where the breach of duty and damage occur in different countries.
- *Place of damage*: The LD is not necessarily where the P suffers damage, including direct/immediate damage.
    - Lord Pearson, *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 at 468: the place where the P suffers damage as the result of the D's negligence may be 'quite fortuitous': '*It is not the right approach to say that, because there was no complete tort until the damage occurred, therefore the cause of action arose wherever the damage happened to occur. 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****?*
- ***Distillers Test***: Two formulae for determining the LD at 469
    - (a) The place where 'in substance the wrongdoing occurred'
    - (b) The place of 'the act (which must include omission) on the part of the [D] which has given the P a cause of complaint in law'.

- *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 per Mason CJ, Deane, Dawson and Gaudron JJ: 'The approach formulated in *Distillers* does no more than lay down an approach by which there is to be ascertained, in a commonsense way, that which is required by *Jackson v Spitfall* (1987) LR 5 CP 542 at 552, namely, the place of "*the act on the part of the D which gives the P his cause of complaint*".'
    - Ultimately, adoption of the *Distillers* test: '***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?***'

Distillers Co (Biochemicals) Ltd v Thompson [1971] AC 458: Laura Ann Thompson (P) was born in NSW with serious disabilities attributable to her mother's consumption of a drug called 'Distaval', obtained on prescription, that contained thalidomide. The drug was made in England, packaged in the form in which it would be distributed globally. In the packaging, it said it was a 'safe and harmless sedative with no side effects'. The drug was imported to NSW, prescribed and consumed, and the P was born with disabilities. Proceedings against the English Distillers Co were brought in the NSWSC.

- *Personal jurisdiction* problem more than choice of law: Distillers had substantial property in NSW, but ownership of assets in NSW is not a basis for personal jurisdiction, just a practical rason for bringing a claim. The D has to be either (a) present in NSW, in the sense of carrying on *business*, for corporate persons, or physical presence for natural persons, or (b) voluntarily submit to NSW's jurisdiction.
    - Even though the drug was sold in NSW, the company was not carrying on business – it was sold by wholesale distributors and entities importing to NSW. And no desire to voluntarily submit.
- The P thus had to look to *statutory bases* for service of originating process outside of the jurisdiction of NSW and Australia. In 1971. The rules of tort applied the *Supreme Court Rules 1970*, and before that the *Common Law Procedure Act* (1899) – now the *UCPR* 2005. The 1899 Act, s 18(4), said that the originating process of the NSWSC can be served outside of Australia *if founded on a cause of action* ***arising in NSW*** i.e. the question is ***Was the tort committed in NSW?***
- Lord Pearson: the place of the tort of negligence is not necessarily committed in the place where the P suffers damage. The place of damage might be the place where the *last necessary ingredient* of negligence occurred.

    - The place of the tort is the place of ***an act or omission on the part of the D which gives the P his or her cause of complaint in law***.
    - But, then, he offered a second articulation: Where, in substance, did the cause of action arise?
        - The HCA often cites both tests, but the first is more helpful.
- **Applied to the facts**: The P was very careful to note this was not a *product liability* claim. The manufacturing process was not negligent (i.e. not *Donoghue v Stevenson*). This was more a *Hedley Byrne v Heller* scenario i.e. ***negligent misrepresentation***. The P said that the negligence of the D was the misrepresentation made to her mother that the drug was a 'safe and harmless sedative' or, alternatively, the omission of warnings to categories of consumer (including pregnant women). ***A misrepresentation can be made only at the point when the representation is communicated to the representee***. Thus, the place of the tort of misrepresentation is the place of *communication* – the P's mother was in NSW ∴ the tort was committed in NSW. This was the basis of the service of the originating process in England.
    - Eventually, the case settled on financially satisfactory terms after the PC determined the LLD and the case returned to NSW (but the NSW court actually held there was no duty of care or breach of duty).
- As a practical matter, the reason for Thompson to pursue the case in Aus was that an English court in the 1970s was far less likely to find a duty of care than a NSW one.
- ***Two applications***: *James Hardie v Putt* and *Amaca v Frost*. In both cases, the place of each tort was NZ, since the NSW manufacturers had negligently failed to warn consumers *there*, not in NSW.

James Hardie & Co Pty Ltd v Putt (1998) 43 NSWLR 554: A NZ resident brought tort proceedings in NSW against two NSW companies which supplied raw asbestos (*not an inherently dangerous substance*) to his NZ employer. The P alleged that while at work manufacturing asbestos cement in NZ, he contracted mesothelioma from inhaling asbestos dust and that the cause of this injury was the negligent failure to warn of the risks on the part of the D.

- Sheller JA (Beazley and Stein JJA agreeing): '…if the defendants owed the plaintiff a duty of care it was breached when and at the place where the plaintiff was exposed to dust from the asbestos without adequate warning…In this case, properly understood, the defendants did the wrong complained of in New Zealand.'

Amaca Pty Ltd v Frost (2006) 67 NSWLR 635; [2006] NSWCA 173: The P was employed by an insulation contractor in NZ, exposed to asbestos fibres manufactured by the D. Applying the *Distillers* test, the NSWCA held that, as a matter of substance, the P's cause of action in tort against the D had arisen in NZ.

- Spigelman CJ (Santow and McColl JJA agreeing): the D's product was '*inherently dangerous, in the sense that it could not be safely used without special precautions. It was not, however, defective in the sense that something went wrong in the manufacturing process*.'
    - Spigelman CJ went on to say that he gave 'particular weight' to the fact that the insulation was manufactured with an eye to be distributed in NZ and across Australia.
    - He also noted that 'each case turns on its facts and it will rarely be appropriate to try to reason on the basis of factual analogies.'

Dow Jones & Co v Gutnick (2002) 194 ALR 433: This was the first appellate case in the common law world where the following question was addressed: Where is the *lex loci delicti* for the tort of defamation where the internet is the medium of publication? In this case, a staff journalist employed by Dow Jones wrote an article describing Mr Gutnick as 'dishonest and a money launderer', uploaded to the DJ website in New Jersey. The publication sold 305,000 print copies with 550,000 subscribers online, including 300 in Victoria (along with 14 print copies).

- Regardless of the medium: LLD is the place of publication. If the medium is online transmission, the place where the material is ***downloaded, read or heard*** in a comprehensible form is the LLD – ***not*** where the information is uploaded. Dissemination is the heart of defamation.
- Place of the tort was clearly Victoria – the place of the *act of publication* on the part of the D that gave the P his cause of complaint at law. *Same consequences as Distillers*:
    - The place of the tort was Victoria – there was extraterritorial jurisdiction to serve originating process on the D in NJ (DJ did not conduct business in Aus) under the Vic equivalent of the UCPR, hence personal jurisdiction was satisfied.
    - The place of the tort was Victoria – therefore, the applicable defamation law was that of Victoria.

    - New Jersey and the law of the States of the US were more advantageous to the D than Aus laws, but that law is *irrelevant*.
- '*In cases, like trespass or negligence, where some quality of the defendant's conduct is critical, it will usually be very important to look to where the defendant acted, not to where the consequences of the conduct were felt*.'

(ii) Maritime and aerial torts

Choice of law scenarios by sea and air:

→ *Where a tort is committed on a ship at anchor or moored in the territorial sea of a foreign country* (12nm): the locality of the tort is the ***coastal state***, not the flag state: *MacKinnon v. Iberia Shipping Co*; *Union Shipping New Zealand v. Morgan*; *Saldanha v. Fulton Navigation*.

→ *Where a tort is committed* ***on an aircraft on the ground*** *in a foreign country* (*Lazarus v Deutsche Lufthansa*) *or in flight over a foreign country* (*Smith v Socialist People's Libyan Arab Jamahiriya*) or in flight over the territorial sea of a foreign country (*Georgopoulos v American Airlines*): the locality of the tort is the ***subjacent state***, not the flag state.

→ *Where a tort is committed on a ship on the high seas*: the locality of the tort is the ***flag state***: *Roerig v Valiant Trawlers*; *Amdur v Zim Israel Navigation Co*.

→ *Where a tort is committed on an aircraft in flight over the high seas or any other place outside the jurisdiction of any state* (e.g. Antarctica): the locality of the tort is the ***flag state***.

→ *Where a tort is committed in a coastal state's Exclusive Economic Zone* (200nm outside the 12nm territorial sea): the locality of the tort is the high seas and, therefore, the ***flag state***: *CMA GCM v The Ship "Chou Shan"*.

Collision cases:

→ *Where there is a collision on the high seas between two ships* (*The Esso Malaysia*; *Parker v The Commonwealth* and *Blunden v The Commonwealth*); *or between a ship and an inanimate object* (*Submarine Telegraph Co v Dickson*; *Oceanic Steam Navigation Co v Mellor*): the applicable substantive law is the ***lex fori***.

Crimes at sea

→ *Where a criminal act on an Australian registered ship is committed, or a criminal act committed by an Australian citizen, other than a member of the crew, on a foreign ship*: the

applicable substantive law is Australian criminal law (i.e. the substantive criminal law of the Jervis Bay Territory): *Crimes at Sea Act 2000* (Cth).

→ *Where a crime is committed aboard an Australian registered ship in the territorial waters of another state*: Australian jurisdiction applies, even though the crime may be subject to the criminal jurisdiction of the coastal state: *R v Anderson*.

→ *Where a crime is committed aboard a foreign ship in Australian territorial waters*: Australian jurisdiction applies, not the flag state as a 'floating island': *R v Disun; R v Nurdin*).