
PRIVATE INTERNATIONAL LAW

Outline

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2. Personal Jurisdiction

PART A – Bases for Jurisdiction

Outline

- a. *Presence of Defendant*
- b. *Submission by Defendant.*
- c. *Service Elsewhere in Australia – SEPA*
- d. *Service in New Zealand – TTPA*
- e. *Service Overseas – ‘long-arm’ provisions*

In order to bring a case against a defendant, the plaintiff needs to establish a basis for personal jurisdiction. Depending on the circumstances and the location of the defendant, a different basis of jurisdiction will apply. A few introductory points:

- Part A is about whether a court has the competence (jurisdiction) to hear and determine a matter with a foreign element – however: even if the court does have such competence, it can still decline to exercise that jurisdiction (Part B).
- Courts need to have personal jurisdiction in order to make binding orders on the defendant – without personal jurisdiction then there would be no point in exercising jurisdiction.
- If the plaintiff cannot establish a basis for jurisdiction, then the matter cannot proceed – this would occur by an application to set aside the originating process or an application to set aside service of the originating process – **UCPR, r 12.11**

A. Common Law – Presence of Defendant

1. **Individuals** – the defendant is an individual, the following rules apply:

a. **Presence as Basis for Jurisdiction** – at common law, the primary basis for the court's jurisdiction is the service of the originating process on the defendant when the defendant is within the territorial jurisdiction of the court – *i.e.* NSWSC will have jurisdiction if defendant is in NSW at the time of service – **Gosper v Sawyer; Laurie v Carroll**

i. **Timing of Service**

1. **Present at Service** – if the defendant is present in the jurisdiction when the originating process is served then jurisdiction is established –

Laurie v Carroll

2. **Fleeting Presence OK** – even if the defendant is only in the jurisdiction for a short period, if service is affected in that period then jurisdiction is established (so long as it is not vexatious, oppressive, or an abuse of process) – **HRH Maharanee v Wildenstein** (Ascot Races)

3. **Leave After Service** – if the defendant leaves the jurisdiction after being served, jurisdiction is still established – **Razelos v**

Razelos

4. **Leave before Service** – if the defendant leaves the jurisdiction after the writ of service is issued but before service can be affected, then no jurisdiction will be established – **Laurie v Carroll**

a. **Exception: evasion** – if evidence suggests that the defendant was aware that the writ had been issued but left the jurisdiction to evade service then the court may grant an order for substituted service which will allow jurisdiction even if the individual has left the country – **Joye v Sheahan** (left Australia, but knew through solicitors of writ

being issued)

ii. **Purpose for Being in Jurisdiction** – general rule: the purpose or reason for the defendant being in the jurisdiction usually is inconsequential for the purposes of service- presence is the sole factor – **Perrett v Robinson**

1. **Exception: fraud/coercion** – service will not give rise to jurisdiction if the defendant has been tricked, fraudulently enticed, or coerced into the jurisdiction by the plaintiff to be served – **Perrett v Robinson**

2. **Perrett v Robinson** – although tort committed in NT, plaintiff wanted to claim in Qld. Plaintiff drove cooperative defendant to Qld for service. Defendant's insurer unsuccessfully sought to have service set aside on basis of fraud – no fraud because defendant came willingly.

Part B – Torts: applicable law – *lex loci delicti*

1. **Base Rule: *lex loci delicti*** – general rule: the law of the place of the wrong is the applicable law for torts:

a. **Intranational (domestic) Cases** – for proceedings commenced in a state or territory court for a tort committed in another state or territory, the *lex loci delicti* (law of the place of the wrong) is the applicable governing law in respect of all substantive issues – **John Pfeiffer v Rogerson**

i. **Example** – action commenced in NSW for battery committed in Queensland. Queensland tort law for battery would be applicable law governing substantive issue of liability.

b. **International Cases** – for proceedings commenced in an Australian court in respect of a tort, the

lex loci delicti (law of the place of the wrong) is the applicable governing law for all substantive issues

Regie Nationale v Zhang

i. **Example** – action commenced in NSW for battery committed in France. French tort law for batter would be applied by NSW courts

the applicable law governing liability.

- c. **Double Actionability Rule Rejected** – the old common law position applying the rule of double actionability was definitively rejected in **John Pfeiffer and Zhang**.

2. Issues in Tort Choice of Law:

- a. **Characterisation** – the issue must first be characterised as a tort – this can be difficult with borderline cases like misleading or deceptive conduct or equitable obligations which, though not strictly torts, resemble torts for the purposes of choice of law.

Problem Questions solving steps and sample answers

Outline...

Answers

1. Choice of law

- a. characterize the question in issue in dispute between the parties (Macmillan)
- i. In this case, it appears that the essential nature of the issue is the choice of law rules for contract (Macmillan; Re Cohn)
- b. as there is no express choice of law clause, the subjective proper law may be implied from the contract itself, and is determined by construing the contract as a whole, and the surrounding circumstances to determine whether the parties has an implied intention for the contract to be governed by AU or Sanapan law (Amin Rasheed; Akai).