

LAWS 2018: FINAL EXAM SCAFFOLD

1. DETERMINE BASIS OF JURISDICTION: CL, STATUTORY, OUTSIDE OF JURISDICTION ETC

Personal Jurisdiction – is defendant subject to authority of the court and, if so, is there a discretionary ground on which court may decline to exercise jurisdiction?

Basis of **common law** personal jurisdiction

- **1) Territorial jurisdiction based on defendant's presence**
 - Individuals:
 - Presence when served with originating process (*Gosper v Sawyer*)
 - Not sufficient that present when cause of action arises
 - If departed before service of OP, establishes jurisdiction if (*Laurie v Carroll*):
 - D left knowing OP had been issued; or
 - D left NSW for purpose of evading personal service
 - Eg *Joye v Sheahan*
 - Presence can be fleeting or transient (*HRH Maharanee of Baroda*)
 - Corporations
 - Not a natural person – principles are the same
 - Present if carrying on fixed place of business for sufficiently substantial period (*National Commercial Bank v Winborne*)
 - Consider:
 - Whether name of foreign corporation is displayed on purported place of business; whether foreign corporation owns, leases or pays rent; whether they employ staff (*Winborne*)
 - Can have presence by an agent if agent has authority to make contracts with persons in NSW binding that corporation (*Winborne*)
- **2) Personal jurisdiction based on defendant's submission**
 - Test from Robert Goff in *The Messiniaki Tolmi*: if person voluntarily recognises that the Court has jurisdiction to hear and determine the claim which is the subject matter of the proceedings
 - Examples
 - Filing appearance on proceedings (*Sabanatham*)
 - Express agreement to submit to court's jurisdiction (*Dunbee v Gilman*)
 - BUT do not conflate choice of law with jurisdiction
 - Instructing lawyers to accept service
 - Cross/counter claims (*Marlborough Harbour Board v Charter Travel Co*)
 - Raising merits without filing an appearance (eg filing a defence) (*The Messiniaki Tolmi*; *Vertzyas v Singapore Airlines*)
 - *Tolmi*: sought order striking out P's statement of claim
 - *Vertzyas*: asked plaintiff to attend medical examination
 - Consent to interlocutory orders
 - Application for a stay on grounds of FNC
 - Does not constitute submission:
 - Objection to jurisdiction in accordance with UCPR r 12.11(4)
 - Agreement that law of particular country is proper law of contract (*Dunbee v Gilman*)
 - If voluntary submission takes form of express agreement, doesn't dispense with requirement for service of OP on defendant
 - → If D is outside Australia, extra-territorial service of OP authorized by Pt 11 Sch 6 UCPR (k)
 - See bleow

Service OUTSIDE the jurisdiction

- This cannot occur at CL, statutory basis is required
- Intranational → *Service and Execution of Process Act 1992* (Cth) s 15 provides lawful basis
- Trans-Tasman → *Trans-Tasman Proceedings Act* s 9(1)
- International →
- **Pt 11 Sch 6 UCPR:** OP may be serve outside Aus
 - (a) when claim founded on tortious act/omission which was done wholly or partly in Australia or damage was sustained wholly or partly in Australia
 - (b) breach of contract which was made or entered into in Australia made through agent trading or residing in Australia;
 - (c) breach of contract to be wholly or part performed in Australia;
 - (d) governed by Australian law or to be enforceable or cognizable in an Australian court
 - (e) subject matter is property situated in Australia
 - (k) when person to be served has submitted to the jurisdiction of the court
 - Prior leave of Court not required
 - But if D does not appear, then P may not proceed without leave of court (which will only be given if ground under Sch 6 is present)
- In cases which do not fall within one of the paragraphs in Sch 6, the court may grant leave for service of OP outside Australia if the court is satisfied that (r 11.5(5))
 - (a) claim has real and substantial connection with Australia; and
 - (b) Australia is an appropriate forum for trial; and
 - (c) in all circumstances, the court should assume jurisdiction
- Under UCPR Pt 11 if personal service is impracticable, a court may make order for **substituted service** only if they have **personal jurisdiction** over defendant.

Tort

- Tort committed in NSW (Sch 6(a)(i))
 - Tort committed in NSW if that was the place of the **act on part of D that gives P his or her cause of complaint in law** or where “in substance” the wrongdoing occurred (*Distillers Co v Thompson; Voth v Manildra Flour Mills*)
 - Product liability – *Distillers*: place where warning should’ve been provided
 - Negligence – *Buttigeig*: tort that occurred was not a failure to warn of stowage, but relevant act of negligent stowage
 - Misrepresentation – *Diamond v Bank of London & Montreal*: place where misrepresentation is received
 - Defamation – *Dow Jones v Gutnick*: where defamatory article was downloaded
 - Maritime torts – see Topic 7 below
 - Eg tort committed on board ship in territorial waters of coastal state → place of tort is coastal state (*MacKinnon v Iberian shipping*)
- Tort damage suffered in NSW (sch 6(a)(ii))
 - Eg medical expenses in the forum; lost property in the form that was offered as security to finance overseas purchase
 - It is sufficient that P suffered or continued to suffer some damage, disadvantage or detriment for which damages are recoverable in tort eg consequential pain and suffering, medical and hospital expenses etc – in NSW as result of accident outside Aus (*Brix-Nielsen v Oceaneering Australia*)

Contract

- Place of breach is NSW (sch 6(c))
 - If goods fail to conform with description in contract, place of breach is place of delivery: *Lewis Construction v Tichaeur*
 - If breach of contract is by repudiation, place of breach is place from which communicate originates (not where received): *Safran v Chani*