

## CHOICE OF LAW IN TORT

**\*The mid semester option assignment is on this**

- Consider concurrent liability in contract
- We need to examine (not in detail) but we need to be informed of the basic principles pertaining to choice in law of contract in order to appreciate that a claim in tort and contract may differ

We will talk about how the older cases will be decided today

- Three important cases
  - *John Pfeiffer*
  - *Zhang*
  - *Nielsen and Overseas Projects*

### **Foreign Torts And Local Torts; Maritime Torts And Aerial Torts**

What is the different between a foreign tort and local tort?

**Identifying the legal system in which the tort was committed**

- It is not clear that when a tort is committed that it was committed where the train came off the rails – referring to the VIC railway accident
- *Donoghue v Stevenson*
  - The tort didn't occur where the person drank the beer but where the beer was actually manufactured

**What is a foreign tort?**

- A tort that occurred/ committed in another foreign legal system
- We are looking at the world from the base of NSW
- A tort is a foreign tort is one which is outside of NSW
  - They fall into two categories:
    - In another AU state or territory – this is an intranational tort
    - In another country/outside Australia – it is an international tort
- The basic principles are the same even if intra or inter but there are some differences
- Our focus is on the international dimension of private international law
- If it is a local tort
  - Then only local law is relevant to the tort – no foreign law applies
  - The Lex fori applies
  - If the tort is a NSW tort then only NSW law is relevant
  - PRIL is concerned with tort cases which have a relevant foreign element
    - What is relevant and not relevant is not intuitive
    - E.g. two NZ people have a MCA in NSW
      - The fact that they are both from NZ may be highly material in some foreign law systems (e.g in PRC it is determinative that they have the same habitual residence but IT IS NOT RELEVANT OR INTUITIVE IN AUSTRALIAN LAW)
      - If the tort is a local tort, regardless of the foreign nature of the parties, the nature of the tort is irrelevant
    - E.g. NZ tort of Invasion of Privacy
      - NZ person goes to NSW for privacy

- And media goes to NSW to invade privacy of the NZ person in NSW
- The fact that both parties are from NZ is irrelevant
- If it was a NSW tort, the foreign law is not of relevance
- A local tort is one which has occurred in NSW
  - These are the ones which we learnt in the first year torts class
- If you conclude that the place that the tort was committed was NSW, consider that it may be not – it may be international

\*Refer to Supplementary Materials – determining the place of a tort

### Lex fori as the only relevant law in respect of local torts

See *Distillers* for identifying where a tort occurs

[CASE] *Szalatany v Fink (1947)* – authority for Lex Fori application

- Facts:
  - Czech was exercising its sovereign authority
  - The P was a member of the diplomatic service in Czech
  - The defendant wrote a letter containing defamatory material regarding the plaintiff
  - Upon opening of the letter the defamatory issue arose
- Issue
  - If the C law was relevant a statement made by a government official was immune from liability
  - England – lesser defence of qualified privilege
  - Do we look at C law or E law?
- This was a tort that was committed in England, therefore the law that applied was the English law

### Tort committed or tort damage suffered in Australia

[CASE] *Distillers Case – Distillers v Thompson (1971)*

- Facts:
  - The two legal systems relevant are NSW and England
  - The P was a minor and her name was Laura – she was a resident of NSW and was affected by disabilities and she said her disabilities were attributable to a chemical which were consumed by her mother in the first three months of her pregnancy
  - Laura's mother had purchased and consumed in NSW a drug that was marketed world wide under the name of "Distabell"
    - A sedative
    - Suitable for children and older people – did not refer to people in between
    - The Distillers company manufactured this drug – the ingredient was a part of the chemical
    - There was to be no repackaging but distributors
    - When it left the factory in England it was in the same packaging that it would be in when it reached NSW
  - P wants to bring a common law negligence action against the defendant (the company)
  - She brought the proceedings in NSW for a reason and it was deliberate
  - She is suing an English company in NSW, they had no place of business in NSW

- The company was not subject to the common law jurisdiction of the court because, common law jurisdiction requires that the corporation is carrying on business or voluntarily submits to the jurisdiction
- The company was not carrying on business, only the importer was carrying on business and they did not want to submit to the jurisdiction
- Issue:
  - The issue was regarding personal jurisdiction
  - On what basis could the defendant be subject to NSW jurisdiction?
  - The basis upon which the SC can exercise jurisdiction
  - There has to be a legal basis upon which the service of the originating process of the court – these processes determine the jurisdiction of the court, so far as the defendant is concerned
- Held:
  - Go to the UCPR Part 11
  - 1899 UCPR s18 of the Act says – the originating process of the court may be served to the defendant outside of Australia if the proceedings are found on a cause of action arising in NSW
  - “if the claim being made in NSW was a tort claim, then the claim would not arise unless the tort was actually committed in NSW”
  - where was the tort committed? (assuming a tort was committed by the company?)
  - It is assumed there is a DoC and that is breached, therefore the above is the only legal question
  - The decision to include the dangerous ingredient was made in English
  - This was not a product liability case like Donoghue
    - There was no argument regarding the use of the ingredient in the drug
  - The act on the part of the defendant a cause of complaint in law was a misrepresentation that was made to the mother who consumed the drugs
  - The misrepresentation isn’t made when the drug was manufactured
  - There was a express and misleading representation
    - The place is where the representation is communicated to the consumer
    - In NSW, the point of sale to the mother
    - The above was the critical act
- Test:
  - Look back at the events regarding the tort
  - Where “in substance” did the wrongdoing occur?
  - The place of the tort is where the defendant did the act that gives the plaintiff the cause of complaint in law – Lord Pearson
- We have now established that the SC has relevant jurisdiction but we have not given thought to the actual substance of her claim
  - E.g. establishing whether there was a duty of care
  - Defendant can’t walk away because they have substantial assets in Australia
  - In bringing it in NSW, the NSW law will be applied as the lexforri
  - This is good because the plaintiffs lawyers had determined that if any court in the CL law was to find a DoC to the plaintiff, it was a NSW court
  - At the time of this case, there was no other decision of a DoC to an unborn regarding prenatal injury
- Refer to the note in the supplementary materials
  - The cases involved asbestos cases which occurred in NZ
  - One was decided in 1998 and the second case was decided in 2006 and there was a re-orientation regarding a choice of tort
  - Asbestos products created in NSW and exported to NZ
  - The plaintiffs brought proceedings in NSW – the problem was choice of law

- They applied the test from the *Distillers Case*
- Negligent failure to warn to take stringent safety precautions – this occurred in NZ
- Therefore NZ law should be applied
- An absence of civil liability in the place that the tort was committed
- NZ was the place that the tort was committed and therefore no civil liability

## PERSONAL JURISDICTION

Jurisdiction over the person of the defendant

- identifying the principles which determine whether a particular defendant is subject to the power or authority of the SCoNSW
- some people will use bases of foreign jurisdiction

**What are the principles that govern personal jurisdiction?**

### (A) COMMON LAW

- The first step is to determine whether the court has common law jurisdiction

This is governed by two principles (if either of these are satisfied, then the court will have jurisdiction over the defendant)

- **the presence of the defendant within the territory of the court**
  - at what time?
  - you're here in NSW today, and if the defendant is served with the originating process while in NSW, this is the clearest base of jurisdiction
  - defendant who was present in NSW before the commencement of proceedings
    - they left NSW before the originating process was filed in court?
    - they are not under the personal jurisdiction of NSW
      - commits tort and then leaves
    - defendant leaves before the originating process is served but it is filed in court
      - they leave NSW before it's served
      - if a D is present in NSW, then leaves, then they are subject to the NSW jurisdiction  
if they attempted to evade personal service or they knew that proceedings have commenced - the plaintiff may obtain an order for substituted service
- **the defendant's voluntary submission to NSW jurisdiction**

Test:

- there has to be a lawful basis to serve the originating process on that person
- the principle as per *Laurie v Carol*

### Territorial jurisdiction based on the defendant's presence

#### 1. Individuals

[CASE] *Gosper v Sawyer* (1985)

- The ordinary basis of territorial jurisdiction is the personal presence of the defendant within the court's territory – Mason and Deane JJ
- Common law jurisdiction is clearly established if the defendant is served with the originating process while present in the forum

[CASE] *Laurie v Carrol* (1958)

- Facts:
  - this is an intranational case, the two states - NSW and England
  - the P and the D, had entered into an arrangement whereby they were going to promote a ballet tour around Australia
  - the P and D were both promoters and there is a falling out
  - both were physically in the State of VIC, before the plaintiff commences the proceedings, the D goes and sees a lawyer in Melbourne
  - and the lawyer advises the defendant that if he does not want to be subject to VIC jurisdiction, he had to leave
  - the Defendant left VIC on the 13th of June 1967, on the 14th the Plaintiff filed the originating process
- Question:
  - was the defendant subject to the common law in VIC
- Judgment:
  - the D is not subject to the common law jurisdiction of the court, this is because the D had left Victoria before the issue of the originating process
  - suppose that he had been present when the plaintiff had commenced the proceedings
    - if he leaves before the OP can be served and when the D leaves and are aware that the proceedings have commenced or have left with intent to evade personal service
    - then that is sufficient for common law jurisdiction
- *Principle: A defendant now present in the forum at the time of the issue of the originating process is not subject to the common law of the jurisdiction*

[CASE] *Joy v Sheahan* (1996)

- Facts:
  - Australia was the forum
  - On the 6th, Mr Sheahan, who is the plaintiff, commenced proceedings in the Federal Court
  - Joy was in Australia
  - J left Australia on the 13th before the originating process could be served on him
- Issue:
  - was Joy subject to the jurisdiction?
  - could an order for substituted service be made?
- Held:
  - yes he was present on the 6th and when he left he knew that the proceedings were made and he left with the intent to evade personal service
  - knowledge or intent to evade must also be included to allow personal jurisdiction
- *Principle: If a defendant who was present in the forum at the time the originating process is issued, but departed from the forum before service of the originating process is not subject to the common law jurisdiction of the court unless they know of the issue of the originating process or departed the forum with the intent to evade service of the originating process*

Note: If D is served while in NSW, they are still subject even if their presence is a transient one

[CASE] *HRH Maharanee of Baroda v Wilderstein* (1972)

- Facts:
  - the plaintiff here is an Indian princess and was a resident of France
  - the defendant was an art dealer who carried out his business in France
  - in France, the parties entered into a transaction whereby the plaintiff purchased a painting
  - after the P purchased it, she then had the painting taken to England for appraisal, the painting turned out to be a copy and therefore it was worth a fraction of what the plaintiff had paid
  - she wanted her money back
  - the plaintiff decides that she will bring the claim of rescission of the contract in the English High Court
  - Problem of personal jurisdiction because Wilderstein is in France
  - he had a passion regarding race horses and he was served with the OP in England when he came to watch the races happening in England
- Held:
  - the transaction in every aspect is to do with France
  - French law is applied in the proceedings
  - but he was subject to the common law jurisdiction of the English HC
- Why bring in England?
  - the form of remedy is a matter of procedure governed by the lex fori
  - but the breach itself is governed by the lex loci delicti
- Principle: even the fleeting and transient presence of the defendant in the forum at the time of service of the originating process is sufficient to establish common law jurisdiction even though the defendant and subject matter of the proceedings have no connection with the forum

## 2. Corporations

*A corporation will be present in the NSW forum if it carries on business in NSW and must carry it on at a fixed and definite place for a substantial period*

[CASE] *National Consumer Bank v Winbourne* (1979)

- Facts:
  - The question was whether a bank incorporated in Saudi Arabia was subject to NSW jurisdiction
  - They carried out no business in NSW, no assets, there were only some transactions between the Saudi Bank and a local bank in NSW that collected bills of exchange and remitted proceeds to Saudi Arabia and also advised some NSW exporters
- Issue:
  - Was this enough for the Bank to be classified in the NSW?
- Held:
  - NO – *the business must be carried on at a fixed place of business and for a substantial period*
  - **The test for presence to determine whether a foreign corporation carries on its business in NSW:**
    - *Must be carrying on business by an agent that has authority on its behalf to make contract with the person in NSW binding on the corporation*
    - *Business carried on in a fixed and definite place in NSW*
    - *Business must have continued for a sufficient period of time*

## Jurisdiction based on a defendant's submission

*D who would not otherwise be subject to the common law jurisdiction of the court, voluntary submits:*

- take a step of willingness to be bound
- any step which a D takes which is inconsistent to an objection
- For example: if the defendant files an appearance in the proceedings
  - this will waive any objection which the D might have

### **1. What constitutes a voluntary submission?**

- Voluntary submission may take several forms e.g.
  - Filing an unconditional appearance in proceedings (*Paramasivam v Sabanathan*);
  - Express agreement to submit to the court's jurisdiction (*Dunbee v Gilman & Co (Australia)*);
  - Arguing merits of case without filing an appearance (*The Messiniaki v Tolmi*; *Vertzyas v Singapore Airlines*)
  - Filing appearance in proceedings is treated as voluntary submission to any amendment of original claim which is founded on/directly arises out of same subject matter as original claim, as well as jurisdiction of courts with respect to D's cross-claims (*Malborough Harbour Board v Charter Travel Co*)
- Acts that don't constitute voluntary submission:
  - Agreement that the law of a particular country is the proper law of a k
  - Objection to jurisdiction of NSWSC in accordance with UCPR 2005 (NSW) r12.11

### Filing an unconditional appearance in proceedings

#### [CASE] *Paramavasion v Sabanathan* (2013)

- Facts:
  - place of tort was Sri Lanka
  - three defendants were residents of Sri Lanka and filed appearances in NSW and the originating process wasn't even filed on them
  - *the filing of an appearance in the proceedings constituted a waiver of any objection and therefore the three defendants had voluntarily submitted to the jurisdiction of the court*

### Express agreement

- there must be a pre-existing contractual agreement between the parties
- this is a voluntary submission
- it must be express and cannot be implied by any other terms of the contract

#### [CASE] *Dunbe v Gilman & Co.* (1968)

- Facts:
  - D was a NSW resident and he entered into a commercial contract with the plaintiff
  - the contract included an express term that this contract is governed by English law
  - a dispute arose between the parties and the P brought proceedings in the English court
  - a D had no presence in England and the English P served the D in NSW, according to the UCPR Pr 11 English equivalent
    - statutory basis of serving

- the English rules expressly provide that if a contract is governed by English law, then that is a sufficient basis for extra territorial jurisdiction
- the OP is served on the basis that the contract was governed by English law
- the defendant got advice from NSW solicitors:
  - do you have any assets in England?
  - do you have any commercial reputation in England?
  - The solicitors gave D advice not to do anything
- the D does nothing
- English HC gives default judgment and wants to enforce it in NSW where the D had assets
- under the CL principles of PRIL
- a foreign judgment is enforceable so long as the foreign court exercises jurisdiction in the international sense
- we are concerned if the English law exercised jurisdiction in line with NSW laws
  - this will happen when the foreign court exercises jurisdiction in factual scenarios which would constitute the jurisdiction of NSW
  - if a foreign judgment is capable of being enforced in NSW, they exercised in foreign circumstances as enforceable in NSW
- Was the D present in England when the proceedings were commenced?
  - No
  - and they did not voluntarily submit
  - just because it has English law clause, English law and English jurisdiction are two different issues

#### Arguing merits of the case without filing an appearance

- Application to strike out, puts the merits of the claim - D cannot do so, until they are unsuccessful to objection

#### [CASE] Vertzyas v Singapore Airlines (2000)

- Facts:
  - Mrs V purchased a return ticket from Athens to Sydney
  - she contended that she suffered bodily injury
  - she brought proceedings in the courts of NSW
  - the Warsaw Convention makes very clear that the places where a passenger can bring a claim against an air carrier
    - It has to be the place of ultimate destination which in this situation was Athens
  - NSW had no jurisdiction
  - Singapore Airlines files a defence putting at issue the merits of claim
- Held:
  - Therefore they have forfeited the right to object to jurisdiction
  - Precluded themselves from objecting
  - *To waive an objection to jurisdiction, party has to do acts in the court proceedings which are inconsistent with maintaining their objection*

#### [CASE] The Messiniaki Tolmi (1984)

- Held:
  - A person voluntarily submits to the Court's jurisdiction if he voluntary recognises that the Court has jurisdiction to hear and determine the claim which is the subject matter of the proceedings
  - Effect – precluded thereafter from objecting to the Court exercising its jurisdiction in respect of such claim



## 2. Objection to jurisdiction

- Considering a foreign defendant
  - Where they make an objection, an objection does not constitute as a submission – Part 11 Rule 12 of the Rules

### SUBSTANCE AND PROCEDURE

We need to distinguish between the substantial and procedural aspects of a claim:

- **All matters of procedure are governed by the lex fori**
  - If foreign laws are relevant, then it can only be relevant in terms of substance
  - Things you would have learnt in CCP – if the problem is to do with the bringing of serving an originating process, pleadings, the form of remedy (damages or specific performance or declaration etc.)
  - The law of evidence is a matter of procedure
- **All matters of substance are governed by the lex causae**
  - If the problem in issue is something that you have learnt in contracts or torts then it is substantial

*The applicable law identified by forum's relevant choice of law rule, such as proper law of the contract if issue is concerned with the performance or discharge, or lex loci delicti if issue is concerned with liability in tort*

### Rationale Of The Distinction And Characterisation

*The efficiency of litigation – the kinds of process, pleadings, admissibility of evidence, form of remedy as procedural issues, the existence and content of legal rights and duties as substantive issues:*

- Efficiency of litigation" dictates that **procedural** issues are governed by **lex fori** (*McKain v RW Miller & Co (South Australia)* per Mason CJ)
- **Procedural issues: "mode or conduct of court proceedings"** (*McKain* per Mason CJ) e.g. kinds of process which may be used to initiate proceedings, rules which govern pleading and admissibility of evidence and form of remedy (*Lumley v Wagner; Phrantzes v Argenti; Slater v Mexican National Railway Co*)
- **Substantive issues: "existence, extent or enforceability of the rights or duties of the parties to an action"** (*John Pfeiffer v Rogerson* per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) e.g. existence of liability in tort for psychiatric injury, effect of illegality on contractual obligations

### Characterisation of the lex fori

*Which legal system determines whether a particular law is substantive or procedural?*

- Characterisation of a law as either substantive or procedural is governed by the lex fori
  - For example: Whether a Chinese statute is substantive or procedural will be determined in NSW will be determined with reference to the NSW laws regarding substance or procedure

### [CASE] *Nalpanidis v Stark* (1996)

- Facts:
  - A personal injury claim being brought in SA where the injury was suffered in Victoria
  - The problem was whether there was civil liability in Victoria re the Transport Act, this Act purported to abolish liability in transport accidents

- “all of the preceding 19 sections are to be treated as the substantive law of Victoria and applied accordingly”
  - the foreign law was characterising itself as substantive
- Issue:
  - Was the statute substantive or procedural?
- Held:
  - The above question is to be answered with reference to South Australian law as it is the law of the forum (lex fori)
  - *The Court held that whether those two provisions are substantive or procedural was to be determined in NSW by reference to NSW law (lex fori), and the NSW conception of what is substantive/procedural.*
  - The Victorian statute was held to be a substantive one
  - “the court must consider how the Victorian provision operates within the body of Victorian law, applying the forum’s understanding of substance and procedure”

**[CASE] *Hamilton v Merck & Co* (2006)**

- Facts:
  - Tort committed in Queensland and being litigated in NSW – the tort was personal injury
  - In QLD there was Personal Injury Proceedings legislation which said that it was mandatory for the plaintiff to give notice of claim to the defendant before commencing the proceedings as well as requirement for both parties to have a conference to try and settle the proceedings
  - The statute said that these requirements were substantive law of QLD
  - The requirements were not complied with by the Plaintiff
- Issue:
  - Was the legislation procedural or substantive?
- Held:
  - The law of NSW as the lex fori determined whether the provisions of QLD legislation should be characterised as substantive or procedural
  - The CoA said that the two provisions were so obviously connected with the mode or conduct of court proceedings, therefore they were considered to be procedural