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2.2 Choice of Law (Torts)

Lex loci delicti

The approach for determining *lex loci delicti* was formulated by the Privy Council in *Distillers*: "**when the tort is complete, look back over the events constituting it and ask the question: where in substance did the cause of action occur.**" This was affirmed by the High Court in *Voth*.

- **Negligence**
 - Where the tort alleged is based on a negligent act or omission of the defendant causing harm, the tort is committed where that negligent act or omission occurred, even though the consequential injury was suffered elsewhere (*Koop v Bebb*).
 - This is difficult if several acts and omissions in different places combined to cause the plaintiff a single harm (*Puttick v Tenon*). In this case, the High Court was unable to make a provisional finding about the *lex loci delicti*. [If an omission, consider where could have been fixed]
- **Defective manufacture of product**
 - The tort occurs in place of manufacture (*McGowan Hills*)
- **Inherently dangerous product**
 - The tort occurs where the plaintiff was exposed to the risks emanating from the product, not where it was manufactured (*Amaca v Frost*). It is at this point that the manufacture of the inherently dangerous product "assumed significance" (*Voth*).
- **Failure to warn**
 - Where a defendant fails to warn of a product's dangerous qualities, a tort occurs where the plaintiff buys or uses the product without warning (*Distillers*).
- **Failure to provide services without proper care**
 - The tort occurs where those services were or ought to be rendered (*Voth*)
- **Negligent misrepresentation directed from one place to another**
 - The tort occurs at the place where the representation was directed, whether or not it was acted upon there, provided it was a place where it could have been reasonably anticipated to have been brought to the attention of the plaintiff, even if in fact it is received by the plaintiff elsewhere (*Voth*)
 - In *Sigma Coachair*, misrepresentations were made to a company in Australia, which then supplied products to the plaintiff (also an Australian company). The Court said the misrepresentations, though originating in Germany, were provided by the first Australian company for the use of the plaintiff. The tort therefore occurred in NSW, even though the first company acted as an intermediary and the materials were supplied indirectly to the plaintiff.
- **Defamation**
 - The tort occurs where the publication is made available to viewers/readers as this is where the damage to reputation is done (*Dow Jones v Gutnick*)
 - In *Gutnick*, the High Court rejected the submission that a special rule was necessary for internet publication. The Court said that for the tort of defamation, the wrong occurs where a person receives the content (or downloads it). This means there can be several claims in different jurisdictions arising from one defamatory act.
 - Note *Defamation Act 2005* s 11 (NSW) overrules this for intrastate defamation
- **Fraud or breach of fiduciary duty**
 - Tort occurs where the conduct takes place, not where it takes effect (*John Walker v Henry*)

Maritime Torts

Territorial Sea

Torts on board a ship in territorial waters are taken to occur in the littoral jurisdiction (*MacKinnon*). This authority is clear in NSW following *Union Shipping v Morgan*. However, where applying the *lex littori* leads to an absurd outcome, the Court may consider the law of the flag as the appropriate *lex loci delicti*.

[Are the facts somewhere between the situations in *MacKinnon* and *Morgan*?]

Heydon JA in *Morgan* contemplated some potential exceptions to the *lex littori* where:

- Just before the unloading of a ship began
- Just before the vessel was moored
- Just before it reached the shore
- Just before it entered the harbour
- Just after it entered the territorial sea

[Discuss whether the location of the tort was fortuitous]

High Seas

While torts on board a ship in territorial waters are taken to occur in the littoral jurisdiction (*Union Shipping v Morgan*), the *lex fori* generally applies to torts occurring on the high sea, unless another state has a better claim (*Blunden v Cth*). This includes the 'general principles of international maritime law' (*CMA CGM v Chou Shan*).

- According to obiter dicta in *Blunden*, one exception to applying the *lex fori* is '**internal economy**' cases where the law of the flag of a foreign vessel applies.
- When there is a collision on the high seas, the *lex fori* clearly applies following *Blunden*.
- The Exclusive Economic Zone is part of the high seas (*CMA CGM v Chou Shan*).

Aerial Torts

Generally covered by aviation conventions e.g. Chicago convention.

Territorial Land or Sea

Where a tort occurs on an aircraft on the ground of a foreign country (*Lazarus*) or in a flight over either the foreign country or the territorial sea of a foreign country (*Georgopoulos*), then occurs in that state and not the state of registration of the aircraft.

The exceptions to the application of the *lex littori* considered by Heydon JA in *Morgan* may also be relevant.

High Seas

Drawing from maritime tort authorities, where a tort is committed on a plane over the high seas, it is generally a situation of 'internal economy' and the *lex loci delicti* is likely the flag state (*Blunden*). Where two aircraft collide above the high seas, the *lex fori* applies.