Table of Contents

1: Introduction

***Limitation Act 1969* (NSW)**	
S 78: Characterisation of Limitation Laws	(1) In this section, *limitation law* means a law that provides for the limitation or exclusion of any liability or the barring of a right of action in respect of a claim by reference to the time when a proceeding on, or the arbitration of, the claim is commenced. (2) A limitation law of the State is to be regarded as part of the substantive law of the State. (3) This section extends to a cause of action that arose before the commencement of this section but does not apply to proceedings instituted before the commencement of this section.

***Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) HCA 22**
Facts SD claimed a constructive trust over property held by F, as a remedy for F having breached a fiduciary duty owed to SD.
Held Lower courts must obey the seriously considered dicta of HCA majority.
Rule Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong. The same principle applies in relation to non-statutory law.

***Cook v Cook* (1986) 162 CLR 367**
Mason, Wilson, Deane, Dawson JJ Subject to the special position of decisions of the House of Lords given the period in which appeals lay from this country to the PC, the precedents of other legal systems are not binding and are only useful to the degree of persuasiveness of their reasoning.
Rule The precedents of other legal systems are not binding and are useful only to the degree of persuasiveness of their reasoning.

***Oceanic Sun Line Special Shipping Co v Fay* [1988] HCA 32**
Facts F lived in QLD and engaged a NSW travel agent to arrange overseas trip – F was sent a brochure concerning a cruise of the Aegean Sea on a Greek vessel operated by OSL, a company incorporated in Greece – brochure included a declaration that the transportation of passengers was governed by the terms and conditions printed on the passenger ticket contract but F did not read this – F's agent was given an exchange order which was exchanged for a Sun Line ticket in Athens shortly before cruise – ticket contained conditions of which F was unaware – Clause 13 required that any action against OSL be brought only before the Court of Athens – during cruise, F was severely injured when a shot gun exploded in Greece – F commenced proceedings in NSWSC – OSL moved to set aside proceedings.
Issue Where was the contract formed, whether the exclusive jurisdiction clause was incorporated into the contract?
Held Unanimously held that as the contract of carriage was made when the exchange order was issued and as the exclusive jurisdiction clause contained in clause 13 of the ticket was not then known to Fay and as insufficient steps were taken to bring such a clause to his attention, the clause was not part of the contract, when it was formed. The brochure was informative but not contractual, hence appellant cannot rely upon it as a means of incorporating the terms and conditions on the ticket into the contract. The majority (Brennan, Deane, Gaudron JJ) applies the *lex fori* to determine preliminary questions of contract formation. Toohey and Wilson JJ dissented on this issue.
Application "Once it is accepted that there was a contract of carriage in Sydney, there are formidable obstacles in the path of the appellant's argument that the conditions on the ticket and in particular the submission to Greek jurisdiction formed part of that contract"
Rule When a defendant applies for a stay or dismissal of proceedings on the grounds of forum non conveniens (forum not appropriate), it must persuade the local court that the plaintiff's claim should be brought in another court because the local court is a **clearly inappropriate forum to determine the dispute.** (Restating Lord Goff in *Spiliada*). <u>Formation:</u> the lex fori determines questions as to the existence, construction, and validity of terms bearing upon determination of the parties' agreement as to the proper law. <u>Exclusive Jurisdiction Clause</u>: where the parties to a contract agree that the courts of a foreign country shall have exclusive jurisdiction to decide disputes arising under the contract or out of its performance, the courts regard that agreement as a submission of such disputes to arbitration and will stay proceedings brought here to decide those disputes.

***Re Canavan* [2017] HCA 45**
Facts S 44(i) prevents a person from being a senator or a member of the HOR if they hold a dual citizenship – per *Sykes v Cleary*, a person makes take 'all reasonable steps' to renounce their foreign citizenship prior to running for office – Canavan believed he was a citizen of Australia and of no other country – Canavan and both parents born in Queensland, only link to Italy is through maternal grandparents – by becoming Australian citizens in 1951, Canavan's maternal grandparents ceased to be Italian citizens under Italian law – Canavan had never visited Italy and took no steps to acquire Italian citizenship – In July 2017, Canavan's mother told him that he may have been registered as an Italian citizen as a result of steps that she had taken to become an Italian citizen – Canavan informed by Italian consular official that he had been registered as an Italian citizen in 2006. Expert evidence was that under Italian law his citizenship did not arise from steps taken by his mother in 2006 but rather his maternal grandmother had not renounced her citizenship at the date of his mother's birth – Under a 1912 Italian law, only the child of a father who was an Italian citizen became an Italian citizen by birth – law was deemed unconstitutional in Italy, and citizenship reverted to being passed to child of either parent – effect of unconstitutionality of law was that Canavan became an Italian citizen retroactively to the date of his birth.
Issue As a matter of law of foreign law, is the person a citizen, and has the person taken reasonable steps to renounce that nationality?
Held Canavan not a citizen of Italy. Given the potential for Italian citizenship by descent to extend indefinitely into public life of an adopted home, one can readily accept that the reasonable view of Italian law is that it requires the taking of the positive steps as conditions precedent to citizenship. Not enough evidence to show that Canavan had Italian citizenship.
Rule S 44(i) Constitution has the implicit qualification that the foreign law conferring foreign citizenship must be consistent with the constitutional imperative underlying that provision – an Australian citizen must not be prevented by foreign law from participation in a representative government where it can be demonstrated that the person has taken all steps that are reasonably required by the foreign law to renounce his foreign citizenship. Citizenship must be determined by the law of the foreign state as the source of the status or the rights and duties.

***Gett v Tabet* [2009] NSWCA**
Facts T diagnosed with a brain tumour at age six – diagnosis was made following a seizure, CT scan, EEG and was preceded by a history of chickenpox, as well as headaches, nausea and vomiting – T received treatment, including surgery to remove the tumour, and suffered irreversible brain damage (partly from seizure, partly from tumour, partly form procedure) – T brought proceedings against G, a specialist paediatrician, alleging that he had been negligent (CT should have been done earlier) – trial judge held that G was negligent in failing to order a CT scan – G appealed.
Held The unanimous decision to not follow existing authority concerning the award of damages for loss of a chance of a better medical outcome was not a decision that turned on the facts of the case. The result is that the capacity for a plaintiff to successfully seek damages for loss of a chance of a better medical outcome is now the subject of uncertainty.
Application A precondition to departure is: the strong conviction of the later court that the earlier judgement was erroneous and not merely the choice of an approach which was open, but no longer preferred, the nature of the error that can be demonstrated with a degree of clarity by the application of correct legal analysis.
Rule The phrase "plainly wrong" or "clearly wrong" can be understood to focus on at least one or more of the following attributes of a ruling: (a) fact or error is immediately apparent from reading the relevant judgement, (b) strong conviction of the later court that earlier judgement was erroneous and not merely the choice of an approach was open, but no longer preferred, (c) nature of the error that can be demonstrated with a degree of clarity. The existence of (b) and (c) is a precondition tot eh exercise of the power to depart from earlier authority. "Clearly wrong" or "plainly wrong" is a necessary, but not sufficient, condition for departure from earlier authority.

***Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC* [2001] QB 825**
Facts Ship owner, FS, assigned benefits of insurance policy to its bank, RZB – ship collided with another ship in Malaysia, sinking it – owner of the sunken ship and cargo owners sought money from sale of ship and insurance proceeds.
Issue Whether the assignment of the policy was an issue relating to contracts or property.
Held This was a contract issue, and English law applied. The assignment was valid. Statutory provisions are engaged in characterisation.
Rule (Mance LJ) In looking at stage two, courts cannot ignore the effect of characterising an issue in a particular way.

***Macmillan Inc v Bishopgate Investment Trust* [1996] 1 WLR 387**
Facts M was a company incorporated in Delaware, which was controlled by RM – M was the equitable owner of 10.6 million shares in BI, a company incorporated in NYC – shares were held on trust by B, a company which was owned and controlled by RM – in breach of trust, shares were mortgaged by B to secure loans from three different financial institutions to fund M's private interests – at the time of M's disappearance, a number of the shares were held as security by SV, CS – loan and security transactions were negotiated and concluded in London – notice by banks received in London – some of the share transfers were by way of delivery of share certificates and a transfer form in London – trial jusge found that the applicable rule required him to apply the law of the palce of transaction, which was NYC – M appealed.
Issue What is the appropriate law to apply to decide whether the defendants were bona fide purchasers? Whether the 'issue' was restitution (governed by proper law, England) or transfer of moveable property (governed by law where property is situated, NY).
Held Issue to be decided by the law of New York, which was the lex situs of the shares. The shares were in the same position as chattels. Law of the defence was applied. Where the share is, is the place of incorporation/share registry is kept.
Application Characterisation 1. Issue: whether defendants have a defence on the ground that they were purchasers for value in good faith without notice. 2. Conflicts Rule: property law, lex fori. 3. System of Law: NY law.
Rule Lex Causae: the system of law to be applied. Cited with approval in *Sweedman v TAC* [2006] HCA 8. An issue as to who has title to shares in a company should be decided by the law of the place where the shares are situated. Characterisation (Staughton LJ): 1. Characterise the issue before the court (interpretation of contract, tort). 2. Select the conflicts rule which lays down a connecting factor (the proper law, lex loci delicti, lex fori). 3. Identify the system of law tied by the connecting factor to the issue (law of NSW, law of England).
Staughton LJ The rules of Conflict of Laws must be directed at the particular issue of law which is in dispute rather than at the cause of action which the plaintiff relies on. 'Lex causae' should be translated as the law applicable to the issue, rather than the suit.

2: The Law Applicable to Torts

Historical Background

***Phillips v Eyre* (19870) LR 6 QB 1**
Facts E was the governor of Jamaica during the Morant Bay Rebellion – as governor, he ordered a brutal response, which led to the deaths of numerous Jamaicans and the arrest and the summary execution of various political figures – at the end of his term as governor, the colonial assembly passed an Act of indemnity covering all acts done in good faith to suppress the rebellion after the proclamation of martial law – when he returned to England, several Jamaicans sued E for trespass to the person and false imprisonment in the Courts of England.
Held E could not be sued for his conduct in Jamaica. The indemnity Act that E passed in Jamaica just before leaving meant that his act was found to be justifiable by the law of Jamaica, and thus it failed the second rule and could not be actionable in England.
Rule *NOW ABOLISHED* To bring an action, the claimant must satisfy two requirements: 1. The conduct must be of such a character that it would have been actionable if it had been committed in local jurisdiction. 2. The act must not have been justifiable by the law of the place where it was done.

***Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20**
Facts NSW resident sues in NSW for an accident that occurred in the ACT – in NSW, if someone contributed to the negligence of another, there is a complete defence, however, in the ACT, damages are divided proportionally to the contribution – court held that the accident was an actionable tort in both NSW and ACT.
Issue Whether the tort was actionable in the ACT.
Held The tort was actionable in the ACT, it had been justified. ACT law applied, causing forum shopping.
Rule *NOW ABOLISHED* Established double actionability: the wrong must be actionable as if it were committee din the forum and must not be justifiable (defence) under lex loci delicti. The lex fori applies when the two limbs of the rule in *Phillips v Eyre* are fulfilled. Note that this still exists in English law.

***Boys v Chaplin* [1971] AC 356**
Facts Two British soldiers were in a car accident while temporarily stationed in Malta –soldiers brough a tort claim in the UK – Maltese law had a limitation on damages that was no present in the UK law.
Issue Whether the tort was actionable in the UK.
Held The tort was actionable, and English (forum) law applied.
Rule *NOW ABOLISHED* Flexible exception to double actionability: regard need not be had for the second limb if the lex fori, rather than the lex loci delicti, had the most significant relationship with the tort and the parties. This is a proper law of the tort type test.

Renvoi

- Australian law requires Australian courts to apply *lex loci delicti* in tort cases (the place where the wrong was committed).
    - Renvoi arises where the law of the lex loci delicti itself requires that another system of law (such as Australian law) govern the dispute.
    - The issue is whether the lex loci delicti includes the 'whole of' the foreign substantive law, including its choice of law rules.
- The double renvoi approach requires a forum court to place itself in the position of the foreign court by adopting whatever renvoi solution the foreign court would apply when faced with the renvoi problem.
    - Compromises the objectives of the tort applicable law rule.
- *Proactive Building Solutions v Mackenzie Keck* [2013] NSWSC 1500: presumed there is not renvoi in contract unless appellate court says otherwise.
- Example
    - Alice is an Australian citizen and get injured while in France. Australian court looks at the case and follows the rule that the law of the place of the accident (France) would apply. France's conflict laws state that if both parties are foreign, the case should be referred to the home of the injured party (AUS).
        - Double Renvoi: The Australian Court, after accepting that France referred the case book, applied Australian law, accepting the loop back to its own legal system.

***Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54**
Facts Claim brought by a WA resident against a VIC company in Supreme Court of WA for damages for personal injuries suffered in China – the Chinese limitation period was one year and, if applied, would defeat claim – WA limitation period was six years – there were uncertainties about the applicable Chinese law – Article 146 of the General Principles of Civil Law of the PRC, "with regard to compensation for damages resulting from an infringement of rights, the law of the place in which the infringement occurred shall be applied. If both parties are nationals of the same country or domiciled in the same country, the law of their own country or of their place of domicile may also be applied"
Issue Whether the proceedings had commenced within time; where do you stop the loop where private international law rules points to the law of the other place?
Held 6/7 decided that, in applying the Australian tort choice of law rule, reference should be made to the whole of the law of the *lex loci delicti*, thus employing the doctrine of renvoi. The majority applied the *whole law* of China, including the choice of law rule. This meant that the Court applied Australian law to resolve tort proceedings, excluding the Australian choice of law rule, which would have referred back to China. WA tort law applies.
McHugh (Dissent) Rejected the renvoi. This enables the forum court to apply the law of the lex loci delicti as fully as possible. It is logically impossible to apply the whole of the foreign law. The only way to escape infinite regression is by sacrificing logic to concerns of pragmatism and applying another solution.
Callinan Favoured considering the whole of the foreign law. Decided on single renvoi, accepting the reference by the Chinese choice of law rules to Australian law and applying Australian domestic law. In relation to the remedying of wrongs committing in foreign countries, that although the lex loci delicti is to be applied, if the evidence shoes that the foreign court would be likely to apply Australian law by reason of its choice of law rules or discretions, then Australian common law of torts should govern the action.
Gummow & Hayne Agreed with the double renvoi approach for reasons of certainty and simplicity. If the foreign law referred back to the law of the forum, this was a reference to the internal law of Australia. Each area must be considered on its merits: the only connecting factor between China and the events were that they occurred in that country.
Gleeson Applied the double renvoi approach. If it is to be accepted that one object of a choice of law rule is to avoid difference in outcomes according to the selection of forum, then the objective ought to be to have an Australian Court decide the present case in the same way as it would be decided in China.
Kirby & Heydon Agreed with the double renvoi approach but did not provide a definitive solution to the renvoi problem.
Rule The infinite regression problem created by the double renvoi approach did not arise on these facts, as it occurs only if both the forum law and the foreign law use double renvoi. It was not necessary to discuss this on these facts. Note that the HCA did not say there was one way to treat renvoi.

Modern Australian Tort Law

John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503

Facts
R was a carpenter employed by P – R injured while working in NSW (lex causae) but he sought damages for personal injury in the courts of ACT (lex fori) – R was a resident of ACT, and employed in the ACT – a provision of the lex causae NSW law limited the damages you could recover for non-economic loss, but under ACT law there was no such limit.

Held
Unanimous HCA applied the law of the place of the wrong, NSW. One should always first look to the law of the place of the wrong as the primary option, but subject to interest analysis. Declined to follow double actionability in *Phillip v Eyre* and flexible exception in *Boys v Chaplin*.

Rule*SPECIFIC TO AUSTRALIAN LIMITAITON PERIODS*
In proceedings in a state or territory of Australia in respect of tort committed in another state or territory of Australia, *the lex loci deliciti* is the governing law in respect of all substantive issues (where the tort occurred). This prevents forum shopping.

The system of law that governs the choice of law rules is the forum court laws. If you commence in NSWSC, it is the laws of NSW that will govern the choice of law. It is the governing system of law binding on the court of the forum which furnishes the rule for choice of law.

Regie Nationale des Usines Renault v Zhang (2002) 187 ALR 1

Facts
In 1991, Z travelled to New Caledonia with the objective of lodging an application for permanent residency with the Australian Consulate in Noumea – while in New Caledonia, Z hired a Renault – Z suffered serious injuries when he lost control of the car – Z spent 14 days in hospital in Noumea and months in NSW – Z remained disabled – Renault was a French company – Renault brought an application seeking to set aside service of originating process on the ground that NSW was an inappropriate forum for the trial of the proceedings.

Issue
Determine the governing law (which law applies to the relevant tort)?

Held
Majority of the court applied the law of the place of the wrong, New Caledonia. HCA held that the reasoning in *John Pfeiffer*, that substantive law for determination of rights and liabilities re torts is *lex loci delicti*, should be extended across Australia to foreign torts despite the absence of the significant factor of federal considerations.

If an interest analysis were applied, the law of New Caledonia would apply to conduct regulation, the question of negligence. Both Australia and France have some interest in the litigation, with plaintiff/defendant living there. New Caledonia has an interest in ensuring that a business that rents out cars in that country deals only in sound vehicles. Most likely New Caledonian law that would apply to the case.

Rule *INTERNATIONAL CONTEXT*
In international cases, the applicable law is the *lex loci delicti*. Influential factors contributing towards this rule include the importance of decisional uniformity, respect for territorial sovereignty, parties' reasonable expectations, certainty and predictability. The double actionability rule should now be held to have no application in Australia in international torts.

Negligent Omission

Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538

Facts
Two NSW corporations sued a Missouri resident for allegedly providing negligent tax advice to a Missouri subsidiary of theirs regarding its liability to tax under USA law, which led to a loss being suffered by the plaintiff companies in NSW – plaintiffs granted leave to serve defendant out of jurisdiction – defendant sought a stay of proceedings, as NSW was a clearly inappropriate forum.

Held
Majority held that this was a case of negligent omission, rather than negligent misstatement, though this is not entirely clear. The cause of complaint was the act of providing the professional accountancy services on an incorrect basis. The act of providing accountancy services was an act that was initiated and completed in the one place (Missouri). The fundamental significance of that simple fact is not diminished merely because it may be possible to treat that act as equivalent to a statement that was received or acted upon in Australia. Laws of Missouri applicable.

Dissent (Deane J)
Held this was a misstatement case, which was acted upon in Australia. The law to be applied is Australian law.

Rule
If a statement is directed from one place to another, where it is known or anticipated that it will be received by the plaintiff, there is no difficulty in saying that the statement was made at the place to which it was directed, whether or not it is there acted upon.

BUT: there is no general rule that the substance of the tort of negligent misstatement is committed where the statement is received and acted upon, because it could be received in one place and acted on in another.

Negligence: Failure to Warn

Distillers Co (Biochemicals) Ltd v Thompson (1971) 1 NSWLR 83

Facts

T brought an action in negligence, alleging a failure to warn her mother of the harmful effects of the drug, D – this drug, which contained thalidomide, was manufactured in England by the first defendant, and supplied to the second defendant, an Australian company, which distributed it in tablet form in NSW – T claimed that her mother had purchased the drug in NSW and had taken it during her pregnancy with the result that the plaintiff had been born malformed and with defective vision – printed matter accompanying the drug bore the name of the first defendant, but made no reference to the second defendant, describing the drug as a *harmless, safe and effective sedative without any side effects*.

Issue

Where, in substance, did the cause of action arise?

Application

Three Theories (Lord Pearson):

- Ingredient Theory: all the ingredients of the tort must have occurred within the jurisdiction – too restrictive for the needs of modern times.
- Last Ingredient: that it is necessary and sufficient that the last ingredient of the cause of action, the event which completes a cause of action and brings it into being, has occurred within the jurisdiction – not a sensible result.
- Cause: the act on the part of the defendant which gives the plaintiff his cause of complaint must have occurred within the jurisdiction → PC applied this theory.

The right approach is, when the tort is complete, to look back over the series of events constituting it and ask, where **in substance did this cause of action arise** (this is what the lex loci deliciti is). It is manifestly just and reasonable that a defendant should have to answer for his wrongdoing in the country where he did the wrong.

Held

The problem was not that the drug was made, but the failure to warn consumers about the drug. This omission occurred in the place the drug was bought. As it is a local tort, then the NSWSC has personal jurisdiction over the foreign defendant. The negligence here was not telling her that there were dangerous side effects.

Rule

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 the cause of action occur (re place of tort in context of establishing the court's jurisdictional competency). It is some act of the defendant, and nots its consequences, that must be the focus of attention. A tort is not necessarily committed where the plaintiff suffers the damage, as the place where the plaintiff suffers damage may be quite fortuitous.

Amaca v Frost [2006] 67 NSWLR 635

Facts

F was exposed to asbestos fibres in products manufactured by JH between 1963 and 1966 while employed in NZ – as a consequence of that exposure, he contracted respiratory diseases that were first diagnosed in 2000 – F brought proceedings for negligence in the DTT of NSW – if NZ law applied, F was barred because of the no-fault insurance regime created in NZ, under which he had already received compensation for his injuries – trial judge held that the tort was the place of manufacture (NSW).

Held

The insulation products, though they were *inherently dangerous* (sold with special precautions), were not defective as nothing had gone wrong in the manufacturing process. The place of each tort was NZ, since the NSW manufacturers had negligently failed to warn customers there, not in NSW. The product was always intended to be distributed in NZ. The element of causation was in NZ (Spigelman CJ). The duty of care was owed in NZ, as that is where the plaintiff was.

Rule

Distinction between negligent manufacture (place of manufacture), and negligent exposure (place of exposure).

Puttick v Tenon Ltd (2008) 238 CLR 265

Facts

P employed by TP as a marketing assistant and export manager – P was allegedly expose to asbestos in three jurisdictions – TP was a subsidiary of Tenon which controlled it and was registered as a foreign company in Australia – P was a resident of NZ, and moved to Victor – after contracting mesothelioma, he sued in the VSC – after his death, his wife substituted as a plaintiff – trial judge held that the applicable law was NZ – P appealed.

Issue

Whether the Court of Appeal erred in locating where the alleged tort occurred (NZ).

Held

The Court of Appeal erred in concluding that it was possible in this case to a make a finding about where the alleged tort occurred. It follows that it was not possible, on the material available, to decide what the lex causae is, or likely to be. All the Court could decide was that it was arguable that the lex causae was NZ.

Application: Location of corporation, location of death, location of exposure, location of employment. Considerations of geographical proximity and essential similarities between legal systems, as well as s 9, all point towards NZ as the lex causae.

Rule

Each case in which it is necessary to decide where a tort occurred turns on its facts and it will rarely be appropriate to try to reason on the basis of factual analogies.

Negligent Misstatement

Sigma Coachair Group Pty Ltd v Bock Australia Pty Ltd [2009] NSWSC 584

Facts – TORT: NEGLIGENCE

S was a company incorporated in Australia that carried on the business of the design, manufacture, and supply of heating, ventilation and air conditioning systems for mobile applications – first defendant, B, was a company incorporated in Australia – it supplied refrigerant compressors to the air conditioning and refrigeration industry, including to the plaintiff, and it also services those compressors – second defendant was a company incorporated in Germany (German branch of B) – it manufactured the compressors that were supplied by B in AUS – S alleged that it entered into a contract with B in 2001, to purchase compressors at a fixed price of $2.9o per unit as it may order from time to time – S constructed air conditioning units using the compressors and installed them in trains in New Delhi – in 2002, a number of compressors failed when the sanction reeds were damaged in New Delhi – statement of claim contained claims for MDC and Negligence against second defendant arising out of the contract.

Issue

Where, in substance, did the cause of action arise?

Negligent Misstatement

Misstatement, and failure to warn, occurred in NSW. Where it is directed from one place to another, the tort is committed at the place to which it was directed whether or not it was acted upon there, provided it was a place where it could have been reasonably anticipated that it would be received by the plaintiff or brought to the plaintiff's attention, even if in fact it is received by the plaintiff elsewhere.

MDC

MDC occurred in NSW. The representations, though originating in Germany, were conveyed, or provided by the second defendant, for use by the plaintiff in NSW. Even if the materials were supplied indirectly to the plaintiff, in the sense that B acted as an agent, the representations were directed to a purchaser or user in NSW and were relied upon in NSW.

Rule

For the tort claim, it is some act of the defendant, and not its consequences, that must be the focus of attention.

Defamation

Dow Jones & Co v Gutnick (2002) 210 CLR 575

Facts

An October 2000 issue of Barron's Online, published by DJ, contained an article entitled 'Unholy Gains' in which several references were made to G – G contended that part of the article defamed him – brought action in VSC as majority of his life was in Victoria; he lived there, he had his business headquarters there (although he conducted business outside AUS, much of his social and business life was in VIC) – in court it was proved that only five copies of the print edition were sent from New Jersey to be circulated in Australia, but that none had actually arrived in the jurisdiction – G therefore resorted to the internet version to show an actionable tort in the jurisdiction – the internet version of the magazine had 550,000 international subscribers and 1700 Australian-based credit cards.

Issue

Whether it was considered to be 'published from' where it was uploaded (New Jersey) or 'published into' where it was downloaded by subscribers in Victoria, Australia.

Held

Unanimous HCA that G had the right to sue for defamation in Victoria, as that is where damage to his reputation occurred. Defamation did not occur at the time of publishing, but as soon as a third party read the publication and thought less of the individual who was defamed.

Rule

Defamation is to be located at the place where the damage to reputation occurs. Ordinarily, this is where defamatory material is published. However, on the internet, the place of publication is the place of download.

Callinan J

The fact that publication might occur everywhere does not mean that it occurs nowhere.

Maritime Torts

Remember, maritime and aerial torts only apply where the lex loci delicti is the place of the boat/plane.

Territorial Sea (within 12 nautical miles of the coast) → the applicable law is usually the *lex littori*.

EEZ → usually the same rules as the high seas, however, may be different if the coastal state can under UNCLOS, and has made laws, regarding the tort.

- UNCLOS: navigation and transit (Art 58), deep seabed mining (Art 77), scientific research (Art 56(1)(b)(ii); Art 246), protection of marine environment (Art 56(1)(b)(iii), Art 192), natural resources (Art 56(1)(a)), pollution (Art 194), artificial islands (Art 60), fishing (Art 61), pipelines (Art 79).

High Seas (outside the EEZ and Territorial Sea) → applicable law is the *lex fori*, unless another jurisdiction has a better claim.

Internal Economy → if, on the high sea, the tort is a matter of internal economy (*Blunden*) within a ship or has no external characteristics (*Morgan*), the law of the flag state is arguably the applicable law. There is limited authority for this.

High Seas

Blunden v Commonwealth of Australia (2003) 203 ALR 189

Facts

Two ships of Royal Australian Navy collided off the Australian coast – the ships were HMAS M and HMAS V – the ships were exercising together and had sailed from Jervis Bay – HMAS M struck HMAS V, and the V sank – 82 soldiers died, most immediately – at the time of the collision, B was serving as a seaman on the M – B commenced proceedings 34-years later – the ships did not have a port or place of registration – B argued that the common law of Australia applied, because all the limitations in states are statutory law – note that the accident occurred outside 12 nautical miles from Australian coast – Cth argued NSW, as both ships left from Sydney, or ACT as the boats were based in the boats.

Issue

Whether the 'common law of Australia' applied (unlimited period).

Held

Arguments by Blunden and Cwth rejected. The rule is lex fori unless a jurisdiction has a better claim. Apply the law of the forum, wherever you commence. Internal to ship: law of the flag has the better claim.

Floating Island Theory: Gleeson, Gummow Hayne & Heydon: ships of foreign state and men of war as part of the territory of the foreign state – this is a legal fiction and does not apply.

Rule

Where tort committed on high seas, one may ask what body of law other than that in force in the forum has any better claim to be regarded by the forum as the body of law dispositive of the action litigated in the forum. The law of the forum will apply unless another jurisdiction has a better claim.

Kirby J

"Where a tort is committed in international waters and only one ship is involved, the traditional approach in English common law has been to apply the choice of law rules for a foreign tort as explained in *Phillips v Eyre*. Where, however, the flag of that ship is a federal state, the relevant law area has conventionally been regarded as that of the place where the ship is registered. Where a tort is committed on the high seas involving another ship, English courts have applied English law for the determination of such maritime disputes"

Exclusive Economic Zone

CMA CGM SA v Ship Chou Shan [2014] FCA 74

Facts

Chou Shan collided with CMA CGM in East China Sea – collision occurred 100 nautical miles from Chinese coastline and in the EEZ of China – one of the consequences of the collision was that oil and fuel leaked from CMA CGM into the sea – following the collision, each ship immediately proceeded to different Chinese ports – various proceedings have been issued in China as a result of the collision – CMA CGM commenced in FCA claiming USD$60 million – one month later, Chou Shan applied to Maritime Court in China to establish a limitation period under Chinese law, which was approved – Chou Shan arrested in WA, released on provision of additional security – Chou Shan applied to stay the proceedings on the grounds that both parties were subject to Chinese jurisdiction before they were subject to Australian jurisdiction – Chou Shan contends that FCA must apply Chinese law because the *lex causae* is the law of the place of the wrong (China's EEZ)

Issue

Which law should apply?

Held

The legal regime which applies within the EEZ is determined by UNCLOS by reference to the specific activity in question: the sovereignty of the coastal state does not extend to generally regulating the conduct of ships in the material context, namely, the navigation of ships resulting in a collision and consequential property damage to vessels.

While pollution was caused (a subject over which rights may be regulated under UNCLOS), the activity concerned was the freedom of both parties to navigate under Art 58 and 90. The tort here is **not internal** to the vessel, and thus is not directed to the law of the flag of that vessel.

Rule

The EEZ is neither part of the territorial sea nor part of the high seas. It is a *sui generis* in nature being situated between the territorial sea and the high seas. The legal regime which applies within the EEZ is determined in UNCLOS by reference to the specific activity in question. If a particular activity is contemplated by Pt V of UNCLOS, then the coastal state arguably, has the right to regulate in respect of that activity but if it does not, then the state does not have the right to do so.

Collisions on the high seas have been historically governed by the general maritime law as administered in the forum, rather than strictly by the law of any particular country.

Internal Economy

Union Shipping NZ v Morgan [2001] NSWSC 325

Facts

Carriage of cargo from NZ to NSW – M was a resident of NZ, crew member employed in NZ – ship arrived in NSW Harbour, engaged in unloading of cargo – accident occurs, M suffers personal injury and brings proceedings in NSW – Union argued that this was not a tort committed in NSW, that Kembla Harbour is really NZ.

Held

The applicable law was the law of NSW as the law of the littoral state, not the law of NZ as the law of the vessel's flag.

Rule

Internal waters of harbour are part of the land mass of a coastal state. Court left open whether this would be the case if the ship merely passed through territorial sea of coastal state. Where a tort is committed on, and confined wholly within, a foreign ship moored and in the course of unloading operations at its NSW port of destination, the place of commission of the tort is NSW – **THE PRINCIPLE FROM THIS CASE IS FUZZY.**

Heydon JA

Assumed, without deciding, that a valid distinction could be made under Australian law between external torts and internal torts. Although Heydon JA appears to accept that the law of the flag state may apply in some circumstances, the conduct in the course of which the alleged tort was committed had an external characteristic, and was not limited to the internal workings of the vessel.

Torts committed on board a ship on the high seas are governed by the law of the country where the ship is registered. The only authority suggesting that this principle may apply to injury received in territorial waters, apart from the advocacy of some text writers, is to be found only in three US decisions to which reference was made in argument.

MacKinnon v Iberia Shipping Co 1995 SC 20

Facts

Scotsman employed on a ship registered in a Scottish port which was lying at anchor in the territorial waters of the Dominican Republic – Scotsman injured in the course of his employment (was given a faulty spanner) and sued his Scottish employers in Scotland for damages in the usual form – future economic loss and pain and suffering recognised by Scottish law – under civil law on Dominican Republic, pain and suffering was not recognised, only future economic loss – under the law of Scotland, there is a requirement for there to be civil liability in the place where the tort had been committed.

Employer: Scottish.
Plaintiff: Scottish.
Ship Registered: Scotland.
Ship Located: Dominican Republic.

Issue

Which law will apply?

Held

The law of the Dominican Republic applied as the *lex littori*. Claim for pain and suffering failed. Ship was within the territory of the Dominican Republic; place of accident is Dominican Republic. Had the ship been on the high sea, it would have been outside the territory of any sovereign states, so the place of the tort is the flag state (state of registration of ship).

Rule

In all cases except where the tort occurs on the high seas, the lex causae is the law of the littoral state that asserts jurisdiction and rights over the waters.

Criticism

There is arbitrariness of a rule that leads to the result that the law governing shipboard torts changes every time the ship sails from territorial waters to the high sea, particularly when the ship is merely passing through those territorial waters (Nygh, 20.72). A solution to this problem is for the law of the littoral state to apply to torts having **consequences purely**

external to the ship, but the law of the flag state to apply to torts having **purely internal consequences** within the ships confines.

Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc
Rule HCA acknowledged the existence of an internal economy rule, while noting that it falls short of being a normative requirement of customary international law.

Aerial Torts

Aircraft on Ground: applicable law is the law of the ground land, not the place of registration of the aircraft (*Lazarus v Deutsche*).

Aircraft in Flight over Land: applicable law is the law of the land, not the place of registration of the aircraft (*Smith v Socialist People's Libyan Arab Jamahiriya*).

Aircraft in Flight over Territorial Sea: applicable law is the law of the territorial sea, not the place of registration of the aircraft (*Georgopoulos v American Airlines*).

Internal Economy: applicable law may be the law of the flag state of the aircraft (where registered) if the accident is a matter of internal economy to the flight. To a large extent, these principles have been superseded by international conventions which deal with injury to passengers and loss to cargo (*Warsaw Convention*). Not that you can raise obiter (flag state principle) from *Union Shipping* here, only if told that the Warsaw convention does not apply.

***Lazarus v Deutsche Lufthansa* (1985) 1 NSWLR 188**
Facts L was a passenger on a flight from Germany to Australia – L alleged that, while the aircraft was on the ground at New Delhi airport, he was defamed and assaulted by a member of the defendant's crew – L sued in tort.
Held Location of tort was New Delhi, despite tort internal to German registered aircraft. Judge did not offer much analysis; this does not gel well with the internal tort rule.
Rule The place of a tort committed on an aircraft on the ground is the place in which the aircraft was located at the relevant time and not the place of registration of the aircraft as such. Not a great authority: highlights assumption that where you are, territorially, is where it happens.

***Georgopoulos v American Airlines* NSWSC (1993)**
Facts An incident occurred on a United States registered aircraft shortly after taking off from Sydney on a flight to Hawaii – this caused the plaintiff to suffer PTSD (fear of imminent death when a door of the aircraft opened in flight) – primary judge held that the *lex locus delicti* was Australia because, at the time of the incident, the aircraft was in flight over the Australian territorial sea.
Held Location of tort was NSW, as the aircraft was in flight over Australian territorial sea. It was within the 12 nautical mile zone. NSWCA held that bodily injury in the *Warsaw Convention* did not include the psychological injury which the plaintiff had suffered, therefore, the place of the tort was of no consequence. Flag that this may be applicable.
Rule The place of a tort committed over the territorial sea is the place over which the Aircraft was located at the relevant time. A notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs, and in most cases, limits the liability of carriers for death or personal injury, and in respect of loss of or damage to baggage.

***Warsaw Convention* 1929**	
Article 17	The carrier is liable for damages sustained in the event of **death or wounding of a passenger or any other bodily injury suffered by a passenger** if the accident which caused the damage so sustained **took place on board the aircraft** or in the course of any of the operations of embarking or disembarking.
Article 18.1	The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.
Article 19	The carrier is liable for damage occasioned by delay int eh carriage by air of passengers, luggage or goods.
Article 20	The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

1 – Jurisdiction

The first overarching issue is whether [the court] has the competence to hear and determine the dispute; whether [defendant] is amenable to the service of [the court's] initiating process.

A. Establishing Jurisdiction for Natural Persons Present within Jurisdiction

The first issue is whether [defendant] is present within the jurisdiction, being [state], at the time of service such that [defendant's] duty to obey the command to appear is perfected (*Laurie v Carroll*). Jurisdiction is prima facie exercisable against those present within the limits of territory (*Gosper v Sawyer; Mobil Oil v Victoria*).

1. Substituted Service under the UCPR?

   Sub-Issue A is whether substituted service may be affected under UCPR R 10.14, as service cannot otherwise practicably be served on the person in the manner provided by law.

   - Asking Before?
     - R 10.14(1) → if a document that is required on permitted to be served:
       - (a) cannot practicably be served on the person, or
       - (b) cannot practicably be served on the person in the manner provided by the law, the court may direct that such steps be taken as specified in the order for the purpose of bringing the document tot eh notice of the person concerned.
     - R 10.14(2) → the court can direct that the document taken to have been served on the person concerned on the happening of a specified event or on the expiry of a specified time.
   - Asking Forgiveness?
     - R 10.14(3) → if steps have been taken, otherwise than under an order under this rule, for the purpose of bringing the document to the notice of the person concerned, the court may direct that the document be taken to have been served on that person on a date specified in the order.
   - This constitutes personal service under UCPR R 10.14(4).

2. Temporarily in Forum?

   Sub-Issue B is whether [defendant's] transient visit constitutes physical presence such that they are amenable to the service of the court's initiating process. As service has been perfected in accordance with UCPR R 10.20, [plaintiff] is prima facie entitled to continue the proceedings (*HRH Maharanee v Wildenstein*).

3. Issuance v Service?

   Sub-Issue C is whether [defendant] was in [jurisdiction] at the appropriate times. Generally, if [defendant] is in the jurisdiction when the originating process is issued, but leaves before the originating process is serviced, then jurisdiction is not established. (*Laurie v Carroll*).

   - Exception → if the defendant is in the jurisdiction when the originating process was issued and either knew it had been issued, or left the jurisdiction in order to evade service, then defendant will be within jurisdiction of the Court (obiter in *Laurie v Carroll*, affirmed in *Joye v Sheahan*) → consider in substituted service.
     - Consider obiter in *Joye v Sheahan* regarding curious result.

4. Fraud?

   Sub-Issue D is whether [defendant] have been induced by fraud to enter the jurisdiction, rendering service invalid. In *Perret v Robinson*, the QSC held that this is exception operates narrowly and will not apply where the concealed purpose is not the only reason for having been persuaded to enter the jurisdiction. In this fact pattern, …. The purpose of presence in the jurisdiction is irrelevant (*Perrett v Robinson*).

B. Establishing Jurisdiction for Registered Corporations Present within Jurisdiction

The first issue is whether [defendant] is present within the jurisdiction. S 601CD of the Corporations Act 2001 (Cth) ("CA") requires registration in Australia before carrying out business in Australia. The business must also have a registered office (s 601CT CA) and to have appointed a local agent (s 601CG CA), though this does not go towards jurisdiction.

1. Australian Corporations

   In accordance with s 109X CA, a document may be served on an Australian corporation by:

   - Leaving it or posting it to the company's registered office (1)(a).
   - Delivering a copy of the document personally to a director of the company who resides in Australia (1)(b).
   - If a liquidator has been appointed, by leaving it or posting it to their office (1)(c).
   - If an administrator has been appointed, leaving it or posting it to their office (1)(d).
   - Personal service on a director who resides in Australia (2).

   UCPR R 10.22 contains further provisions on effecting personal service on a corporation:

   - Personally serving the document on a principal officer of the corporation (a).
   - Serving the document on the corporation in any other manner in which service of such a document may, by law, be served on the corporation.
   - Delivering a copy of the document personally to a director of the company who resides in Australia (1)(b).

2. Foreign Corporations

   In accordance with s 601CX CA, a document may be served on a foreign corporation by:

   - Leaving it at its registered office or with the foreign corporation's local agent, or by sending it to them by post (1).
   - Personally delivering a copy to two directors if two or more live in Australia (3).
   - Personally delivering to sole directors of foreign proprietary company who reside in Australia (3A).

C. Establishing Jurisdiction for Registered Corporations Present Interstate

The first issue is whether [defendant] is present within the jurisdiction. S 601CD of the Corporations Act 2001 (Cth) ("CA") requires registration in Australia before carrying out business in Australia. Under s 15(1) *Service and Execution of Process Act 1992* (Cth) ("SEPA"), an initiating process issued in one state may be served in another; service under SEPA has the same effect, and may give rise to the same proceedings, as if the process has been served in the place of issue (s 12 SEPA). CA s 601CX and 109X does not apply (SEPA s 9(9)).

1. Australian Registered Corporation

   In this fact pattern, the corporation is an Australian registered corporation:

   - S 9(1): leaving it at, or sending by post to, the company's registered office.
   - S 9(2): delivering a copy personally to a director who resides in Australia.
   - S 9(3): leaving it at address of liquidator.
   - S 9(4A): leaving it at the address of administrator.
   - S 9(5): registered foreign body: leaving it at, or posting to, bodies registered office.

2. Foreign Registered Corporation

   In this fact pattern, the corporation is a registered foreign corporation:

   - S 9(6)(a): leaving, or sending by post, to the address of a local agent of the foreign company, notice of which has been lodged under the CA.
   - S 9(6)(b): leaving, or sending by post, to the address shown in the last-mentioned notice (if notice of a change in address have been lodged).
   - S 9(7): personally to each of two directors who reside in Australia.
   - S 9(8): leaving at the address of the liquidator.