Case Notes

Blunden v Commonwealth of Australia (2003) 203 ALR 189; (2003) 78 ALJR 236; (2004) Aust Torts Reports 81-722; [2003] HCA 73

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In 1964 the aircraft carrier *HMAS Melbourne* and the destroyer *HMAS Voyager* collided on the high seas off the Australian coast. The destroyer sank with much loss of life.[1] In *Blunden* the High Court had to determine which limitation legislation applied to a claim for damages for personal injury (post traumatic stress and related matters) suffered on the high seas by a seaman involved in the disaster. It is the latest in a number of cases relating to the incident that have reached the High Court.[2]

The Court had previously determined in *John Pfeiffer Pty Ltd v Rogerson*[3] that when a tort is committed in Australia then the substantive law to be applied is the law of the place of the wrong.[4] In *Regie Nationale des Usines Renault SA v Zhang*[5] the rule that it is the place of the wrong that determines the law to be applied by the court in which action is commenced was extended to torts occurring in nation states other than Australia.[6] The question for the Court was whether these principles could be extended to a tort occurring on the high seas, an area that is outside the jurisdiction of any one nation state.[7]

Preliminary Issues

The plaintiff had chosen to commence his action in the Supreme Court of the Australian Capital Territory. A number of matters were agreed between the parties. The first was that the plaintiff was entitled to commence his action against the Commonwealth in the Supreme Court of any State or Territory under s56 of the *Judiciary Act 1903* (Cth) ('the *Judiciary Act*') which, among other things, provides:

> "(1) A person making a claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth:
> …

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[1] Further information about this incident, from a non-legal perspective, may be found in Timothy Hall, *HMAS Melbourne*, Allen & Unwin, 1982 and Tom Frame, *Where fate calls: the HMAS Voyager tragedy*, Hodder & Stoughton, 1992.

[2] Other High Court cases with a *Voyager* connection include *Parker v The Commonwealth* (1965) 112 CLR 295 and *The Commonwealth v Verwayen* (1990) 170 CLR 394.

[3] (2000) 203 CLR 503.

[4] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, [100] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

[5] (2002) 210 CLR 491.

[6] *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, [75] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

[7] Article 89 of the *United Nations Convention on the Law of the Sea* states that "[n]o State may validly purport to subject any part of the high seas to its sovereignty." Over 140 countries have ratified this convention. A full list of countries that have ratified the Convention and its related implementation agreements may be found at <http://www.un.org/Depts/los/reference_files/status2003.pdf> at 30 May 2004.

(c) if the claim did not arise in a State or Territory—in the Supreme Court of any State or Territory or in any other court of competent jurisdiction of any State or Territory."

It was also agreed that the Commonwealth could not rely on the doctrine of executive immunity to avoid the action because of the terms of section 75(iii) of the Constitution.[8] It was also accepted that the common law of Australia extended beyond the low-water mark[9] and that rights arising under the common law against the Commonwealth on the high seas could therefore be enforced in Australian courts exercising federal jurisdiction and were not, unless a limitations statute applied, subject to any time limit.

The Applicable Law

If the 'laws of the Commonwealth' are not applicable or fail to provide adequate remedies or punishment then section 80 of the *Judiciary Act* states that the statute law in force in the State or Territory in which a Court is called upon to exercise federal jurisdiction will apply. The plaintiff made two main submissions. First, that the 'laws of the Commonwealth' included the common law. Second, that the common law was the applicable law because the tort took place onboard an Australian vessel that was a 'floating island' of Australian territory carrying its own law. The Commonwealth submitted that the appropriate approach was to determine the law area within Australia with which events on the high seas have the closest relevant connection and apply the relevant limitations Act. This lead the Commonwealth to submit that the relevant limitations legislation was either that of the Australian Capital Territory, as the seat of administration of the Navy, or that of New South Wales, as the location of the last port at which the *Melbourne* and the *Voyager* had called before the accident.

The leading judgment of the Court was jointly delivered by Gleeson CJ, Gummow, Hayne and Heydon JJ. Their Honours rejected the plaintiff's first submission and held that the expression 'laws of the Commonwealth' referred to in section 80 of the *Judiciary Act* plainly identified statute law because the section distinguished between the common law of Australia and the modification made to that law by the Constitution and statute law.[10] The joint judgment also referred to the case of *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd.*[11] In that case Knox CJ and Gavan Duffy J had suggested that the phrase 'laws of the Commonwealth' as used in the Constitution itself probably meant Acts of the Commonwealth Parliament.[12]

The joint judgment also rejected the plaintiff's second submission on the ground that the 'floating island' theory it appeared to rely upon was 'long discredited'.[13] It was also noted that even if the theory was accepted it was not applicable where the issue was what law should apply in the exercise of federal jurisdiction as opposed to whether that jurisdiction should be exercised at all.[14]

The Commonwealth's submissions suggesting that the law to be applied was that of the place having the 'closest relevant connection' was also rejected as having no sound

[8] This issue has previously been discussed in detail by the High Court in the case of *Commonwealth v Mewett* (1997) 191 CLR 471.
[9] See the decision of the High Court in *Commonwealth of Australia v Yarmirr* (2001-2002) 208 CLR 1.
[10] (2003) 203 ALR 189, [29] (Gleeson CJ, Gummow, Hayne and Heydon JJ).
[11] (1922) 31 CLR 421.
[12] *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 431.
[13] (2003) 203 ALR 189, [31] (Gleeson CJ, Gummow, Hayne and Heydon JJ). Their Honours referred to *Chung Chi Cheung v The King* [1939] AC 160 where Lord Atkin stated (at 174) that the doctrine was 'quite impracticable when tested by the actualities of life on board ship and ashore'.
[14] (2003) 203 ALR 189, [32] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

legal basis. These submissions were characterised in the joint judgment as being an attempt to define a 'proper law of the tort' rather than rely on the law of the forum. It was concluded however that, in the face of the requirements laid down by the *Judiciary Act*, it was apparent that it was the law of the forum that was to apply to torts committed in an area such as the high seas which does not possess any system of legal regulation that is capable of being applied as the 'proper law'.[15]

The joint judgment concluded that the combined operation of sections 56 and 80 of the *Judiciary Act* was to allow a plaintiff to commence an action for a tort committed by the Commonwealth on the high seas in any relevant State or Territory Supreme Court. The applicable limitation Act was the one in force in the State or Territory in which the action was commenced. As Mr Blunden commenced his action in the Australian Capital Territory the applicable limitation legislation was the *Limitation Act 1985* (ACT). In separate judgments the remaining members of the Bench, Kirby and Callinan JJ, agreed with these conclusions. The responsibility for making the formal order to remit the matter back to the ACT Supreme Court was left to a single justice. The ACT Supreme Court was charged with giving effect to the High Court's conclusions as to the relevant limitations legislation.

An Unfinished Tale

This decision of the High Court makes it clear that that the limitations law applicable to an action against the Commonwealth, not involving foreign ships, personnel or courts, will be that of the State or Territory where the action is instituted in a court having appropriate jurisdiction. This does leave the door ajar to 'forum shopping' by those wishing to commence actions against the Commonwealth. As was noted by all the judges who heard the case, however, this result stems largely from the Commonwealth's continuing failure to enact comprehensive limitations legislation dealing with civil actions commenced in courts of federal jurisdiction.[16]

It is also interesting to note that the joint judgment flagged a number of issues that still remain to be determined in relation to tortious actions arising on the high seas. These were said to include the possible significance of the law of the flag of a foreign vessel in relation to matters of that vessel's "internal economy"[17] or the law of the place in a federation where a vessel might be registered.[18] There obviously remains some way to go before the conflict of law rules relating to torts committed beyond the territorial sea are complete.

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[15] (2003) 203 ALR 189, [40]-[43] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[16] (2003) 203 ALR 189, [44] (Gleeson CJ, Gummow, Hayne and Heydon JJ), [66] (Kirby J), [108] (Callinan J).

[17] This is the rule of customary international law that a coastal state will usually refrain from exercising jurisdiction over things done on board a foreign flagged vessel that do not engage the interests if the coastal state. The High Court has recently had the opportunity to discuss this rule in *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 200 ALR 39. This case is also the subject of a note in this journal.

[18] (2003) 203 ALR 189, [25] (Gleeson CJ, Gummow, Hayne and Heydon JJ).