OF LIMITATIONS AND TORTS AND THE LOGIC OF COURTS

BY MICHAEL PRYLES*

[*For over 120 years foreign torts were governed by a combination of the law of the forum and the law of the place of the tort. This rule of private and international law, established in the classic case of* Phillips v. Eyre *was much criticized. By referring to two laws and placing a great emphasis on the law of the forum it was thought to be outdated. In 1988 a majority of the High Court replaced it with a single choice of law rule predicated on the law of the place of the tort. The reform, which was effected in the case of* Breavington v. Godleman *did not last long. In the case* McKain v. Miller *the High Court reverted to the old law in* Phillips v. Eyre.]

The judgment of Mason C.J. in *McKain v. R. W. Miller and Co. (South Australia) Pty Ltd*[1] is the best analysis I have read on substance and procedure in the conflict of laws, judicial or extra-judicial. The joint judgment of Brennan, Dawson, Toohey and McHugh JJ. is one of the most disappointing. Strangely, it deals with an issue which did not really call for decision in the case and which reduces much of the judgment to the status of *obiter dicta*. But their Honours took the opportunity to quash a new dawn which was thought to arise following the Court's earlier decision in *Breavington v. Godleman*.[2]

The judgments in *McKain* principally canvass two issues, the classification of statutes of limitation as substantive or procedural in the conflict of laws, and the law governing interstate torts. The Court also broached the effect of the full faith and credit clause of the Constitution, s. 118. Underlying all was the struggle between two philosophies, uniformity and diversity. For the majority:

> To describe the States, as Windeyer J. once described them (*Pedersen v. Young* (1964) 110 CLR at 170), as 'separate countries in private international law' may sound anachronistic. Yet it is of the nature of the federation created by the Constitution that the States be distinct law areas whose laws may govern any subject matter subject to constitutional restrictions and qualifications. The laws of the States, though recognised throughout Australia, are therefore capable of creating disparities in the legal consequences attached in the respective States to the same set of facts unless a valid law of the Commonwealth overrides the relevant State laws and prescribes a uniform legal consequence. That may or may not be thought to be desirable, but it is the hallmark of a federation as distinct from a union.[3]

For the minority Gaudron J. observed:

> The constitutional solution operates at two stages. At the first stage, it eliminates 'conflict of laws'. More precisely, it brings about a situation such that, as between the States, the Territories and the Commonwealth, there is only one body of law which applies to any given set of facts. That is achieved by covering cl 5 and by ss 106, 107, 108, 109 and 118 in Ch V of the Constitution which, when taken together, leave no room for the notion that the one set of facts might, within Australia, simultaneously be subject to different legal regimes.
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> The second stage of the constitutional solution eliminates 'choice of law'. The Constitution does not permit of the possibility that the legal consequences attaching to a set of facts occurring in Australia might be determined other than by application of the body of law governing those facts.

* LL.B., LL.M., Ph.D., S.J.D., LL.D. Partner, Minter Ellison Solicitors, Melbourne. Visiting Professor, University of Technology, Sydney. Adjunct Professor of Law, Bond University, Queensland.

1 (1991) 104 A.L.R. 257.

2 (1988) 169 C.L.R. 41.

3 (1991) 104 A.L.R. 257, 274.

> That is the immediate and direct effect of covering cl 5 which provides that the Constitution and the laws of the Commonwealth are 'binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State' and s 118 which requires that 'full faith and credit . . . be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State'.[4]

The Classification Issue

McKain involved a suit brought by a resident of New South Wales against a South Australian company in respect of an accident which occurred in South Australia. The plaintiff was a merchant seaman, ordinarily resident in New South Wales who was allocated employment with Australian shipowners through the Sydney roster of an engagement system established under the Maritime Industry Seagoing Award 1983 (Cth). Through that Sydney roster the plaintiff was allocated employment on the vessel *Troubridge* in South Australia from 17 February 1984. This vessel was chartered to the defendant company by its owners, the South Australian Government. The plaintiff flew to South Australia and took up his position on the *Troubridge*. Some few days later he sustained injuries on the vessel as a result of an alleged breach by the defendant of the duty of care owed to the plaintiff as employee. He consulted a medical practitioner in Adelaide and soon thereafter flew back to Sydney where he allegedly incurred further medical expenses and sustained further damage. Some five years after the injury was sustained in South Australia the plaintiff instituted proceedings against the defendant in New South Wales.

The defendant asserted that the action was barred by s. 36(1) of the Limitation of Actions Act 1936 (S.A.) which provides 'all actions in which the damages claimed consist of or include damages in respect of personal injuries to any person, shall be commenced within three years next after the cause of action accrued but not after.' At the hearing the defendant applied to amend the defence by also alleging that the action was barred by s. 82(2) of the Workers Compensation Act 1971 (S.A.). It provides:

> Where a worker has received or is entitled to receive compensation under this Act . . . in respect of an injury, he [*sic*] shall not bring an action against the employer for damages in respect of the same injury unless he [*sic*] commences that action within three years from the day on which that injury occurred.

Under s. 14(1) of the Limitation Act 1969 (N.S.W.) the relevant period of limitation was six years. The simple issue for decision in *McKain* was whether the South Australian provisions furnished a defence to the action commenced in New South Wales.

In the conflict of laws a distinction is drawn between laws which are classified as procedural and those which are classified as substantive. A court will only apply its own procedural laws and will not apply the procedural laws of a foreign jurisdiction.[5] Conversely, a foreign law which is classified as substantive, may be applied in the courts of the forum if the choice of law rules indicate that it is

[4] *Ibid.* 288-9.

[5] This is now subject to the ability of a court to apply the procedural law of another State in the exercise of cross-vested jurisdiction. See *e.g.* Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) s. 11(1)(c).

applicable. In consequence, if the South Australian limitation provisions were classified as procedural, it would follow that they could not furnish a defence to an action brought in New South Wales.

There are a number of earlier authorities examining the classification of limitation periods for the purposes of conflict of laws. Traditionally, a distinction was drawn between a limitation period which barred the action and one which extinguished the right. The former was regarded as procedural because it merely went to the remedy while the latter was regarded as substantive because it affected the right itself.[6] A statute such as s. 36(1) of the Limitation of Actions Act 1936 (S.A.) was historically classified as procedural.[7] In more recent years, this classification has been subject to trenchant criticism[8] and it has been changed in the United Kingdom by the Foreign Limitation Periods Act 1984 (U.K.). This followed a recommendation of the Law Commission of England and Wales which concluded that 'there is a clear case for the reform of the present English Rule.'[9] This has brought English law into line with the classification adopted in most civil law countries and in conformity with some international conventions.[10]

In *McKain*, Mason C.J. examined the traditional distinction between limitation periods which bar the remedy and those which extinguish the right and noted that this distinction has been described as both artificial and semantic. His Honour did not question the basic principle that matters of procedure had to be determined according to the law of the forum. But the classification issue was a matter of some difficulty. His Honour referred to Dicey's observation in the first edition of *The Conflict of Laws*, that English law gave the widest possible extension to the term procedure.[11] This is certainly true and many matters have been classified as procedural by Anglo-Australian courts which would be regarded as substantive in civil law systems. Mason C.J. went on to observe that the broad procedural classification 'developed at a time when the importance of international judicial comity may not have been given the same recognition it nowadays commands ... and when the notion of forum shopping was not considered as objectionable a practice as it now is'.[12] The Chief Justice also noted that attitudes have changed and that the current edition of Dicey & Morris's *The Conflict of Laws* notes that the practice of giving broad scope to the classification of matters as procedural has fallen into disfavour because of its tendency to frustrate the purposes of choice of law rules.[13] As evidence of the change the Chief Justice referred to the Foreign Limitation Periods Act 1984 (U.K.).

6 So, too, a statute which created a right of limited duration was regarded as substantive: *Australian Iron and Steel Ltd v. Hoogland* (1962) 108 C.L.R. 471, 488; *Davis v. Mills* 194 U.S. 451 (1904).

7 *Huber v. Steiner* (1835) 2 Bing (N.C.) 202; 132 E.R. 80; *Subbotovsky v. Waung* [1968] 3 N.S.W.R. 261; *John Robertson and Co. Ltd (in liq.) v. Ferguson Transformers Pty Ltd* (1973) 129 C.L.R. 65; *Pedersen v. Young* (1964) 110 C.L.R. 162.

8 North, P. M. and Fawcet, J. J., *Cheshire & North's Private International Law* (11th ed. 1987) 80.

9 Law Commission (Great Britain), *Classification of Limitation in Private Law* (no. 114, 1982) 11, para. 3.10.

10 North and Fawcet, *op. cit.* n. 8, referring to the European Economic Community Convention on the Law Applicable to Contractual Obligations (1980) 504.

11 Dicey, A. V., *The Conflict of Laws* (1st ed. 1896) 712.

12 (1991) 104 A.L.R. 257, 264.

13 Collins, L. (ed.), *Dicey and Morris on the Conflict of Laws* (11th ed. 1987) vol. I, 173.

Mason C.J. then examined the rationale that matters of procedure are those which affect the remedy rather than the right, and subjected it to critical analysis. In his view, it was not an acceptable basis of classification for three reasons. Firstly, the effect of a statute of limitation is to 'confer upon a *defendant* a very important right — the right to plead the limitation period as an absolute defence'.[14] Secondly, 'it is simply no longer accepted that all matters which touch upon a remedy are necessarily to be treated as procedural'.[15] He gave as an example that 'the question of which heads of damages are recoverable is now treated as a substantive issue.'[16] Thirdly, basing the classification on this criteria results in a broad procedural classification which tends to encourage forum shopping.[17]

The Chief Justice then proceeded to examine alternative bases of classification. He referred to the important writing of the United States academic W. W. Cook who had argued that the line between substance and procedure does not exist. Cook's solution was to draw the classification by asking, 'How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?' Mason C.J. rejected this approach on the basis that the 'criterion of inconvenience' is too vague to serve as a definition of principle for classification purposes.

Mason C.J. then advanced his own criteria of classification and remarked:

> For the purposes of private international law, an appropriate criterion may be formulated by reference to the principal reason why it is necessary to draw a distinction between matters of substance and procedure. This reason, as has been seen, is associated with the efficiency of litigation. That efficiency is achieved by the adoption and application of the rules of practice and procedure and by the judges' practical familiarity with those rules. With this in mind, the essence of what is procedural may be found in those rules which are directed to governing or regulating the mode or conduct of court proceedings.[18]

The Chief Justice then asked whether either s. 36(1) of the Limitation of Actions Act 1936 (S.A.) or s. 82(2) of the Workers Compensation Act 1971 (S.A.) formed part of the mechanism or machinery of litigation, or was directed to the regulation of the mode or conduct of court proceedings. His answer was in the negative. It followed that the South Australian provisions were not procedural in nature. As the parties had conceded that the cause of action should be determined in accordance with the law of South Australia, it followed that s. 36(1) of the Limitation of Actions Act 1936 (S.A.) afforded a defence.

Two other Justices agreed with Mason C.J. that the South Australian limitation provisions were not to be classified as procedural. Gaudron J. expressed the view that 'a limitation provision expressed in the usual form, and hence in general terms, is properly to be seen as applying to actions brought with respect to events governed by the law of the enacting State.'[19] Deane J. adopted the views of the English Law Commission that 'private international law exists to fulfil foreign rights, not to destroy them, and the rule that limitation provisions are procedural is anomalous in that its effects may be to bar a claim which is still

[14] (1991) 104 A.L.R. 257, 265 (emphasis in original).
[15] *Ibid.*
[16] *Ibid.*, referring to *Chaplin v. Boys* [1971] A.C. 356.
[17] *Ibid.* 266.
[18] *Ibid.* 267.
[19] *Ibid.* 293.

alive in the jurisdiction in which it arose or to allow a claim already barred by the *lex causae*'. He went on to say that the common law rule 'with its unsound theoretical basis and its discordant practical effect, is inappropriate to be applied, within the context of the domestic law of this country, to the resolution of competition or conflict between the laws of the States of the Commonwealth'.[20]

The majority of the Court, in their joint judgment, adhered to the traditional view and remarked that 'whether or not a distinction between a statute extinguishing a right and a statute barring an action to enforce the right be thought desirable, it is firmly and clearly established as a principle of law. As the distinction has operated in practice free of injustice, there is no warrant for discarding it.'[21]

Choice of Law

The cause of action in *McKain* was one in tort. The tort had been committed in South Australia but the action was instituted in New South Wales. Thus, *prima facie*, the case raised a choice of law issue, namely whether South Australian law or New South Wales law governed the substantive rights and obligations of the parties. However, it would seem that this issue did not call for determination by the High Court. According to the Chief Justice, 'it is not in dispute between the parties that the cause of action arises under and should be determined in accordance with the law of South Australia.'[22]

The concession by the parties that South Australian law governed the merits of the case is not surprising. In *Breavington v. Godleman*[23] a majority of the High Court appeared to depart from the long established rule in *Phillips v. Eyre* and hold that torts committed within Australia are governed by the *lex loci delicti*. It is true that diverse views were expressed in that case and that the task of extracting a *ratio decidendi* is not easy. Nevertheless commentators, including the present writer,[24] and subsequent cases have generally agreed that there was a majority in *Breavington* in favour of the *lex loci delicti*.[25]

In view of the concession of the parties that South Australian law governed, it is surprising that the majority justices, in their joint opinion, commenced with an examination of the choice of law issue and devoted the majority of their judgment to it.

The majority turned their back on reform, rejecting the single *lex loci delicti* rule, and reverted to the double choice of law rule in *Phillips v. Eyre*. They chose to re-state the formulation by adopting the words of Brennan J. in *Breavington* which they reproduced in their judgment:

> A plaintiff may sue in the forum to enforce a liability in respect of a wrong occurring outside the territory of the forum if:
> 1. The claim arises out of circumstances of such a character that, if they had occurred within the

[20] *Ibid.* 285.
[21] *Ibid.* 280.
[22] *Ibid.* 270.
[23] (1988) 169 C.L.R. 41.
[24] Pryles, M. C., 'The Law Applicable to Interstate Torts: Farewell to Phillips v. Eyre?' (1989) 63 *Australian Law Journal* 158.
[25] Sykes, E. I. and Pryles, M. C., *Australian Private International Law* (3rd ed. 1991) 566-8.

territory of the forum, a cause of action would have arisen entitling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce; and

2. by the law of the place in which the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind which the plaintiff claims to enforce.

This restatement is narrower in expression than the traditional formulation of the *Phillips v. Eyre* conditions which speak of 'a character that . . . would have been actionable' and 'justifiable'. It defines more precisely the issues which are referred for determination to the *lex fori* and the *lex loci* respectively.[26]

It would seem that the majority turned the clock back not merely to pre *Breavington* but to pre *Chaplin v. Boys*.[27] In the latter case, three members of the House of Lords introduced a flexible exception to the classic rule in *Phillips v. Eyre*. This was not accepted by Brennan J. in *Breavington* and it was rejected by the majority in *McKain*.

The heavy emphasis given to the *lex fori* under this choice of law formulation can result in choice of law, and the result in a suit, varying with choice of forum. This did not disturb the majority who described this possibility, whether or not desirable, as a 'hallmark of a federation'.[28] In contrast, the supporters of the *lex loci delicti* rule emphasized the desirability of uniformity in Australia and the undesirable results which would follow from choice of law varying with choice of forum.

The majority did note that the *lex fori* based rule could theoretically create as many causes of action as there are *fora* in which the rules apply. But they rejected any suggestion that a plaintiff, having recovered judgment in one state, could sue again in another state relying on its laws. In such cases, the first judgment would be *res judicata* and would extinguish the cause of action. This is because the choice of law rule adopted by the majority incorporated the *lex loci delicti* as well as the *lex fori*.[29] However, the majority's explanation is only true if the rules enunciated by them are choice of law rules and not rules of justiciability.[30] Moreover the majority did not consider the possibility of a plaintiff suing in one state, under the law of that state, and simultaneously making claims under the laws of other states relying on cross-vested jurisdiction.

Conclusion

As far as the tort choice of law rule is concerned, the majority rejected all the reforms initiated over the past 20 years, including the concept of flexibility, introduced in *Chaplin v. Boys* by the House of Lords to modify the rule in *Phillips v. Eyre*, and the replacement of that rule by the *lex loci delicti*, in *Breavington*. Not only has the majority reverted to the rule in *Phillips v. Eyre* but they have adopted the pre-1971 version which encompasses a double choice of law rule without any flexibility.

The status of the majority's pronouncement on choice of law will be of interest to scholars of jurisprudence. The joint judgment is clearly a majority judgment of

[26] *Breavington v. Godleman* (1988) 169 C.L.R. 41, 110-1, as cited in *McKain v. R. W. Miller and Co.* (1991) 104 A.L.R. 257, 276.
[27] [1971] A.C. 356.
[28] (1991) 104 A.L.R. 257, 274.
[29] *Ibid.* 276.
[30] Sykes and Pryles, *op. cit.* n. 25, 553.

the Court. But it appears to deal with an issue which did not call for determination by the High Court. As such, it may be *obiter dicta*. What then is its effect in relation to the majority view espoused in *Breavington*, namely that torts in Australia are governed by the *lex loci delicti*? Whatever the jurisprudential niceties of this equation, the reality would seem to be that the Court as presently constituted will not accept a *lex loci delicti* rule and has gone back to *Phillips v. Eyre*.

The real issue for determination by the High Court concerned the classification of limitation periods. On this point, the reasoning of the majority is clearly in accordance with the weight of existing authority. But the views espoused by the minority, particularly Mason C.J., are much more convincing and in line with current trends in the rest of the world.

One thing is clear. *McKain* will not be the last word on choice of tort law in Australia. The double-barrelled, *lex fori* oriented rule in *Phillips v. Eyre* will not survive. If the Court, as presently constituted, will not change it, it is probable that a differently constituted Court will in the future. In any event the legislature may intervene and carry out much needed reform. In this regard, the forthcoming report of the Australian Law Reform Commission on choice of law will be awaited with great interest. The majority view espoused in *McKain* can be seen as a holding operation which may delay but will not prevent reform.