Double actionability is dead

Choice of law for Australian torts suddenly got a whole lot simpler

By Andrew S. Bell

On 21 June 2000, the High Court handed down its decision in *John Pfeiffer Pty Limited v Rogerson* (2000) HCA 36 ('*Pfeiffer*'). In short, the decision holds that the law which governs the liability of the parties in tort in circumstances where the tort occurs in one part of Australia but is litigated in another is simply the *lex loci deliciti* or law of the place of the tort. There is no flexible exception from this position and the role of the law of the forum in which the dispute is being litigated has been pared back to matters which are truly procedural, viz. rules directed towards regulating the mode or conduct of court proceedings.

This decision provides much needed clarity and certainty to an area of law which has traditionally been bedevilled with complexity. The decision overrules *McKain v R.W. Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 and *Stevens v Head* (1993) 176 CLR 433 and, to the extent that both of those decisions derived from *Phillips v Eyre* (1870) LR 6 QB 1, that decision no longer has a role to play in Australia, at least where questions of intra-national torts are concerned. In terms of result, the decision is to the same effect as *Breavington v Godleman* (1988) 169 CLR 41 but, whereas the majority position in that case was arrived at by a number of routes for which no single majority existed (which was the real reason why its substantive result was later subverted in *McKain* and *Stevens*), *Pfeiffer* arrives at its destination with virtually unanimous reasoning. The separate judgments of Kirby J and Callinan J did not materially differ from the joint judgment delivered by the balance of the Court.

The Court, which is sometimes criticised for the narrowness of its decisions, went out of its way to make it plain that questions of time limitations were substantive and not procedural. As such, the Court has brought the common law into line with the *Choice of Law (Limitation of Actions) Act 1993 (NSW)* and corresponding legislation passed in other States which sought to achieve that result in the wake of *McKain*.

The Court also spelt out that questions not only of kind but also of quantification of damage should be determined by the law of the place of the wrong. Hence, in the instant case, Mr Rogerson, who had been injured in New South Wales but who had brought proceedings in the Supreme Court of the ACT, was limited in terms of the damages which he could recover by sections 151G and 151H of the *Workers Compensation Act 1987 (NSW)*.

Pfeiffer is a decision which not only brings much certainty to the common law of this country but also yields certainty for employers and their insurers in respect of potential liability. It vastly reduces, if not entirely eliminates, the scope for forum shopping within Australia in cases of tort. It seeks to ensure that, so far as is possible, only one legal outcome will flow from a tortious act or omission occurring within the Australian polity, irrespective of where that tort is litigated. Such a result is intuitively attractive. Ascertainment of tortious liability by reference to the place of the alleged wrongdoing, as opposed to the forum in which the plaintiff may have chosen to commence suit, may also be thought to accord with the reasonable expectation of parties.

This decision does not expressly deal with the question of international torts and room remains for debate as to whether the traditional, double actionability approach as stated in *Phillips v Eyre* would continue to obtain in that context. It is noteworthy, however, that *Phillips v Eyre* no longer represents the law in England for international torts, the choice of law rule in that jurisdiction now being supplied by a statutory rule (the *Private International Law (Miscellaneous Provisions) Act 1995*) which, in most cases, provides for a similar rule as has now been enunciated for intra-national torts within Australia.