Regie National des Usines Renault SA v Zhang

[2002] HCA 10 (14 March 2002)

By Justin Gleeson SC

The plaintiff, Mr Zhang, had entered Australia in 1986. In early 1991 he travelled to New Caledonia with the objective of lodging an application for permanent residency with the Australian Consulate in Noumea. While in New Caledonia he hired a Renault sedan. He suffered serious injuries when he lost control of the car. He spent 14 days in hospital in Noumea and was then transported back to Sydney where he was a patient at the Royal North Shore Spinal Unit for several months. He remains disabled.

Mr Zhang brought an action in the Supreme Court of New South Wales to recover damages from the Renault companies for his injuries. The Renault companies did not conduct business in New South Wales or Australia and could not be served within the jurisdiction. However service was effected on them outside the jurisdiction, using the 'long arm' jurisdiction of a Part 10 Rule 1A(e) of the *Supreme Court Rules*. It was conceded that that rule was applicable: the proceedings were for the recovery of damages in respect of damage suffered within New South Wales caused by a tortious act or omission wherever occurring.

Under Australian choice of law rules, the law of the place of the wrong is the governing law in respect to torts, whether those torts are committed in Australia or overseas.

The Renault companies brought an application under Part 10 Rule 6A seeking to set aside service of the originating process on the ground that the New South Wales court was an inappropriate forum for the trial of the proceedings.

The trial judge, Smart J, granted the application. He was heavily influenced by his finding that French law would govern the claim. He regarded this matter as outweighing what were otherwise the practical advantages in the matter proceeding in New South Wales.

The Court of Appeal allowed the appeal from the decision of Smart J. They held that he was wrong to conclude that French law, as the law of the place where the tort occurred, would govern the claim and therefore his discretion had miscarried. The Court of Appeal re-exercised the discretion and refused the stay application.

In the High Court, the joint judgment of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ held that under Australian choice of law rules, the law of the place of the wrong is the governing law in respect to torts, whether those torts are committed in Australia or overseas. In this respect, the majority extended the previous decision of the Court in *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503 at 521. That case had held that the law of the place of the wrong governed intra-national torts. The result is that the principle in *Phillips v Eyre*, which involved a double actionability test, has now been completely eradicated from Australian law.

The joint judgment did, however, recognise the following:

a) there may be cases where, as a matter of Australian public policy, an Australian court should not permit a claim based on a foreign tort to be litigated. However these cases should be directly dealt with under the rubric of public policy, rather than through the retention of the double actionability rule;

b) any party, whether the plaintiff or defendant, which seeks to rely upon the foreign law of the place of the wrong must allege and prove that law;

c) it follows that where an applicant on a stay motion seeks to rely upon a foreign law as governing the matter, then the applicant is required to lead appropriate evidence as to the foreign law and the particular features of it which provide an advantage to the applicant;

d) difficult distinctions may remain between questions of substance which will be governed by the law of the place of the wrong and questions of procedure. For example, the joint judgment reserved for later consideration whether, in the cases of foreign torts, all questions about the kinds of damage, or amount of damages that may be recovered, would be treated as substantive issues governed by the law of the place of the wrong.

Ultimately, however, the Renault companies achieved a pyrrhic victory. The joint judgment held that, although the trial judge had correctly found and taken into account that French law as the law of the place of the wrong would govern the action, he had not directed himself correctly to the ultimate question; namely whether a trial in New South Wales would be productive of injustice because it would be oppressive in the sense of seriously and unfairly burdensome, prejudicial or damaging or vexatious in the sense of productive of serious and unjustified trouble and harassment. In other words, the trial judge set the hurdle for the Renault companies too low on the stay application. The mere fact that the New South Wales Court would need to apply a French law to determine the matter did not render it a clearly inappropriate forum. Further, the Renault companies had led limited evidence respecting the substantive law applicable in New Caledonia. Overall, the practical considerations tended to favour a hearing in Sydney and the Renault companies had not surmounted the hurdle necessary to achieve a stay.

Kirby J agreed with the joint judgment that the rule adopted in *Pfeiffer* should be extended to international torts, subject to the exception where

enforcement by the forum of the law of the place of the wrong would be contrary to public policy of the forum. However, Kirby J dissented from the joint judgment because he discerned no error in the primary judge's weighing of the factors relevant to the stay. He stated that, having rejected *Phillips v Eyre* as the applicable choice of law rule, the Court should not succumb to a new provincialism in the guise of exercising the discretion to stay proceedings.

Callinan J also dissented. He held that the word 'inappropriate' in the rule should not be burdened with the encrustations of 'oppressiveness' and 'vexatiousness'. He held that suits should not be determined in a jurisdiction which has, with respect to the relevant events, no real connection with the defendant. He held that, on any test, New South Wales was an inappropriate forum. Callinan J did not deal with the application of Pfeiffer to foreign wrongs.

Some lessons for counsel include:

1) the evidence necessary to be led on a stay application may extend beyond merely evidence of the procedures of the relevant foreign Court and the relative advantages and disadvantages generated by such procedures, to evidence of the substantive content of the foreign law applicable to the claim;

2) this will probably require the obtaining of affidavits from qualified lawyers in the foreign jurisdiction, deposing to the relevant law;

3) to be admissible, the affidavits should depose to the content of the foreign law but not seek to apply it to the facts of the particular case;

4) there is room to develop the categories of public policy whereby an Australian court might decline to apply foreign law otherwise mandated by the relevant Australian choice of law rule;

5) despite the direction in *Voth v Manildra Flour Mills* 171 CLR 538 at 565 that the stay applications ought to be able to be determined quickly, often in the privacy of the judge's chambers, this may not be possible where there is a body of evidence led concerning not only the procedures of the foreign court but also the substantive foreign law and factual disputes are thereby generated;

6) the burden on the applicant for the stay remains a heavy one because it is necessary to establish that the continuation of the proceedings in the local court would be vexatious or oppressive in the sense defined above;

7) in claims like personal injuries claims where the damage travels with the plaintiff, New South Wales courts will often remain a viable forum notwithstanding the accident occurred overseas and foreign law will govern the tort claim.

Lake Macquarie City Council v McKellar [2002] NSWCA 90

By Justin Gleeson SC

In this appeal, the appellant failed in its attempt to overturn the judgment of Sidis DCJ that the Council was negligent in allowing a nail to remain on a basketball court. The plaintiff had stepped backwards during the course of a basketball game on the courts and his foot became caught by the nail rivet on the concrete surface of the court. The plaintiff fell back heavily injuring himself.

The point of general significance is that senior counsel for the appellant developed oral argument which Ipp AJA described as bearing very little relationship to the written submissions which had been previously filed (prepared by different counsel previously briefed in the matter). Ipp AJA stated:

> The Court has a heavy burden of cases and if judgments are to be delivered within a reasonable time it is desirable that judgments in more straightforward cases be delivered at the conclusion of oral argument. Otherwise the period between argument and the delivery of judgment will grow to an inordinate degree. This process however will be prevented if the oral argument differs in substance from the written submissions.

Ipp AJA also stated:

> Where, after written submissions have been filed, new counsel is briefed who wishes to present different arguments, the new counsel is duty bound to ensure that amended written submissions, properly reflecting these new arguments, are filed in good time.

Heydon JA agreed with the observations of Ipp AJA. He stated that in a future case it may be necessary for the Court to take the extreme step of declining to hear oral arguments which are outside the parameters of written argument unless there has been some good explanation for why the disparity exists.

Handley JA agreed with Ipp AJA.

The lessons for counsel are:

1) written submissions must be filed on time;

2) if new counsel is briefed, amended written submissions must be filed in adequate time prior to the hearing if different arguments are to be presented; and

3) if these steps are not followed there is the prospect of not only costs orders against counsel, but the possibility of argument not being allowed on the fresh points which could prompt a negligence claim against counsel.

Any barristers who consider that the suggestions by the Court may be unworkable or overly harsh are invited to write to the Association or this journal with their comments.