# *Before The High Court*

## Conflict of Laws and the Quantification of Damages in Tort

BRIAN R OPESKIN*

### 1. *Introduction*

In the last few years, the High Court of Australia has had two important opportunities to consider the choice of law principles applicable to torts committed within the Australian federation. On both occasions the issue has proved divisive. This has stemmed in part from the realisation by some judges that the choice of law rules in tort inherited from English common law are unsatisfactory, and in part from a growing sense that conflict of laws within Australia should not necessarily be treated identically to cases with an international dimension. In 1988, *Breavington v Godleman*[1] considered these issues, but the variety of opinions expressed failed to give sure guidance for future cases, notwithstanding the unanimous outcome on the facts. Three of the seven justices (Wilson, Deane and Gaudron JJ) considered that choice of law rules for torts committed in Australia could be derived expressly or impliedly from the Australian Constitution. Three others (Mason CJ, Brennan and Dawson JJ) found no solution in constitutional principles and applied traditional or (in the case of Mason CJ) novel common law rules. Toohey J found it unnecessary to decide this question on the facts of the case.

In 1991 the High Court again considered the issue of choice of law in torts in *McKain v R W Miller & Co (South Australia) Pty Ltd.*[2] Mindful of the need to state the choice of law rules in a way that commanded the assent of a majority of the Court, four judges (Brennan, Dawson, Toohey and McHugh JJ) put aside individual differences of opinion and adopted a traditional choice of law rule in torts, based ultimately on the two-limb rule in *Phillips v Eyre*[3]. Deane and Gaudron JJ adhered, with slight modifications, to the views they had each expressed in *Breavington* on the role of the Constitution in formulating choice of law rules, while Mason CJ stated that the case did not involve a choice of law question, since the parties had agreed that the substantive law of the *lex loci delicti* should apply.[4] *McKain* also considered the distinction between substantive and procedural laws in the context of statutes of limitation. The Court divided here as well. The majority (Brennan, Dawson, Toohey and McHugh JJ) affirmed the traditional distinction between

* Lecturer in Law, University of Sydney. I wish to thank Jennifer Aldrich for research assistance, and Ross Anderson, Denis Galligan and Therese MacDermott for their helpful comments on a draft of this article.

1 (1988) 169 CLR 41.
2 (1991) 104 ALR 257; 66 ALJR 186.
3 (1870) LR 6 QB 1.
4 (1991) 104 ALR 257 at 270.

limitation statutes that merely bar the remedy, which are procedural, and those that extinguish the underlying right, which are substantive. Mason CJ and Deane J, in dissent, held that statutes of limitation should generally be classified as substantive for a number of compelling reasons. Gaudron J took the eclectic view that the South Australian limitation statute should not be construed as limited to actions commenced in that State, but applied to all actions governed by the law of South Australia. In the result, her Honour sided with the minority, without addressing the pith of the substance — procedure distinction.

Despite the consolidation of opinion in *McKain*, areas of uncertainty remain. The choice of law test adopted by the majority is expressed in language that leaves doubt as to its operation in certain cases, and the distinction between substantive and procedural laws has not been explored outside the field of limitation statutes. A case currently pending in the High Court, *Stevens v Head*,[5] provides the Court with a further opportunity to address these issues. However, in the author's opinion, it will not be possible to achieve an ideal outcome in *Stevens*, given the principles adopted by the majority of the Court in *McKain*. The most that can be achieved is a result that is satisfactory in light of the constraints of legal principle that the Court has imposed in *McKain*.

A further dimension to the issues raised by *Stevens* is that the Australian Law Reform Commission has recently completed a report on choice of law, which touches several aspects of the case.[6] The Commission has recommended the enactment of specific choice of law rules for courts exercising federal jurisdiction, through amendments to the *Judiciary Act* 1903 (Cth), and has also recommended that the States and Territories be encouraged to enact parallel legislation in the terms of its draft uniform Choice of Law Bill.[7] If enacted, the Bill will make substantial changes to the common law rules applicable to cases such as *Stevens*. With such changes in prospect, the High Court may be reluctant to embark on the revision of common law choice of law rules necessary to achieve a satisfactory result in *Stevens*. However, the Court should not use the possibility of legislative change as an anodyne against judicial revision of common law rules that are no longer suited to modern conditions or modes of thought. There is no certainty that the recommended reforms will be implemented by legislation. And even if they are, the cooperative federalism required for the implementation of the draft uniform Choice of Law Bill will entail delay.

## 1.1 Facts and Context

In July 1988 Mrs Stevens, a 75 year old New Zealand woman, came to Australia to visit Expo '88 in Brisbane. Unable to get more proximate accommodation, a real estate agent found her a holiday home in Tweed Heads, New South Wales, a short distance from the border with Queensland. Mrs Stevens was unaware that she was staying in New South Wales. On 28

5 Special leave to appeal was granted by Deane, Dawson and McHugh JJ on 10 April 1992.
6 Australian Law Reform Commission, *Choice of Law* (1992), No 58.
7 Id at par 3.26, and Appendices A and B.

July 1988 she was hit by a motor vehicle as she crossed the street outside her holiday home. The driver was a Queensland resident, and the motor vehicle was registered and insured in Queensland. The accident aggravated degenerative changes in her spine and hips, leading to severe pain in conducting her daily activities. Additionally, she suffered a post-traumatic stress disorder, which changed her from "a cheerful outgoing hospitable woman to an anxious reclusive and pain-ridden person".[8]

The law applicable to motor vehicle accidents differs significantly between New South Wales and Queensland. In Queensland, the familiar common law rules of negligence apply to an action brought in respect of a motor accident with purely local connections. However, in recent years, New South Wales has experimented with two statutory schemes for compensating victims of motor vehicle accidents. The first scheme, implemented by the *Transport Accidents Compensation Act* 1987 (NSW), largely followed the 1984 recommendations of the New South Wales Law Reform Commission.[9] It abolished the right of action at common law for damage arising from a transport accident, with effect from 1 July 1987, and replaced it with a fault-based statutory compensation scheme. This scheme was known as the Transcover scheme. It was short-lived. A second scheme was enacted by the *Motor Accidents Act* 1988 (NSW), which came into force on 1 July 1989. The Act repealed the Transcover scheme, restored rights of action at common law in relation to motor vehicle accidents, and imposed caps and other limitations on the damages recoverable in such actions. The limitations on damages were thought necessary to contain third-party insurance claims, and hence premiums, within politically acceptable levels. Both the restoration of common law rights of action and the limitations on damages were given retrospective effect to 1 July 1987, the date of commencement of the Transcover scheme.

Under Part 6 of the 1988 Act, the damages recoverable in relation to a motor vehicle accident are subject to limitations that do not apply under the common law rules applicable in Queensland. The limitations of potential relevance to the present case are that (a) damages for the provision of home care services by family members are not to be awarded unless they are provided for more than six hours per week and continue for at least six months (s72); (b) damages for non-economic loss cannot be awarded for sums less than $15,000 or greater than $180,000, and in the case of non-economic loss between $15,000 and $40,000, the first $15,000 is not recoverable (s79);[10] and (c) no interest is to be awarded on damages from the date of injury to the date of award unless certain prerequisites, which have the purpose of encouraging settlement of claims, are met (s73).

---

8 *Stevens v Head* District Court of Queensland 10 May 1991 per Hall DCJ at 21.

9 New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales* (1984) No 43. In one important respect the *Transport Accidents Compensation Act* 1987 departed from the Commission's recommendations. The Commission had recommended a statutory right to compensation without proof of fault. However, for reasons of cost, the requirement of fault was retained.

10 The limitations on non-economic loss are indexed annually (s80). The figures quoted are the monetary limits as originally enacted.

## 1.2 History of Litigation

Mrs Stevens might have commenced an action for damages either in Queensland or, after the *Motor Accidents Act* had come into force on 1 July 1989, in New South Wales. In either case the court would be faced with a factual situation involving foreign elements. To a New South Wales court, the Queensland registration of the motor vehicle and the New Zealand and Queensland residence of the plaintiff and defendant, respectively, would be foreign elements. To a Queensland court, the location of the accident and the residence of the plaintiff would be foreign elements. However, according to orthodox principles, choice of laws rules would only be relevant in determining the plaintiff's entitlement to compensation if proceedings were commenced in Queensland. If the action were commenced in New South Wales, where the tort was committed, the tort would not be a "foreign" one, and New South Wales law alone would apply.[11]

Proceedings were in fact commenced in the Queensland District Court in respect of the loss and injury arising from the accident. In the District Court, counsel for the plaintiff argued that Queensland law should apply because Queensland was the State with which the action had the most significant connection. Hall DCJ rejected the argument. In his view, *Breavington v Godleman*[12] required the *lex loci delicti* to be applied to Australian torts. Even if that choice of law rule permitted some flexibility in its application, the circumstances of this case gave no warrant for rejecting New South Wales law as the governing law. It seemed that the plaintiff's leasing of the holiday home in New South Wales for the duration of her vacation was sufficient connection with New South Wales.

Notwithstanding the general applicability of New South Wales law, Hall DCJ refused to apply the limitations on damages contained in Part 6 of the *Motor Accidents Act*. He viewed these limitations as procedural rather than substantive, and so held that they were not to be applied in an action in Queensland, in accordance with a long-standing principle in the conflict of laws that foreign procedural laws are not applied in the forum.

Assessing the plaintiff's damages according to the law of Queensland, his Honour assessed general damages on all heads at $20,000. This included $2,000 for the value of home care services provided gratuitously to the plaintiff.[13] Interest of $2,500 was also awarded, calculated from the date of injury to the date of judgment at 6 per cent, pursuant to the *Common Law Practice Act* 1867 (Queensland).

The defendant appealed to the Supreme Court of Queensland, which delivered judgment[14] some months before the High Court's decision in *McKain*. Thomas J (with whom Ryan and Mackenzie JJ agreed) endorsed the opinion of the trial judge in holding that the law governing the tort was prima

---

11 *Szalatnay-Stacho v Fink* [1947] KB 1.

12 (1988) 169 CLR 41.

13 Such damages were recoverable according to the principles laid down by the High Court in *Griffiths v Kerkemeyer* (1977) 139 CLR 161, considered in *Nguyen v Nguyen* (1990) 169 CLR 245. See also Graycar, "Women's Work: Who Cares?" (1992) 14 *Syd LR* 86.

14 (1991) Aust Torts Reports 81-130.

facie the law of New South Wales. However, the Supreme Court differed from the District Court as to whether the limitations on damages in Part 6 of the 1988 Act were to be characterised as substantive or procedural. Relying on dicta in *Breavington v Godleman*, Thomas J held that the law governing the quantification of damages should not be separated from the law governing the tort itself. The plaintiff's damages were therefore to be assessed in accordance with the *Motor Accidents Act*. Accordingly, there could be no recompense for the home care services provided to the plaintiff gratuitously, because of non-compliance with the time requirements,[15] and damages for the plaintiff's non-economic loss had to be reduced by $15,000 pursuant to the statutory formula in s79.

As to the award of interest, Thomas J held, as the trial judge had done, that interest on damages was to be assessed at 6 per cent, in accordance with Queensland law. By New South Wales law, no interest would have been recoverable in the circumstances of this case.[16] Without canvassing the nature of the distinction drawn between the caps on damages for non-economic loss in s79 and the restrictions on the recovery of interest in s73, his Honour stated that "the assessment of interest . . . is a point at which the law of the forum should start to apply." In his view, the different practices of Australian courts in this regard would not encourage unduly the sin of forum-shopping.

When *Stevens v Head* comes before the High Court, three legal issues will arise for consideration. (1) What is the choice of law rule applicable to torts committed within Australia? In answering this question, the principles recently enunciated in *McKain* will require clarification. (2) On the assumption that New South Wales law is the applicable system of law, does the *Motor Accidents Act* form part of the law relevant to the disposition of this particular case, given that the case's only connection with New South Wales is that the accident occurred in the State? This is a question of statutory interpretation and the spatial operation of the New South Wales Act. (3) On the assumption that the *Motor Accidents Act* is relevant to the disposition of the present case, are the limitations on damages and interest in Part 6 of the Act substantive or procedural?

## 2. *Choice of Law in Torts*

In *McKain*, four justices[17] of the High Court restated the choice of law rule for torts committed in Australia in the following terms:

> 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 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

15 Section 72. However, $2,908 was awarded for the actual cost of care paid to persons outside the family. The trial judge had made no award on this ground on the incorrect assumption that there was no evidence of such costs.

16 Section 73.

17 Brennan, Dawson, Toohey and McHugh JJ.

> wrong occurred, the circumstances of the occurrence gave rise to a civil liability *of the kind* which the plaintiff claims to enforce.[18]

This formulation follows the words of Brennan J in *Breavington*,[19] but its genesis lies in the two-limb rule in *Phillips v Eyre*,[20] and in the restatement of that rule by Lord Wilberforce in *Chaplin v Boys*.[21] Although the two-limb rule has been much criticised for the role it gives to the *lex fori*, the majority's decision in *McKain* must be regarded as stating the current legal position in Australia. Indeed, Mason CJ, Deane and Gaudron JJ, each of whom made a radical restatement of choice of law rules in *Breavington*, might now feel compelled to adopt the majority's formulation in *McKain*. The *McKain* formulation also rejected a flexible exception to the two-limb rule, at least for torts committed in Australia, in the interest of certainty.[22]

The question remains as to how the two-limb rule is to be applied, or reformulated, to answer the circumstances of Mrs Stevens' case. The terms in which the rule is stated in *McKain* are appropriate to a situation in which the relevant difference between the *lex fori* and the *lex loci delicti* is that one system of law permits the recovery of a head of damage, which the other denies. This was the case in *Chaplin v Boys*, where Maltese law (the *lex loci delicti*) did not permit recovery of damages for pain and suffering, although English law (the *lex fori*) did allow recovery for that head of damage. Similarly, in *Breavington*, the law of the Northern Territory (the *lex loci delicti*) did not permit recovery of damages at common law for loss of earnings or earning capacity because of its statutory compensation scheme for motor vehicle accidents, whereas Victorian law (the *lex fori*) permitted such recovery. In each case, the *lex loci delicti* did not give rise to a civil liability "of the kind" which the plaintiff sought to enforce in the forum.

However, where the relevant difference between the *lex loci delicti* and the *lex fori* is not the recoverability of a head of damage, but the quantification of damages within that head, the majority's formulation in *McKain* offers little guidance. In the present case, there is some civil liability of the kind the plaintiff seeks to enforce under both New South Wales law and Queensland law, since some damages for home care services and non-economic loss are recoverable under each. But having satisfied each limb of the test, one is left asking which system of law determines the damages that the plaintiff may recover under each head.

If every legal issue arising in a tort claim, other than the "kind" of civil liability in question, were classified as procedural, the ambiguity in the *McKain* formulation would not present a serious problem: the *lex fori* and the *lex loci delicti* would determine the recoverability of each "kind" of civil liability (in accordance with the two-limb rule), and all other matters impinging on the quantum of recoverable damage would be governed by the *lex fori*, as the system of law governing matters of procedure. However, a dichotomy between "kinds" of civil liability and procedural matters is a false

---

18 (1991) 104 ALR 257 at 276 (emphasis added).
19 (1988) 169 CLR 41 at 111.
20 (1870) LR 6 QB 1 at 28-29.
21 [1971] AC 356 at 389.
22 (1991) 104 ALR 257 at 275-276.

one. Some matters do not go to the "kind" of civil liability, but are properly regarded as substantive rather than procedural. For example, where contributory negligence results in an apportionment of damages, the proportionate reduction does not go to the "kind" of civil liability, but to the quantification of damages across all heads. Yet, the application of the apportionment rule has rightly been regarded as a matter of substance rather than procedure.[23] Accordingly, classification of legal issues as substantive or procedural cannot resolve the ambiguities in the *McKain* formulation, and some reformulation of the rule is necessary. There are three alternatives that the High Court might pursue.

### 2.1 Narrow interpretation of the kind of civil liability

The test in *McKain* requires a civil liability "of the kind which the plaintiff claims to enforce" under both the *lex fori* and the *lex loci delicti*. If the kind of civil liability is narrowly defined, it may be possible to use the majority's test, as currently formulated, to provide a solution to some aspects of *Stevens v Head*. For example, if in relation to the value of home care services, the head of damage is defined as "gratuitous home care services of less than six hours per week", there would be civil liability of that kind according to Queensland law (the first limb), but no liability of that kind under New South Wales law (the second limb). Accordingly, Mrs Stevens could not recover in respect of that claim. However, to take such a view of the "kind" of civil liability in question would be to permit the triumph of form over substance. The substance of the limitation in s72 of the *Motor Accidents Act* is the imposition of quantitative limitations on the recovery of damages, even if couched in verbal rather than numeric form.

If a narrow construction of the "kind" of civil liability seems implausible in the case of home care services, it is an impossible argument in relation to the claim for non-economic loss, where recovery under New South Wales law is restricted by reference to quantum alone. It cannot be argued that non-economic loss valued between $15,000 and $40,000 (and hence subject to the $15,000 deduction) is a different kind of civil liability to loss over that amount. In the result, a solution based on a narrow definition of the "kind" of civil liability is unworkable.

### 2.2 Reinstating a threshold test

The difficulty with the *McKain* formulation is that it fails to indicate which system of law governs the legal issues, once both the *lex fori* and the *lex loci delicti* recognise the same kind of civil liability. The problem recalls the view taken by Windeyer J in *Anderson v Eric Anderson Radio & TV Pty Ltd*,[24] that the rule in *Phillips v Eyre* is a threshold question that determines whether an action in the forum in respect of a foreign tort is well founded. If the threshold

---

23 *Kolsky v Mayne Nickless Ltd* [1970] 3 NSWR 511 at 521.

24 (1965) 114 CLR 20. Windeyer J stated, at 41: "But when the two conditions are fulfilled — when the act is wrongful by the law of the forum and in the place where it occurred — what then? The case is one that the court will entertain, but by what law is it to judge it?"

test was satisfied, it was necessary to turn to the system of law selected by the choice of law rule, which was held to be the *lex fori*.[25]

It would be a retrograde step to regard the two limb rule as addressing only a threshold question. (1) Judicial support for such a notion, both in England[26] and Australia, is weak. Although some Australian cases have advanced such a view,[27] the judgments in *Breavington*[28] lend it no support. (2) It introduces unnecessary complexity into the process of determining the law applicable to foreign torts. (3) It raises questions about the function and purpose of a rule that requires, as a preliminary filter or threshold test, civil liability of the same kind, under two systems of law. (4) And it leaves unanswered the question of which system of law (the *lex fori*, the *lex loci delicti*, or the proper law) should govern substantive tort issues once the threshold has been passed. For these reasons, the view that the two-limb test is only a threshold test should be rejected.

### 2.3 Reformulating the two limb rule

In England, the two-limb test has been interpreted in a way that avoids the present difficulties. In *Chaplin v Boys*,[29] Lord Wilberforce stated that the substantive law to be applied to a foreign tort is the *lex fori*, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the *lex loci delicti*. This speech has come to be regarded as embodying the *ratio decidendi* of the case.[30] The consequence of this holding is that, once the existence of civil liability under the *lex loci delicti* has been proved, the condition is fulfilled and "the trial can proceed on the basis of the ordinary [English] principles of common law negligence".[31] If this reasoning were applied to Mrs Stevens' case, the trial would proceed on the basis of principles of common law applicable in Queensland, because New South Wales law (as the *lex loci delicti*) does recognise civil liability in respect of each relevant claim, namely home care services and non-economic loss.[32]

The adoption of such a formulation for Australia is inappropriate. The English focus on the law of the forum is an inducement to forum shopping,

---

25 Id at 41-42.

26 *Chaplin v Boys* [1971] AC 356 at 384-387 (Lord Wilberforce). See also Law Commission, *Private International Law: Choice of Law in Tort and Delict*, Working Paper No 62 at 9-10.

27 *Walker v W A Pickles Pty Ltd* [1980] 2 NSWLR 281 at 289; *Kolsky v Mayne Nickless Pty Ltd* (1970) 72 SR(NSW) 437 at 444; *Hartley v Venn* (1967) 10 FLR 151.

28 (1988) 169 CLR 41 at 73, 110, 142, 156.

29 [1971] AC 356 at 387, 389.

30 *Church of Scientology of California v Commissioner of Metropolitan Police* (1976) 120 *Sol J* 690; *Coupland v Arabian Gulf Oil Co* [1983] 1 WLR 1136 at 1145-1146.

31 *Coupland v Arabian Gulf Oil Co* [1983] 1 WLR 1136 at 1154.

32 Once again problems of definition arise. If the "relevant claim" in relation to home care services is regarded with more particularity as a claim for the value of home care services provided to the plaintiff gratuitously, New South Wales law does not create civil liability in the circumstances of this case (where the services were provided for less than six hours per week). The cases have stressed the need to look to actionability "as between the actual parties", and not merely in the abstract: *Armagas Ltd v Mundogas S A* [1986] 1 AC 717 at 753; *Breavington v Godleman* (1988) 169 CLR 41 at 109, 146.

and means that one set of events may give rise to as many different results as there are law districts in which to litigate. This is a greater danger in a federation comprised of nine law districts than in the United Kingdom, which is comprised of only three. In *Breavington*, the one point on which all justices agreed was that a limitation on the recoverability of a head of damage under the *lex loci delicti* should be applied in the forum, at least in the case of Australian torts. It would be perverse to return to a situation in which the *lex fori* was given primacy. Accordingly, if a two-limb rule is to be maintained, it is far better to state it in the opposite way to that stated by Lord Wilberforce: the law applicable to a tort committed in Australia should be the *lex loci delicti*, subject to the condition that the law of the forum recognise a civil liability of the same kind. Such a formulation provides the forum with a qualitative control over recovery in respect of foreign torts: no recovery is permitted unless the forum's law recognises that the conduct in question would make the defendant civilly liable. However, that satisfied, the law in force in the *locus delicti* would apply.

This solution differs from that proposed by the Australian Law Reform Commission in its recent report. The Commission stated that the *McKain* formulation engendered "confusion, uncertainty, injustice and forum shopping",[33] and it recommended that the *lex loci delicti* be applied to intra-Australian torts, subject to displacement in appropriate circumstances. Displacement is permissible if there is a substantially greater connection with another place and the purpose of the laws in both places will be promoted by applying the law of the other place.[34] Notably absent from the Commission's proposal is any reference in the choice of law rule to the *lex fori*. The Commission's recommendation is preferable to both the *McKain* formulation and the reformulation suggested in the previous paragraph. However, the majority's decision in *McKain* leaves the Court far less latitude than a law reform agency in formulating an appropriate rule. The suggested compromise attempts to build on the High Court's previous decision, while giving a primary role to the *lex loci delicti*, as the Law Reform Commission has done.

## 3. *The Content of the Lex Loci*

The previous section of this article indicated that the substantive law of New South Wales is applicable to the resolution of at least some issues raised in the Queensland suit. However, not every provision of New South Wales law will be relevant to a suit with foreign connections. The law in question might expressly limit its spatial operation to events of a purely local character, or some territorial limitation might be implied so as to confine the otherwise general words of a statute to a local operation.[35] In the Queensland Supreme Court the plaintiff argued that the *Motor Accidents Act* 1988 did not apply to the present case because the Act was intended to apply only to claims involving either third party insurers licensed under the New South Wales legislation, or the New South Wales nominal defendant. Since Mrs Stevens'

33 Above n6 at para 6.14.
34 Id at para 6.27. See also cll 6 and 7 of the draft uniform Choice of Law Bill 1992.
35 See generally Kelly, *Localising Rules in the Conflict of Laws* (1974).

motor accident involved a motor vehicle registered and insured in Queensland, it was argued that the limitations on damages and interest in Part 6 of the Act were inapplicable. The Court found, however, that the Act was applicable, notwithstanding the numerous connections of the case with Queensland.

The application of the 1988 Act to the present case presents a problem of considerable difficulty due to a combination of two factors. First, the *Transport Accidents Compensation Act* 1987 and *Motor Accidents Act* 1988 embody different policies as to their spatial operation, and, secondly, the 1988 Act is poorly drafted in that it utilises definitions from the repealed 1987 Act, which contain spatial limitations at odds with the policy of the 1988 Act.

### 3.1 The Spatial Operation of the 1987 and 1988 Acts

In its 1984 report, which led to the enactment of the *Transport Accidents Compensation Act* 1987, the New South Wales Law Reform Commission expressly considered how their proposed statutory compensation scheme should apply to cases with foreign connections.[36] It concluded that the scheme should apply when any two of three specified connections with New South Wales were satisfied. These connections were that the injured party was a New South Wales resident; the accident occurred in New South Wales; or the vehicle was registered in New South Wales.[37] The 1987 Act gave effect to these recommendations through two interrelated provisions, each of which imported some territorial connection with New South Wales.

First, by s31, benefits under the Act were available only to an "injured person", which was defined in s3(1) to mean a person who suffered bodily injury caused by or arising out of a "transport accident". The latter term was defined in s4(1) to mean, in simplified terms, an accident arising out of the use of a motor vehicle registered in New South Wales or used on New South Wales roads. The term also extended to accidents arising from the use of public transport in New South Wales. The second provision importing some territorial connection between the statute and New South Wales was s33. In essence, this articulated the "two connections" test recommended by the Law Reform Commission: a benefit was only payable under the Act in respect of death or bodily injury where two of the three New South Wales connections were satisfied. If the 1987 Act were still in force, no benefit would be payable to Mrs Stevens under the Act because only one connection with New South Wales could be established (the place of the accident), and this notwithstanding that the accident was a "transport accident" as defined in s4(1).

When the State government initiated a review of the Transcover scheme, as a prelude to introducing the 1988 Act, specific reference was made to the injustice of cases such as the present, in which an out-of-State resident was injured in New South Wales by an out-of-State car but could obtain no redress under the Act.[38] The advisory Committee of Review recommended

36 Above n9 at 358-365.
37 Ibid.
38 New South Wales Attorney General's Department, *Motor Accidents: The Act and Background Papers* (1989) at 85-87.

that all accidents occurring in New South Wales should be covered by the one scheme and subject to New South Wales law irrespective of the choice of forum, the residency of the parties, or the place of registration of the motor vehicles. When the Attorney-General read the Motor Accidents Bill 1988 for the second time in the Legislative Assembly, he clearly thought that the Bill implemented the Committee's recommendation in this regard. The speech stated that the limitations on damages in Part 6 would be available to a defendant in all cases in which the accident occurred in New South Wales, even in respect of interstate vehicles not insured under the new third-party scheme.[39]

It is less clear that the language of the 1988 Act achieves the stated purpose, for its relevant terms are expressed with perfect generality in the sense that they do not limit their operation to events connected with New South Wales. Key expressions, such as "motor vehicle", "motor accident", "driver", "owner" and "injured person", are defined in s3(1) of the 1988 Act in a way that has no territorial connection with New South Wales. The operative provisions of the Act, which rely on these definitions, do not appear to be confined to accidents occurring in New South Wales. It is clear, however, that the Act cannot have an unlimited operation. In the first place, the New South Wales Parliament has power to make laws only for the "peace order and good government" of New South Wales,[40] and this requires some connection between the subject-matter of the legislation and the State, even if only a "remote and general" one.[41] Secondly, s12 of the *Interpretation Act* 1987 (NSW) states that, in any Act, a reference to "a locality, jurisdiction or other matter or thing" is a reference to "a locality, jurisdiction or other matter or thing in and of New South Wales". Thirdly, there is a judicial presumption that legislation is not intended to have extraterritorial effect.[42] For these reasons, the operation of the *Motor Accidents Act* must be confined to circumstances having some connection with New South Wales. Limiting the operation of the Act to accidents occurring within New South Wales achieves this purpose. Although it is by no means the only connection possible,[43] it accords with the parliamentary intention as expressed in the second reading speech. On this view, the limitations of Part 6 would apply to Mrs Stevens' action because the accident occurred in New South Wales.

---

39 *Parliamentary Debates*, New South Wales Legislative Assembly, 29 November 1988 at 3832.

40 *Constitution Act* 1902 (NSW), s5.

41 *Union Steamship Co of Australia v King* (1988) 166 CLR 1 at 14, reaffirmed in *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 372.

42 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363, per Connor J.

43 The Act might alternatively be limited to accidents involving vehicles insured by New South Wales insurers. This would have the advantage of matching the claims against insurers more closely with the risks covered. For a case offering an embarrassing range of territorial limitations, see *Mynott v Barnard* (1939) 62 CLR 68.

## 3.2 The Drafting Difficulties

The *Motor Accidents Act* contains two provisions that have some additional bearing on the application of the Act to the circumstances of this case. Section 69 specifies the scope of application of Part 6 of the Act. In simplified terms, it states that Part 6 applies to an award of damages for injury arising from the use of a motor vehicle (s69(1)); and it applies to an award of damages for injury arising out of a "transport accident" as defined in the repealed 1987 Act, provided it is not "an award of damages to which subsection (1) applies" (s69(2)).

When one turns to the definition of a "transport accident" in s4 of the 1987 Act, it is clear that Mrs Stevens' accident was a transport accident as defined.[44] Her accident arose out of the use of a motor vehicle that had not been registered in New South Wales, on a public street in New South Wales, within s4(1)(b) of the definition. However, Part 6 of the 1988 Act only applies to an award of damages in respect of a transport accident in so far as the award is one to which subsection (1) does not apply. Here subsection (1) does apply. The purpose of the two subsections of s69 is to ensure that the limitations on damages in Part 6 extend not only to motor vehicle accidents (s69(1)), but also to accidents involving other means of transportation (s69(2)). This is made clear by the Explanatory Note to cl69 of the Motor Accidents Bill 1988, which may be used as an aid to interpretation of the Act.[45] In the result, s69(2) does not make Part 6 applicable to this case. Whether s69(1) makes Part 6 applicable depends on the spatial operation given to the general language of the subsection. On the view expressed above,[46] the general words of s69(1) should be construed to apply to an award of damages for injury arising from the use of a motor vehicle in New South Wales.

The conclusion in the previous paragraph is enough to indicate the prima facie relevance of Part 6 of the *Motor Accidents Act* to Mrs Stevens' case. Section 7 of the Act supports this conclusion, at least in relation to the loss suffered in the period from the date of her accident until 1 July 1989, the date of commencement of Part 6 of the 1988 Act. Section 7 is essentially a transitional provision, and is contained in a Part of the Act dealing with the restoration of common law rights. It provides that Part 6 shall be taken to have applied from 1 July 1987 to 1 July 1989 to a "transport accident" occurring after 1 July 1987. The need for the provision arises from the circumstance that s6 of the Act restores common law rights of action retrospectively from the date of commencement of the Transcover scheme (1 July 1987). While s69(2) applies the limitations of Part 6 to loss suffered after 1 July 1989 as a result of a transport accident (whenever occurring), it seems that a further provision was thought necessary to limit damages in common law claims during the retrospective period.

---

44 However, no benefit would have been payable under the 1987 Act because only one of the three specified connections with New South Wales would be satisfied. The accident occurred in New South Wales, but the plaintiff was a New Zealand resident, and the vehicle was registered in Queensland.

45 *Interpretation Act* 1987 (NSW), s34(2)(e).

46 Section 3.1.

If it be assumed that the *Motor Accidents Act* has a spatial operation that makes it prima facie relevant to the disposition of the present case, the question remains whether the limitations on damages and interest in Part 6 of the Act might be denied effect in Queensland proceedings because they are procedural rather than substantive in character.

## 4. *The Substance — Procedure Distinction*

In the conflict of laws there exists an inveterate distinction between matters of substance and matters of procedure. The former are said to be governed by the *lex causae* and the latter by the *lex fori*. In the jurisprudence of the American realists, the distinction itself has been dismissed as artificial and illusory.[47] However, all justices in *McKain* accepted the existence of the distinction as legitimate, convenient, or soundly based in common sense.[48] If the utility of the classification is accepted as a starting point for inquiry, it is necessary only to delimit its sphere of application in the circumstances of a particular case. Thus, one must ask whether statutory limitations on damages or interest are matters of substance or procedure. The question should be examined from the stand-point of principle and authority.

### 4.1 The Distinction as a Matter of Principle

In 1933, the American jurist, Walter Wheeler Cook, stated in an influential article that the supposed line between the categories of "substance" and "procedure" had no objective existence to be discovered by logic and analysis alone. Substantive laws shaded off into procedural laws by imperceptible degrees. Cook accepted the need to draw some distinction between substance and procedure, but thought that the boundary could not be drawn without considering the purpose for which the classification was to be made.[49] When one looked to the purpose of the distinction in the conflict of laws, the question became: "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?"[50]

The High Court's decision in *McKain* offered a recent opportunity to consider the theoretical basis of the substance — procedure distinction. The principal issue in the case was whether an action for negligence could be maintained in New South Wales in respect of a tort committed in South Australia. The limitation period was six years in New South Wales and was still running, by a slender margin, at the time the plaintiff commenced his

---

47 See eg Llewellyn, *The Bramble Bush* (1930) at 82-83. For a conservative response, see Ailes, "'Substance' and 'Procedure' in the Conflict of Laws" (1941) 39 *Mich LR* 392, who argues that the classification is "referable to a fundamental habit of the human mind" in distinguishing between substance and form, and between the eternal and the transitory (at 404-405).

48 (1991) 104 ALR 257 at 263, 277, 281-282, 289. However, Gaudron J at 290 and 293, doubted whether there was a complete dichotomy between substantive and procedural laws.

49 Cook "'Substance' and 'Procedure' in the Conflict of Laws" (1933) 42 *Yale LJ* 333.

50 Id at 344.

action. However in South Australia the relevant limitation period was three years, which had expired some years previously. Traditionally, limitation statutes which bar the remedy without extinguishing the underlying right have been regarded as procedural, and hence inapplicable in proceedings commenced in another forum. However, Mason CJ and Deane J were prepared to reconsider the traditional rule in light of the purpose of the distinction between substantive and procedural laws. Mason CJ considered Cook's thesis, but thought the criterion of "inconvenience" too vague to serve as a definition of principle. Instead he adopted a formulation that differed from Cook's, while owing much to it. In the Chief Justice's view, which is largely supported by the reasoning of Deane J, the reason for the distinction lay in the efficiency of litigation, and accordingly: "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."[51]

This formulation offers a sound and principled basis for distinguishing substantive and procedural laws across the wide variety of issues that may arise in the conflict of laws. The majority's joint judgment, by contrast, lacks any principled consideration of the rationale of the substance — procedure distinction, either in the context of that case or generally. Their Honours felt bound to uphold the traditional distinction between statutes that extinguish the right and those that merely bar the remedy because, in their view, that principle of law had been established by a clear and consistent line of authority in Australia and England. While this unquestioning application of authority is a matter of regret, the majority's narrow reasoning now gives it some freedom in disposing of *Stevens v Head*. Nothing in their judgment contradicts the statements of principle underlying the judgments of Mason CJ and Deane J, and the authorities which swayed the majority in *McKain* may be less compelling in relation to the classification of quantitative limitations on damages and the award of interest than in relation to limitation statutes.

### 4.2 The Distinction as a Matter of Authority

A glance at conflict of laws literature reveals many references to the purported principle that assessment or quantification of damages is a procedural matter governed by the *lex fori*. This observation is typically made in the context of a juxtaposition between the recoverability of a particular head of damage (which is said to be a substantive matter governed by the *lex causae*) and the quantification of damages within that head (which is said to be procedural). Such general observations have been made in both the House of Lords[52] and the Australian High Court. In *Breavington*, for example, Brennan J remarked that "the lex fori not the lex loci governs the quantification of damages".[53] This dichotomy shadows the long held view

---

51 (1991) 104 ALR 257 at 267. Deane J expressed a similar view, at 283, 286.

52 See, eg, *Chaplin v Boys* [1971] AC 356 at 378-379 (Lord Hodson); 381 (Lord Guest); and 393 (Lord Wilberforce).

53 (1988) 169 CLR 41 at 119. However, Mason CJ expressed a view (at 79), iterated in *McKain* (1991) 104 ALR 257 at 265, that the measure of damages is plainly a question of substantive law. In an earlier opinion his Honour had taken the conventional view: see *Pozniak v Smith* (1982) 151 CLR 38 at 50.

that matters going to the remedy are procedural, while matters going to the underlying right are substantive.

When one leaves the level of generalities and searches for conflict of laws cases in which the quantification of damages has been a live issue, it is apparent that there is a paucity of relevant Australian decisions. The closest analogy to *Stevens v Head* is *Allan J Panozza & Co Pty Ltd v Allied Interstate (Queensland) Pty Ltd.*[54] In that case, two Queensland companies entered into a contract by which the defendant agreed to carry beans owned by the plaintiff from New South Wales to Queensland. The proper law of the contract was Queensland law. The beans were lost in transit and the owner commenced an action in New South Wales for damages for the loss. Section 6 of the *Carriage of Goods by Land (Carriers' Liability) Act* 1967 (Queensland) limited the liability of a carrier for the loss of goods to $200 per consignment. In the New South Wales proceedings, the Court of Appeal had to determine whether it would apply the limitation on damages contained in the Queensland statute. Street CJ, with whom Reynolds and Glass JJA agreed, held that s6 was "an express limitation upon the *substantive liabilities* arising under a contract to which the Act applies",[55] and hence that it operated to limit the plaintiff's damages in the New South Wales proceedings. This was to be contrasted with the requirement in s5 of the Act that a claimant give written notice of loss to the carrier, within a specified time. This was held to be (erroneously in the author's opinion) a procedural stipulation, which did not affect litigation in New South Wales.

More recently the New South Wales Court of Appeal considered a case that raised similar issues. In *Guidera v Government Insurance Office of New South Wales*,[56] the plaintiff brought an action in New South Wales in respect of a motor vehicle accident that had occurred in the Northern Territory. The action was brought directly against the insurer of the vehicle, as was permitted under the *Motor Vehicles (Third Party Insurance) Act* 1942 (NSW). The trial judge, in assessing damages, applied the provisions of the New South Wales Act regarding the discount rate and interest on damages, which were less favourable than the relevant provisions of Northern Territory law. On appeal, the plaintiff argued that these were matters of substantive law that fell to be determined by Northern Territory law as the *lex loci delicti*. However, the Court of Appeal did not find it necessary to address the nature of the distinction between substantive and procedural laws. In its opinion, a complete answer to the plaintiff's argument was that the common law principles had to yield to a statute of the forum, which on its true construction applied to the circumstance of the case.[57] This approach is not available in *Stevens v Head* because the relevant limitations on damages and interest are not contained in a forum statute, but in a foreign statute whose applicability to proceedings in the forum necessarily rests on choice of law rules.

---

54 [1976] 2 NSWLR 192.
55 Id at 197 (emphasis added).
56 (1990) Aust Torts Reports 81-040.
57 Id at 68,048.

In *Amor v Macpak Pty Ltd*[58] an application was made by the defendant to transfer proceedings from the New South Wales Supreme Court to the Queensland Supreme Court, pursuant to the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW). The action was one for damages arising from a tort committed in Queensland, where the discount rate on future loss was less favourable than the rate in New South Wales. The legislation required the proceedings to be transferred to Queensland if it was in the interests of justice that the matter be determined by the Queensland Supreme Court, and Allen J held that one relevant consideration in weighing the interests of justice was the law governing the transaction. In this context, his Honour classified the discount rate as a procedural law, with the consequence that the discount rate applicable to the proceedings depended on whether or not the proceedings were transferred to Queensland. His Honour commented, however, that the distinction between substantive law and procedural law owed more to convention than reason, and frequently seemed artificial.[59]

It is also necessary to mention the High Court's decision in *Pozniak v Smith*[60] in order to defeat an argument that this decision dictates a procedural classification of statutory limits on discount rates and, by analogy, interest rates. In that case the plaintiff had been injured in a motor vehicle accident in Queensland caused by the admitted negligence of the defendant. The plaintiff was a resident of New South Wales, the defendant was a resident of Queensland, and the action was commenced in the High Court in its original jurisdiction.[61] The question before the Court was whether the matter should be remitted to the Supreme Court of New South Wales or to the Supreme Court of Queensland, where the cause of action arose. One difference between the laws of the two States was that in Queensland the discount rate on future loss was 5 per cent, while in New South Wales a rate of 3 per cent applied. The majority held that, where the relevant law in the competing jurisdictions was materially different in its effect on the rights of the parties, the only safe course was to remit to the State whose law gave rise to the cause of action.[62] The Court ordered that the matter be remitted to the Supreme Court of Queensland. This conclusion clearly contemplated that Queensland courts and New South Wales courts would apply their own discount rate in proceedings commenced in their courts. However, this does not necessarily imply that a law relating to the discount rate is procedural. At the time of *Pozniak*, the prevailing view was that, once the threshold test of *Phillips v Eyre* had been passed, the law applicable to torts was the *lex fori*.[63] An alternative explanation for the majority's assumption that each State court would apply its own discount rate is that this was a substantive matter governed by the *lex fori*, in accordance with the prevailing choice of law rule

58 (1989) 95 FLR 10.
59 Id at 13.
60 (1982) 151 CLR 38.
61 The matter was one "between residents of different States", within s75(iv) of the Constitution.
62 (1982) 151 CLR 38 at 47. Mason J, at 54, adopted a different test.
63 See Mason J in *Pozniak v Smith* (1982) 151 CLR 38 at 49, citing *Koop v Bebb* (1951) 84 CLR 629; *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 41-42; and *Kolsky v Mayne Nickless Ltd* (1970) 72 SR(NSW) 437 at 444.

in torts. In short, there is nothing in the majority's judgment to compel a conclusion either way as to the classification of statutory limits on damages or interest as substantive or procedural.[64]

Finally, mention should be made of a body of cases that has a superficial bearing on the classification of statutory limits on damages and interest. These cases are concerned with whether a statute which, for example, amends the rate of interest that may be awarded on damages, has a retrospective operation on causes of action that have accrued but not been adjudged at the time of the amendment. There is a common law presumption that a statute does not apply to events that have already occurred, in such a way as to affect accrued rights and liabilities.[65] However, there is an acknowledged exception to the general rule for statutory amendments concerned only with matters of procedure, which may operate retrospectively. In this context it has been necessary to classify the law in question as substantive or procedural.

Walter Wheeler Cook cautioned against the tendency to draw the same bright line between substance and procedure, regardless of the purpose for which the classification is made; a tendency which, in his view, "has all the tenacity of original sin and must constantly be guarded against".[66] In the context of retrospectivity, no problem arises as to the application in the forum of unfamiliar procedures of a foreign law district. The central issue is not the inconvenience to the forum of applying foreign rules, but the justice of applying a law to litigants retrospectively, when they may have ordered their affairs on the basis of the law as it existed at the time they acted. All this is to say that cases concerned with the classification of laws for the purpose of determining their retrospective operation are not apposite to the inquiry necessitated by *Stevens v Head*. Nevertheless, in so far as they may be thought relevant, the cases support the proposition that laws fixing the rate of interest on damages are substantive, and so do not operate retrospectively.[67]

### 4.3 Application to Present Facts

It has been argued that Mason CJ's test for distinguishing substantive from procedural laws is soundly based, and that the authorities do not dictate a contrary conclusion in relation to the quantification of damages in tort. This conclusion accords with the report of the Australian Law Reform

---

64 However, Mason J (at 50) clearly thought that quantification of damages was a procedural matter governed by the *lex fori*.

65 See Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261 at 267.

66 Cook "'Substance' and 'Procedure' in the Conflict of Laws" (1933) 42 *Yale L J* 333 at 337.

67 See *Simonius Vischer & Co v Holt* [1979] 2 NSWR 322 at 335-337; *Kelly v John Fairfax & Sons Ltd* (1987) 9 NSWLR 369. By contrast, monetary limits on the jurisdiction of inferior courts and tribunals have been held to be procedural, and amendments to those limits have been given retrospective effect: *Ex parte Palmer, Re McCabe* (1967) 69 SR(NSW) 140; *Ex parte Clark, Re Morrison* (1968) 69 SR(NSW) 339; *Helensburgh Workers Club v Marshall* [1984] 2 NSWLR 566; *Australian Iron & Steel Pty Ltd v Najdovska* (1988) 12 NSWLR 587 at 621. These cases are easily distinguished from the monetary limitations in Part 6 of the *Motor Accidents Act*, which are imposed on the plaintiff's right of recovery and not merely on the particular court or tribunal adjudicating the matter.

Commission, which has recommended that statutory interest rates, discount rates and ceilings on damages should be regarded as substantive matters, at least in intranational cases.[68]

When Mason CJ's test is applied to the facts of Mrs Stevens' case, the relevant limitations on the quantification of damages contained in Part 6 of the *Motor Accidents Act* must be regarded as substantive law. These limitations are not directed to the mode or conduct of court proceedings. They are contained in a statute that is readily accessible to courts in Queensland, and of which Queensland courts are required to take judicial notice.[69] The construction and application of legislation is a familiar judicial task and can pose no real inconvenience to a Queensland court, notwithstanding the absence of equivalent legislation in Queensland. Similarly, there can be no objection to a Queensland court exercising the discretion to award a plaintiff interest on damages, conferred by s73 of the 1988 Act, just as in *McKain*, Mason CJ, Deane and Gaudron JJ held that a New South Wales court could exercise the discretion to extend a period of limitation, conferred by a South Australian statute.[70]

If it be accepted, contrary to the decision of the trial judge and the Queensland Supreme Court, that all relevant limitations in Part 6 are substantive, their applicability to Mrs Stevens' case depends on the extent to which New South Wales law is selected by the choice of law rules as the system of law governing foreign torts. In section 2 of this article it was argued that the choice of law rule in *McKain* should be restated to give primacy to the *lex loci delicti*. On this basis, Mrs Stevens' damages would be limited to those available under the *Motor Accidents Act* 1988.

---

68 Above n6 at paras 10.40-10.45 and cl 14(2)(b) of the draft uniform Choice of Law Bill 1992.

69 *State and Territorial Laws and Records Recognition Act* 1901 (Cth), s3.

70 (1991) 104 ALR 257, at 269-270, 286, 293-294. This issue did not arise for the other justices.