NOTES

Let It Be: The Approach of the High Court of Australia to Substance and Procedure in *Stevens v Head*

1. *Introduction*

A. Stevens v Head

One area of particular interest in the recent High Court decision of *Stevens v Head*[1] is the issue whether, in the context of a claim in the forum in respect of a foreign tort, statutory limitations imposed by the lex loci delicti on the amount of damages recoverable for tortious wrongs will be given effect to in the forum.

The majority of the High Court (Brennan, Dawson, Toohey, McHugh JJ) decided that such limitations will usually not be given effect to in the forum. Mason CJ and Gaudron J held that such limitations usually will be applied in the forum. Deane J did not express a view on the issue, deciding that constitutional principles made the application of conflict of laws rules inappropriate.[2]

The majority approach, as first expressed in *McKain v R W Miller & Co (South Australia) Pty Ltd*,[3] has been roundly criticised by commentators.[4] The primary criticism has been that the majority were satisfied to rely on traditional authority and attempted no principled justification of their conclusion.[5] The weakness that this failure to justify has exposed in the majority approach is evident in the tendency of New South Wales courts, in recent decisions,[6] to follow the Mason CJ view. However, the fact that the majority declined to justify their approach does not mean that it is unjustifiable. On the contrary, it is arguable that Mason CJ's approach is not supported by the applicable principles. This Note will argue that the correct principles provide ample justification for the majority approach.

B. A Simple Question

The issue of whether or not the limitation on amounts recoverable for tortious wrongs imposed by the *lex loci delicti* is given effect to in the forum depends upon an apparently simple question of characterisation: are limitations on the quantification of damages matters of substance or procedure?

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1 (1993) 67 ALJR 343.

2 Id at 357.

3 (1991) 104 ALR 257.

4 See Opeskin, B, "Conflict of Laws and the Quantification of Damages in Tort" (1992) 14 *Syd LR* 340; Butler, M, "Return to Forum Shopping" (1992) 14(5) *Law Institute Bulletin* 37; Pryles, M, "Of Limitations and Torts and the Logic of Courts" (1992) 18(3) *MULR* 676–682. See also Australian Law Reform Commission *Choice of Law* (1992) No 58 at 10.13, 10.41.

5 Opeskin, id at 353.

6 For example *Byrnes v Groote Eylandt Mining Co Pty Ltd* (1990) 19 NSWLR 13; *Sherwood v Webb* (1992) 28 NSWLR 251.

If the limitation is characterised as substantive law, it should be given effect to in the forum, since the forum generally applies the substantive rules of the *lex loci delicti*.[7] If, however, the limitation is characterised as procedural, it should not be applied in the forum. In many cases, the forum will simply apply its own law on quantification of damages.

The implications of characterising the limitations as procedural are obvious. Say X has an accident in New South Wales, but New South Wales legislation limits the amount of damages X might recover. Subject to jurisdictional questions, X might choose to bring his action in Queensland, where there is no such limitation. X should still have the advantage of familiar New South Wales law governing issues such as causation, negligence and the remoteness of damage. Conveniently for X, however, Queensland law should apply to the issue of quantification of damages, and the New South Wales plaintiff will avoid the effect of the New South Wales limitation on amounts recoverable.

The simple, crucial question is thus whether or not limitations on the quantification of damages are properly to be characterised as procedural.

C. *Two Approaches*

In *McKain*, a majority of the High Court held that a statute of limitation should be characterised as procedural, as long as it did not actually extinguish the underlying right, but merely restricted the remedy. In *Stevens*, the same majority reached the same conclusion on the same basis with respect to limitations on the quantification of damages. Such limitations were held to be generally procedural, and therefore not applicable in the forum.

Mason CJ disagreed in both cases. Mason CJ thought that only those laws "which are directed to governing or regulating the mode or conduct of court proceedings" should be classified as procedural.[8] Thus, limitations on quantification of damages, at least insofar as they represent more than a mere rule of calculation, should be characterised as substantive. In *Stevens*, Gaudron J agreed with this conclusion.[9]

2. *Which Approach is Preferable in Principle?*

A. *Minority Approach*

Mason CJ's chief objection to the majority approach is that it contradicts the basic principles underlying the distinction between substance and procedure. Mason CJ first raised this argument in his discussion in *McKain*,[10] and relies on it in *Stevens*.[11] Mason CJ argues that the purpose of the distinction must be decisive in determining the principles for characterisation. Since substance and procedure have different meanings in different contexts,[12] this approach

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7 At least in intra-Australian cases: *Breavington v Godleman* (1988) 169 CLR 41.

8 Above n3 at 267.

9 Above n1 at 362.

10 Above n3 at 267.

11 Above n1 at 348.

12 Above n3 at 277.

is undoubtedly preferable as a model for judicial methodology to the methodological approach of the majority, which relies on precedent rather than principle.

Mason CJ contends that the purpose of the distinction between procedure and substance is to facilitate efficiency of litigation "by the adoption and application of the rules of practice and procedure and by the judge's practical familiarity with those rules".[13] It is a short step from this proposition to the conclusion that only those laws directed to governing or regulating the mode or conduct of court proceedings should be characterised as procedural, and hence that limitations on quantification of damages are substantive laws.

If Mason CJ is right in his contention with respect to the purpose of the distinction, his conclusion cannot be faulted. However, it is this contention which forms the fatal weakness in his argument. Further analysis reveals that the true purpose of the distinction is incompatible with Mason CJ's conclusion. Moreover, using Mason CJ's methodological model, it actually supports the view of the majority.

B. The Dichotomy between Rights and Remedies as a Rationale for the Distinction between Substance and Procedure

In order to determine the purpose of the distinction between substance and procedure, it is firstly necessary to determine the purpose of conflict of laws rules in general. The opinion of Mason CJ is consistent with that of many commentators[14] when he says that the objective of the conflict of laws rules is the fulfilment of foreign rights.[15]

However, it is implicit in this formulation of the objective of conflict of laws rules that, just as the court fulfils foreign rights, so it refuses to fulfil foreign remedies. The purpose of the distinction between substance and procedure is to ensure that only those foreign rules concerned with the definition of the right are given effect to by a court of the forum, while those rules concerned with the nature of the remedy are not given effect to by that court.[16]

(i) The Original Rationale for the Distinction between Substance and Procedure

There is clear evidence that, at least originally, the rationale for the distinction between substance and procedure was the importance of giving effect to the dichotomy between rights and remedies. One of the first references to the distinction in an English law report comes from a case in 1460, in which defence counsel offered "a distinction between cases where the custom will bind and will be allowed in all courts [ie the right] and where only in the court of the town or city where the custom is alleged [ie the remedy]".[17] The lex fori was applied to the determination of issues dealing with remedy as early as 1760,

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13 Id at 267.

14 North, P M and Fawcett, J J, *Cheshire & North's Private International Law* (12th edn, 1992) at 28; English Law Commission, *Classification of Limitation in Private International Law* (1980) Working Paper No 75 at 16.

15 Above n1 at 351.

16 Ailes, E H, "Substance and Procedure in the Conflict of Laws" (1941) 39 *Mich LR* 392 at 401.

17 Id at 399.

when Wilmot J said that persons appealing to English courts must take their remedy according to the law of England.[18] In *Huber v Steiner*, Tindal CS said "so much of the law as affects the rights and merit of the contract ... is adopted from the foreign country; so much of the law as affects the remedy only ... is taken from the lex fori".[19]

Thus matters of substance were originally understood as matters affecting the definition or merits of the right; matters of procedure as those affecting the enforcement of the right, or, the remedy. At least as long as the dichotomy between rights and remedies is of continued relevance to the law, it would be totally inconsistent with the principles behind the distinction to ascribe any other meaning to those terms.

(ii) The Modern Rationale for the Distinction between Substance and Procedure

The issue is, whether or not the dichotomy between rights and remedies is still relevant in Australian law today. If so, there is no reason why the distinction between substance and procedure should serve any different rationale than that on which it was fashioned. However, the dichotomy between rights and remedies has been heavily criticised by several commentators and judges.[20] Mason CJ cites and apparently agrees with this opinion in his judgment in *McKain*.[21] Much of this criticism is perhaps unfair. The dichotomy is criticised as being artificial and illusory.[22] There are two responses to this.

First, the dichotomy between rights and remedies is no more illusory than the distinction between substance and procedure itself. In a sense, it is artificial to speak of remedies as separate from the right itself: "[t]he size of a right is a part of the right".[23] However it is no less artificial to speak of some laws as procedural, when even rules of evidence may have a substantive effect on the outcome of a case.[24] If artificiality is to be a ground for rejection of an argument, either both differentiations must be rejected as too artificial, or both be accepted despite the artificiality. It cannot be disputed that the High Court has accepted the distinction between substance and procedure, expressly discounting this artificiality.[25] It would therefore be highly inconsistent to hold similar artificiality against the dichotomy between rights and remedies. Of course, the real justification for discounting the artificiality in both cases is that, as Ailes once noted, the logical difficulties with these differentiations belie their usefulness as analytical tools.[26]

Secondly, in many cases, the dichotomy will not be illusory at all. Mason CJ himself admits that it is useful in many contexts.[27] Clearly, where a foreign

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18 Ibid.

19 132 ER 80 at 83.

20 *Chase Manhattan Bank NA v Isreal-British Bank (London) Ltd* [1981] Ch 104 at 124 per Goulding J.

21 Above n3 at 262, 266.

22 English Law Commission, above n14 at 14.

23 Leflar, R A, McDougal, L L and Felix, R L, *American Conflicts Law* (4th edn, 1986) at 346 cited in *Stevens v Head*, above n1 at 350.

24 Above n16 at 408–409.

25 Above n3 at 266.

26 Above n16 at 403, 405.

27 Above n3 at 262.

right would be enforced by a foreign court with a remedy that does not exist in the forum, a forum court will apply its own remedial laws.[28] It is not hard in that case to identify the foreign remedial law as connected with the enforcement of the right rather than the right itself. Why should this identification be any more difficult in a case where the foreign court applies limits on the amount recoverable which do not exist in the forum? The fact that a different remedy is applied does not mean that the recognition of that right is stultified, as has been claimed.[29] The right is recognised, it is simply enforced differently in the forum. Neither is it correct to state that a right without a particular remedy is any less a right, except in those cases where the holder of the right is left without any means of redress whatsoever.[30] In the latter case, the majority approach would probably indicate that such a foreign law, which appears to extinguish the right itself, would be characterised as substantive.[31]

(iii) Mason CJ and the Dichotomy between Rights and Remedies

Apart from these arguments, it is questionable whether it is consistent for Mason CJ to reject the dichotomy between rights and remedies in view of his formulation of the objective of the conflict of laws.

As other commentators have done, Mason CJ contends that the fulfilment of foreign rights is the objective of the conflict of laws. It is inconsistent with this objective that foreign remedies are given effect to. This does not merely result implicitly from the wording of this formulation of the objective. It also results from the vested rights theory, of which this formulation of the objective seems to represent an adoption.

A brief explanation of the theory is required. The vested rights theory is based on the principle of territoriality.[32] It recognises the reality that a court of the forum cannot directly enforce a foreign law or foreign judgment. However, where a litigant has acquired a right under a foreign law, and the law of the forum allows the court to recognise that right, the court will be guided in its understanding of the nature of that right by the provisions of the foreign law. This doctrine was introduced into English jurisprudence by scholars such as Holland[33] and Dicey.[34]

No other theory of the conflict of laws corresponds as well to the Mason CJ formulation of the objective of the conflict of laws. Moreover, as if to underline the point, Mason CJ supports his formulation of the objective by reference to *Hooper v Gumm*,[35] a case decided at the zenith of the dominance of the vested rights theory in English law, and quotes the following statement: "[W]here rights are acquired under the laws of foreign states, the law of this country recognises and gives effect to those rights".[36]

28 *J D'Almeida Araujo Lda v Sir Frederick Becker & Co Ld* [1953] 2 QB 329 at 336.
29 English Law Commission, above n14 at 16.
30 Above n16 at 404.
31 Above n3 at 278–281.
32 Ibid; North and Fawcett, above n14 at 27.
33 Holland, T, *The Elements of Jurisprudence* (11th edn, 1910).
34 Dicey, A, *A Digest of the Law of England With Reference to the Conflict of Laws* (1868).
35 (1867) LR 2 Ch 282.
36 Above n1 at 351.

Certainly, it is arguable that the Mason CJ formulation of the objective need not represent an adoption of the vested rights theory. The vested rights theory has been rejected in many countries.[37] Indeed, some commentators who have used a formulation of the objective of the conflict of laws similar to the Mason CJ formulation have expressly rejected the vested rights theory.[38] Moreover, the adoption of the vested rights theory by Mason CJ seems not to accord with his approach in other issues, such as choice of applicable law.[39]

However, these objections, rather than defeating the argument that Mason CJ's formulation represents an adoption of vested rights, merely serve to underline the internal inconsistency between that formulation and the other arguments of Mason CJ in *Stevens*. This internal inconsistency is also evident among commentators who use a similar formulation yet reject the vested rights theory. For example, Cheshire and North, although arguing that the vested rights theory is inapplicable in English law, then proceed to couch their discussion of English law in vested rights nomenclature.[40] One might otherwise think that this inconsistency is evidence that Mason CJ did not, in fact, intend to adopt the vested rights theory. However, there being no objective interpretation that can be ascribed to Mason CJ's formulation of the objective of the conflict of laws, other than it represents an adoption of the vested rights theory, it must be accepted that the incongruity of the Mason CJ formulation, so interpreted, is a weakness of the judgment rather than an argument against this interpretation.

The reason that this inconsistency does not defeat the argument that the words of Mason CJ represent an adoption of the vested rights theory is that there is no objective interpretation that can be ascribed to Mason CJ's formulation of the objective of the conflict of laws, other than that it represents an adoption of the vested rights theory.

If this interpretation is correct, then Mason CJ's argument that a right includes a remedy is inconsistent with his own formulation of the objective of conflict of laws rules. The close relationship between the vested rights theory and the traditional understanding of the distinction between substance and procedure based on the dichotomy between rights and remedies is well documented.[41] Dicey expressed it as a corollary of the vested rights doctrine that while "a court must recognise every right which it enforces, it need not enforce every right which it recognises".[42] The vested rights theory differentiates between those foreign laws which define rights, and those which dictate how those rights are to be enforced. The rejection by Mason CJ of that dichotomy in this context is incompatible with the objective of conflict of laws rules, as he formulates it, and thus, by his own yardstick, is made untenable.

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37 For an account of the rejection of the vested rights theory in the USA see Juenger, F K, *Choice of Law and Multistate Justice* (1993), ch III.

38 North and Fawcett, above n14 at 28.

39 Above n1 at 345–346.

40 North and Fawcett, above n14 at 38.

41 Above n16 at 392.

42 Dicey, A, *Conflict of Laws* (4th edn, 1927) at 26.

C. *The Majority Approach*

The distinction made by the majority in *McKain* between a statute of limitation that extinguishes the right and a statute of limitation that bars the remedy makes it apparent that the majority has taken an approach that is consistent with the dichotomy between rights and remedies.[43] This dichotomy, which formed the original rationale of the distinction between substance and procedure, clearly continues to provide the purpose for that distinction. It is difficult to see how such an approach lacks principle, especially if, indeed, as Mason CJ seems to contemplate, the objective of the conflict of laws is to fulfil foreign rights, and therefore not fulfil foreign remedies. If this is the guiding principle, then the majority judgment is not only principled, but moreover, unlike Mason CJ's judgment appears to be, it is consistent in its use of principle.

D. *Other Principles*

Both commentators and the dissenting judges in *Stevens* oppose the majority judgment on the basis of principle. However, it is arguable that other principles relevant in this area of the law are either no obstacle to the majority approach, or, in fact, support it.

(i) Forum Shopping

Another important principle in this context is the prevention of forum shopping. It has been said that the majority approach encourages forum shopping.[44] Mason CJ mentions the prevention of forum shopping as one of the virtues of his approach.[45] However, it is worth questioning whether or not the judicial campaign to prevent forum shopping has gone too far.

Even Savigny, one of the first and greatest proponents of opposition to forum shopping, recognised that it could not be prevented without universally uniform conflict of laws rules.[46] This is, of course, unlikely. Certain rules which, even by Mason CJ, will always be characterised as procedural, may often have substantive effects such that forum shopping will become advantageous.[47] Additionally, the fact that different forums will apply different considerations of public policy will also ensure that forum shopping will always be potentially attractive. Thus, when Gaudron J says that it is "worse than absurd that the law should allow that the consequences attaching to an act or event in this country ... can vary according to the State in which they are litigated"[48] she is totally ignoring that the law will always allow this unless even clearly procedural laws of foreign State courts such as rules of evidence are applied in the forum.

Despite this, forum shopping has been opposed at every turn. The practice of plaintiffs bypassing the "natural" forum and bringing actions in some alien forum which would give the relief or benefits not available in natural forum[49]

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43 Opeskin, above n4 at 353–354.
44 Butler, above n4 at 37; above n3 at 266.
45 Above n3 at 269.
46 Savigny, F C von, *System des Heutigen Römischen Rechts* (1849) at 114.
47 Above n16 at 408.
48 Above n1 at 360.
49 *Boys v Chaplin* [1971] AC 356 at 401 per Lord Pearson.

was denounced by the High Court in *Breavington v Godleman*.[50] Obviously, the arguments raised against forum shopping, which assume that there is a natural forum for each piece of litigation,[51] are particularly applicable in cases of blatant forum shopping.[52] However, it seems that a combination of the inappropriate forum doctrine for international torts[53] and the cross-vesting legislation for intranational torts[54] should prevent blatant forum shopping. There are strong arguments that, where there is no single forum more natural than any other, simple cases of litigants' attempts to have their action tried in a particular court or jurisdiction where they feel they will receive the most favourable judgment or verdict, which might be referred to as "bona fide" forum shopping, "cannot be dismissed merely as an evil to be avoided":

> [T]he legal system's concern that forum shopping is a manipulation of the rules by which plaintiffs avoid the 'correct' legal forum in order to obtain a more favourable outcome conflicts with its commitment to party-driven litigation and to the provision of a remedy for every injury.[55]

If plaintiffs are allowed to gain procedural advantages in other contexts, how is the marginalisation of procedural advantages justifiable in this context? The more "bona fide" the forum shopping becomes, the more other considerations should take priority over the objective of preventing forum shopping.

As long as blatant forum shopping is prevented by several legal mechanisms, the fact that the majority approach may allow some "bona fide" forum shopping should not be seen as an obstacle to the adoption of the majority approach.

(ii) Justice

Savigny himself recognised that, in torts cases, other considerations take priority over the prevention of forum shopping.[56] This recognition has been neglected in modern times.[57] The most important principle in torts cases is surely that of just compensation.[58]

Mason CJ's approach seems unreasonably harsh from the point of view of the plaintiff, particularly when seen in conjunction with the choice of law rule he formulates. This rule requires the forum to give effect to its own law "even if, for instance, the operation of the local legislation cuts down the extent of the claim which could otherwise be maintained".[59] He thus envisages that the forum would apply its laws limiting the quantification of damages in addition to the foreign limitation. The lower limitation would thus apply to the plaintiff's case. Plaintiffs who, perhaps out of necessity, bring actions in jurisdictions other than the locus delicti, will have to accept the lowest common

50 Above n7.

51 Keane QC, P A, "Personal Injuries Litigation — Conflicts of Laws and Forum Shopping" (1990) 20(3) *Qld L Soc J* 203 at 203.

52 "Forum Shopping Reconsidered" (1990) 103(7) *Harv LR* 1677 at 1695.

53 Above n51 at 210.

54 Griffith, G, Rose, D and Gageler, S, "Further Aspects of the Cross-vesting Scheme" (1988) 62 *ALJ* 1016 at 1021.

55 Above n52 at 1695.

56 Above n46 at 279–280.

57 Above n37 at 50.

58 Above n1 at 346.

59 Ibid.

denominator. In a situation where plaintiffs already have the burden of satisfying the "restrictive"[60] tests of *Phillips v Eyre,*[61] this poses a further obstacle to plaintiffs suing for foreign torts, apparently punishing them for simply being victim of a tort outside the forum. There is a tendency to forget that, at least once one has come as far as the determination of the appropriate remedy, it is the plaintiff, not the tortfeasor, who is the primary victim. Moreover, in most motor accident personal injuries cases, which are indeed those cases most likely to involve conflict of laws issues, the individual plaintiff is most likely to be facing an insurance company defendant. In cases of doubt, it is surely more just that rules are interpreted in favour of the plaintiff.

The majority averted to this principle in support of their approach when they noted that the characterisation of limitations on quantification of damages has "operated in practice free of injustice".[62] This reflects Story J's statement that "there is no hardship or injustice" in the refusal to apply rules of the foreign law relating to remedies.[63]

E. Conclusion

The issue of whether or not the limitation on amounts recoverable for tortious wrongs imposed by the *lex loci delicti* is given effect to in the forum depends upon an apparently simple question of characterisation: are limitations on the quantification of damages substantive or procedural law?

In *Stevens v Head*, a majority of the High Court held that such limitations should generally be characterised as procedural. There are strong arguments in favour of the proposition that this approach is preferable in principle to the minority view as expressed by Mason CJ. It is more consistent with the rationale for the distinction, namely, the dichotomy between rights and remedies. Moreover, it appears to achieve fairer results.

If principles are to determine the proper rule then it appears that the majority view in *Stevens v Head* is correct. The attempts by Mason CJ and some commentators to reformulate the distinction represent efforts to fix something which is not broken. The majority view now represents the law in Australia. Those minded to disturb this position out of concerns for principle would perhaps be better advised to Let It Be.

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60 Above n37 at 50.
61 (1870) LR 6 QB 1.
62 Above n3 at 280.
63 *LeRoy v Crowninshield* (C.C. Mass 1820) 2 Mason 151 at 158.

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Thanks to Ross Anderson and Barbara McDonald for their helpful suggestions; apologies to Lennon/McCartney for the title.