Jurisdiction and Choice of Law as regards Foreign Torts

Perrett v. *Robinson*[1]

***S.J. Lee**

By the time the case of *Perrett* v. *Robinson* came on for trial in 1987 before Shepherdson J., over seven years and quite a deal of litigation had been and gone since the cause of action arose.[2] It arose from a motor vehicle accident which occurred in 1979 in the Northern Territory as a result of the admitted negligence of the defendant. For jurisdictional reasons the plaintiff brought proceedings in the Queensland Supreme Court.[3] Both parties were at all material times resident in the Territory but the vehicle driven by the defendant was owned by a Queensland resident and was registered and insured in Queensland.

The defendant agreed to and in fact did make an overnight round trip from Darwin to Mt. Isa for the sole purpose of enabling himself to be served with the Queensland writ. Although the Queensland licensed insurer was later served with a copy of the writ, it had no knowledge of the "border hop" at the time of its execution.[4] The insurer entered a conditional appearance and applied to have service of the writ set aside.[5]

The application was refused and an appeal to the Full Court was dismissed.[6] It was not contended that any fraud or trickery was brought to bear upon the defendant to entice him into Queensland for the sole purpose of service. It was submitted however that for the purpose of considering whether such personal service, and thus the Court's jurisdiction, was vitiated by fraud, the insurer should be regarded as the real defendant in view of its position of *dominus litus*. Indeed it was suggested on the facts that the "border hop", funded by the Territory Insurance Office (T.I.O.), was part of a fraudulent scheme concocted without the knowledge of the insurer whereby the T.I.O. could avoid a compensation payout at the Queensland insurer's expense. However, the proposition that fraud operating on the real defendant (insurer) was decisive, was rejected as being an unjustified extension of the authorities, which regarded

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1. Unreported No. 5083 of 1981 – judgment delivered 3rd April, 1987.
2. Various interlocutory applications will not be canvassed here.
3. *Motor Vehicle (Compensation) Act* (N.T.) 1979 s.5 precluded all actions for damages (except for pain and suffering and loss of amenities of life) by a Territory resident arising out of a motor vehicle accident in the Territory; see also s.13 which relegates the claimant to a claim against a statutory fund.
4. *Motor Vehicle Insurance Regulations* (1968) (Qld) Reg. 10(1).
5. Reg. 11(3).
6. (1983-84) 54 A.L.R. 585 (Weld M.); [1985] 1 Qd.R.83 (Full Court).

the crucial factor to be fraud brought to bear upon the nominal defendant (Robinson).[7]

The problem having then been left to the trial judge to determine whether to apply Queensland or Territory law to resolve the issue of recoverability of damages for loss of earning capacity, Shepherdson J. proceeded to dissect the issue into two questions: does the action lie in the Queensland Court? If so, which law applied to adjudicate the claim? His Honour accordingly took the view that Willes J's test in *Phillips* v. *Eyre*[8] is a jurisdictional test, regarding himself bound by *Koop* v. *Bebb*[9] where the High Court held, interpreting *Phillips* v. *Eyre*, that:-

> ". . . *an action in tort will lie* in one State for a wrong alleged to have been committed in another State, if two conditions are fulfilled: first, the wrong must be of such a character that it would have been actionable if it had been committed in the State in which the action is brought; and secondly, it must not have been justifiable by the law of the State where it was done . . ."[10] (emphasis added)

It was not suggested that on the facts the first condition had not been fulfilled, and, in relation to the second condition, Shepherdson J. adopted the view that the words "not justifiable" in their context pointed to a civil liability under the *lex loci delicti*.[11] On this view the condition was satisfied, because, although the plaintiff was not entitled under Territory law to damages for loss of earning capacity, he was entitled to damages for pain and suffering and loss of amenities of life. His Honour pointed out that in 1980 the Territory legislation had been amended to even preclude damages for pain and suffering and loss of amenities of life, and observed that had this amendment applied in the present case, the second condition would not have been satisfied.

The threshold hurdles of *Phillips* v. *Eyre* having been overcome, his Honour went onto hold that the *lex fori* is applied as the choice of law rule, subject to the contact or interest principle operating in the proper case in favour of the *lex loci delicti*. Shepherdson J. cited Lord Wilberforce's speech in *Chaplin* v. *Boys* where his Lordship restated the general rule as regards foreign torts "as requiring actionability as a tort according to [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*]" and where His Lordship suggested a qualification in certain cases: that the Court should consider "whether . . . the relevant foreign rule ought, as a matter of policy or as Westlake said of science to be applied".[12] Shepherdson J. gleaned from this that the Court applies the *lex fori* subject to flexibility in favour of the *lex loci delicti* when clear and satisfying grounds are shown. Indeed on the facts his Honour found that such grounds existed and thus applied Territory law to

7. [1985] 1 Qd.R.83 at 85 (per Connolly J.) and 91 (per McPherson J.)
8. (1870) L.R. 6 Q.B. 1 at 28, 29
9. (1951) 84 C.L.R. 629.
10. *Ibid.* at p.642 (per Dixon, Williams, Fullagar and Kitto JJ).
11. Cf. Lord Wilberforce in *Chaplin* v. *Boys* [1971] A.C. 356 at 389.
12. [1971] A.C. 356 at 389 and 391; see also Lord Hodson at 378.

defeat the claim: the view was taken that the nexus with Queensland was tenuous and the application of Territory law would otherwise best achieve justice between the parties.

In support of the flexibility approach reliance was placed on the Full Court of Victoria decision in *Godleman* v. *Breavington*[13] and various single judge decisions. However, as against the flexibility approach His Honour had to deal with several High Court and State appellate decisions favouring a rigid application of the *lex fori*. His Honour considered two High Court decisions decided prior to *Chaplin* v. *Boys*: *Anderson* v. *Eric Anderson* and *Koop* v. *Bebb*, where this latter view was expressed, but pointed out that these views were dicta as the High Court was on both occasions concerned with jurisdiction and not choice of law.[14] His Honour similarly regarded views expressed in two New South Wales Court of Appeal decisions, and seemed to find a third not as persuasive as *Godleman*, as unlike *Godleman* it was concerned with liability and not with the further questions of damages.[15] In *Kemp* v. *Piper*[16] a majority of the South Australian Full Court applied the *lex fori*, but Shepherdson J. did not accord the decision much weight as Bray C.J. (with whom Mitchell J. agreed) also pointed out that the same result in the case would have been achieved by applying the Lord Wilberforce and Lord Hodson approach. Hogarth J. dissented and applied the flexibility approach.

Shepherdson J's judgment is with respect a study in judicial technique in its methodical and logical canvassing of the authorities. However, although there certainly is persuasive authority in favour of the acceptance of the Lord Wilberforce approach in Australia, it is submitted with respect that there is a more compelling weight of authority in favour of a rigid application of the *lex fori*.

But even if that submission is incorrect, it is further submitted that his Lordship's approach (and Shepherdson J. at least does not purport to rely on the so-called separate but overlapping majorities in *Chaplin* v. *Boys* to justify a wider flexibility approach) cannot be superimposed on the jurisdictional view the High Court has taken of *Phillips* v. *Eyre*. Lord Wilberforce's speech seems to rest upon his interpretation of Willes J's test as a choice of law rule and in particular his interpretation of the second condition: "civil liability in respect of the relevant claim". The basic tenet pervading the speech is that a plaintiff should not as a general rule be able to claim in the *locus fori* that for which civil liability does not exist under the *lex loci delicti*. It is here then that flexibility comes into consideration. One wonders whether applying the contact principle to qualify the *lex fori*, which operates after the threshold hurdles of *Phillips* v. *Eyre* have been overcome, is an unjustified extension beyond that which was originally intended.

13. Unreported – 27th October, 1986.
14. (1965) 114 C.L.R.20; (1951) 84 C.L.R.629.
15. *Schmidt* v. *Government Insurance Office* [1973] 1 N.S.W.L.R.59, and *Walker* v. *W.A. Pickles Pty. Ltd.* [1980] 2 N.S.W.L.R.281; *Kolsky* v. *Mayne Nickless* (1979) 72 S.R. (N.S.W.) 437.
16. [1971] S.A.S.R.25.

At the time of writing the High Court has granted special leave to appeal and has reserved judgment in relation to both Shepherdson J's decision and the Full Court of Victoria's decision in *Godleman*. Its judgment will hopefully provide the "secure foothold for litigants and their advisers" which is desperately needed in this area.[17]

17. Lord Hodson in *Chaplin* v. *Boys* [1971] A.C. 356 at 378.