

1. SCOPE OF CONFLICT OF LAWS

When asked 'consider conflict of laws' then have to cover all topics ie jurisdiction, proof of foreign law etc. When asked solely about 'choice of law' issues then need to look more narrowly at place of tort etc.

Choice of law – in tort, contract, or governmental seizure of property.

Conflict of laws is WHOLE subject.

DEFINITIONS

Forum:	the place where litigation is taking place or contemplated.
Lex causae:	the applicable law identified by the forum's relevant choice of law rule
Lex fori:	the law of the place of the forum.
Lex loci delicti:	the law of the place of the wrong [tort].
Lex situs	the law of the location of the land.
Locus delicti:	the place of the wrong (tort).

BACKGROUND

Conflict of laws is concerned with private legal questions; with a focus on tort and contract (and some property) when it comes to choice of law with a relevant foreign element. Concerned with intra-national questions. Which legal system is to be applied? The introduction of a foreign element is what distinguishes these matters from normal Tort/Contract law.

International - where foreign element has a connection with a place outside Australia.

Intra-national - where the connection is with other Australian states or Territories.

A **foreign element** is a **relevant connection with another foreign legal system**, but it is important to determine whether the foreign element is relevant. Eg A NZ citizen has an accident in NSW whilst living there. Is the NZ element relevant? Not really. However, if the tort occurs in a foreign country, that is a highly relevant foreign element.

A relevant connection with a foreign legal system is concerned with the interplay of foreign legal systems (not sovereign).

Look at whether place is a geographical area, with its own legal system in matters of tort. Eg public liability/compensation law is different in the ACT from NSW. Problems exist with the individual states of US not with the US as a whole. Tort law in New York different from Florida/Miami. Scotland has separate system from England and Wales, and different again from Northern Ireland.

TOPIC: Choice of law – concerned with the question of which law will the NSW court apply. Which legal system. Which law will be applied in a case? Identify the particular legal system that will supply the rule that the NSW court will apply.

TOPIC: Substance and procedure. When we have a legal qn connected only in NSW (no foreign element) don't have to segregate substantive and procedural issues. But in international issues you have to – hence, **in all foreign matters, all matters of procedure governed by the law of the forum.**

TOPIC: Exclusionary doctrines: on no account will an Australian court enforce a foreign law that is contrary to Australian public policy, a foreign penal law, a foreign revenue law, or enforce a law that is against gross moral conscience.

Oceanic Sun Line Special Shipping Co v Fay (1988) 165 CLR 197: This case is the leading decision on the formation of contract. It concerned a catastrophic accident that happened on a Greek registered cruise ship in 1983. It concerned 3 different legal systems, QLD, NSW and Greece.

FACTS: Fay (Qld resident) wanted to take a cruise operated by Oceanic, with headquarters in Greece. Cruise conducted almost entirely in Greek territorial waters. Fay booked and paid for cruise through a travel agent in NSW. The Agent received an exchange order, receipt for payment of cost of cruise, identified cabin etc, together with a document stating that this paper will be exchanged for a ticket when the passenger boards the ship in Greece. This is what happened.

The ticket which was exchanged for the paper contained 2 significant provisions:

- In event passenger injured in accident, maximum liability of cruise was USD \$500.
- If there was any claim made then Courts of Athens had exclusive jurisdiction.

Fay catastrophically injured whilst shooting at clay targets... shotgun discharged backwards into his abdomen. Initially returned to NSW to undergo surgical procedures, then returned to QLD.

ISSUES: Fay wants to bring a damages/personal injury claim against Oceania – for negligence in provision of sporting equipment/shotgun. Fay commenced proceedings in the Supreme Court of NSW. HCA had to consider: Did the contract of carriage include those 2 provisions and which law determined that?

Jurisdictional issues: Defendant is Greek, Plaintiff in NSW. Personal jurisdiction – is this defendant subject to the power of the supreme court of NSW. In what circumstances will they be subject to the authority of the Supreme Court? Is Defendant in NSW, or have they voluntarily submitted to the jurisdiction. Even if Greek Defendant is subject to jurisdiction, is there something that would cause the Court to disallow it. Sch 6(e) UCPR... Def can be served outside NSW if Plaintiff has suffered loss or damage outside NSW. Discretionary non exercise of jurisdiction – circumstances where the court has jurisdiction but in its discretion refuses to exercise such discretion.

Tort/Contract claim: Fay bringing a tort claim. He could have brought it as a contract claim. What happens when concurrent liability in tort and contract? Every contract has a governing law, capable of identifying from start of contract - HCA was in no doubt that the law of Greece was the proper governing law.

Oceanic applied for a stay of proceedings due to exclusive jurisdiction clause. Fay says news to him. What Oceanic sought to do when Fay boarded the ship is impose 2 new terms. Which legal system determines whether an express provision

is a term of the contract? Greek law may have regarded those 2 conditions to be terms of the contract. HCA had to decide which legal system decides if those are terms of the contract?

HELD - HCA said it is NSW law, as the lex fori, that is applied to determine if those clauses form part of the contract. Applying NSW law, the contract was made in NSW at the time Fay paid and the exclusive jurisdiction clause did not form part of the contract.

Oceanic tried to then say forum non conveniens. But clearly an appropriate forum. Went to Court of Appeal – arguing only about where matter will be heard. Case came back to NSW for trial and settles, but not a happy settlement

Venter v Ilona MY [2012] NSWSC 1029: Johannes Venter was killed when he was caught between two hatches covering a helicopter deck on board the ship, the Ilona. His wife, Rachel, also part of the crew, witnessed the death and brought proceedings for compensation.

The most important thing to be decided in this case was where and when Venter died, as it will determine if the widow's compensation claim can be heard in NSW. Basis of claim is the negligent failure of his employer.

The incident occurred off the coast of Thailand – but precise location an issue.

Maritime torts specific: Was the ship on the 'high seas' (belongs to no sovereign state) or was it in Thailand territorial sea (within 3 mile range). If tort is committed on board a ship within the territorial waters of a state, then that state is the place the tort occurred. If committed on high seas, and confined within a single ship (ie no collision) then the place of tort is the place of registration of the ship.

Under Thai law, Mrs Venter could no longer bring a claim due to the short limitation period for the bringing of a fatal accident claim or personal injury claim – 1 year.

Qn: are limitation periods substantive or procedural?

The matter settled so nothing was established.

THIRD PARTY CLAIM: a third party claim was made by the operators of the ship against the German manufacturer. Contract claim brought against a German defendant - which legal system would determine whether a provision is a term of the contract? Same issues as *Oceanic Sun Line*. Contract contained an exclusive German jurisdiction clause. Law of NSW as lex fori determines whether matter can be heard in what jurisdiction. High bar to argue that notwithstanding a foreign jurisdiction clause, the matter should be heard in NSW. Proceedings in NSW stayed permanently pending German proceedings. Under German law however, a copy of the quote should have been attached to the contract, and because it wasn't, a type of [German] consumer guarantee applied, thereby making the exclusive jurisdiction clause not a term of the contract.

Re torts outside Australia, such as tort on the high seas or in a foreign country or territorial waters of country, **the substantive law that will be applied in Supreme Court of NSW is the lex loci delicti** – the law of the place the tort was committed.

NOTE one of the golden rules is lex fori – procedural issues will be done in accordance with NSW law.

2. CHOICE OF LAW IN TORT

Focusing on which system of law will be applied by Supreme Court of NSW in a tort case.

The first step is to determine whether a tort is a local tort (a tort committed in New South Wales) or a foreign tort. A tort is committed in the place where “in substance the wrongdoing occurred” or the place where there occurred the act or omission on the part of the defendant which gives the plaintiff a cause of complaint in law: *Distillers Co (Biochemicals) v. Thompson*. In the context of choice of law, the significance of the place where a tort was committed is that no choice of law issues (as distinct from possible issues involving jurisdiction over the defendant) arise in the case of a local tort. In such a case, New South Wales law (lex fori) is the only relevant law: *Szalatnay-Stacho v. Fink* (law of Czechoslovakia not relevant in proceedings in England between citizens of Czechoslovakia arising out of a defamatory statement published in England). However, in the case of a foreign tort, choice of law issues will require consideration. In particular, it will be necessary to consider the effect of the law of the place where the tort was committed (lex loci delicti).

FOREIGN TORTS, LOCAL TORTS, MARITIME & AERIAL TORTS

FOREIGN TORTS & LOCAL TORTS

The lex fori as the only relevant law in respect of local torts (torts committed in the forum). The place where a tort was committed – meaning a legal system/country.

Local Tort: committed in NSW. [The only relevant legal system is NSW]

Foreign Tort: committed anywhere outside NSW.

Intranational Tort: committed inside Australia.

International Tort: committed outside Australia.

With regard to a local court, the applicable substantive law is the lex fori – the law of NSW. Don't say there are no choice of law issues – there is a choice of law issue, it's the law of NSW. If tort happened in NSW the only relevant law is NSW: the only applicable substantive law. Substantive choice of law issues will only arise in foreign tort issues.

Foreign legal systems place great significance on the fact that the parties in a tort claim have a foreign connection, particularly if they have same place of residence. If we had a tort committed in NSW and parties both had a strong connection with a foreign country (like NZ – where no tort claim for personal injury & death), it is completely irrelevant in NSW.

Szalatnay-Stacho v Fink: [1947] 1KB 1. Both parties were Czech. Tort in question is tort of defamation. Plaintiff said he had been defamed in a letter written [in England] by the Defendant to the President of Czech-Slovakia. If Czech law was the relevant law, the Defendant had a complete defence, as there was immunity from tort law for officials for statements made in the course of official correspondence. In English law, only a defence of qualified privilege could apply. How do we know if

foreign element is relevant? Look at where the tort committed? Place where defamatory statement published – being England, therefore lex fori is England.

How do we determine where a tort is committed?

To determine the locus delicti, the basic test is the same for both personal jurisdiction and choice of law.

Distillers Co (Biochemicals) Ltd v Thompson: [1971] AC 458. concerns England and NSW. Defendant is Distillers Co, which manufactured in England a mild sedative known as 'Distaval'. Packaging said it was a mild sedative with no side effects. Imported in NSW and sold by prescription to the Plaintiff's mother. Plaintiff born with serious disabilities – plaintiff's contention is that the disabilities were as a result of the dangerous substance, thalidomide, contained in the drug. Plaintiff brought a claim in the Supreme Court in NSW. Only civil claim that the plaintiff can make is in tort.

Plaintiff wins in Supreme Court & Privy Council – but only insofar as where the case should be heard. Privy Council finds that tort occurred in NSW. What is the relevance of the location?

Defendant didn't carry on business in NSW/Australia but had an Australian distributor (who wasn't being sued). At common law – a Defendant is subject to NSW jurisdiction only if the defendant is present in NSW or if the defendant voluntarily submits to the jurisdiction. Defendant had substantial assets in NSW (half of south dowling st). Defendant had no intention of submitting. Use UCPR Pt 11 to serve outside Australia now. [then SC Rules Pt 10 1970]

s18(4) at the time stated: originating process can be served in England if the cause of action in tort arose in NSW. So court had to first deal with WHERE the tort was committed.

Pearson L: "The right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question, where in substance did this cause of action arise?"

The Distillers Test to determine the locus delicti:

- 1) The locus delicti is the place where 'in substance the wrongdoing occurred'.
- 2) The locus delicti is the place of 'the act (including an omission) on the part of the defendant which has given the plaintiff a cause of complaint in law'.

This is not a products liability complaint but a claim in negligent misrepresentation. Saying it is a safe and harmless sedative, or failing to advise of side effects. So act is negligent failure to warn the mother. The tort did not occur when packaged in England – but the misrepresentation is made at point of sale in NSW.

Defendant can't walk away from this matter as it has assets in NSW. Why didn't the Plaintiff sue in England directly? To do with development of tort law in 1960s. Up until this time, it was highly contentious whether common law duty of care is owed to the unborn. No appellate/trial court had found a common law duty of care

in favour of an unborn child. View of Plaintiff's legal advisors, was that the place where a court was more likely to find a common law duty of care was in Australia. They were absolutely right. Professional view was that at that time, an English court would find that no duty of care existed. Matter settled.

James Hardie & Co P/L v Putt: (1998) 43 NSWLR 554 & **Amaca v Frost:** (2006) 67 NSWLR635

Both cases concerned an application of the Distillers test. Dust disease re NZ residents. Claims being made in NSW for personal injury arising out of asbestos exposure. Place of tort is NZ – not about the negligent manufacture of the product. It was an inherently dangerous product which requires a lot of information to be given to users which did not occur. NZ residents hadn't been told to take stringent safety measures in using the product. **Act or omission was the negligent failure to warn the Plaintiff – place they should have been warned was NZ.** No civil liability under *lex loci* so no claim.

Dow Jones & Co v Gutnick: (2002) 194 ALR 433 HCA had opportunity to be first appellate court to deal with tort of defamation on the internet. With the tort of defamation by whatever means (letter, broadcast, internet statement), the place of defamation is the place of publication of defamatory statement, the time it is comprehensibly made to a third party. G was in Victoria – made claim in Victoria SC. DJ (publishers of Wall St Journal) had issued story including statements of G which were highly defamatory. Medium of publication of the statement? Headquarters of DJ was New Jersey. This was also the place of DJ's web server. Article was uploaded to web server in NJ. Publication was made available to online subscribers (500K+), 1300 in Australia, 300 in Victoria. Place of tort? Also made available in print form (14 print copies sold in Victoria).

HCA said the place of tort of defamation was Victoria, as the place of publication. Just because uploaded in NJ server doesn't matter. Unless that defamatory statement made to a third party, no tort has been committed. So once published in Victoria, defamation occurs. Publication can only take place when made available in comprehensible form – must be seen or heard. Could be seen only at the point it was downloaded in Victoria.

MARITIME TORTS

Definition: **A tort committed on board a ship.**

Territorial Sea – seas belonging to a state/country.

High seas - seas belonging to no one – or not subject to any jurisdiction.

Where a tort is committed on a ship at anchor or moored in the territorial waters of a foreign country, the locality of the tort is the foreign country (the coastal state), not the flag state (state of registration) of the ship as such: *MacKinnon v. Iberia Shipping Co*; *Union Shipping New Zealand v. Morgan*; *Saldanha v. Fulton Navigation*. Where a tort is committed on a ship on the high seas, the locality of the tort is the flag state: *Roerig v. Valiant Trawlers* (fatal accident involving death of a Dutch crew member on an English registered trawler on the high seas off the coast of West Africa).

In *Union Shipping New Zealand v. Morgan*, the New South Wales Court of Appeal left undecided the locality for choice of law purposes (and hence the applicable substantive law) of a tort committed on a ship engaged in innocent passage through the territorial waters of a foreign country with which the ship has no other connection. Query whether the same uncertainty applies to a tort committed on an aircraft engaged in innocent passage through the air space of a foreign country with which the aircraft has no other connection.

Maritime torts may be compared with crimes at sea. The Crimes at Sea Act 2000 (Com) provides that Australian criminal law (in particular, the substantive criminal law of the Jervis Bay Territory) applies at sea outside Australian territory to a criminal act on an Australian registered ship and to a criminal act committed by an Australian citizen (other than a member of the crew) on a foreign ship. At common law, for purposes of criminal jurisdiction, a foreign ship in Australian territorial waters is in Australian territory and is not a “floating island” of its flag state (*R v. Disun; R v. Nurdin*). Furthermore, at common law, a crime committed on an Australian registered ship in the territorial waters of a foreign state is subject to Australian jurisdiction even although the crime also may be subject to the criminal jurisdiction of the coastal state (*R v. Anderson*).

Note the observation of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in *Regie Nationale des Usines Renault v. Zhang*, at paragraph [76], that “special considerations” apply to maritime and aerial torts.

First distinction to draw is that a tort may be committed in the territorial sea or on the high seas. When on the high seas, there are 2 possibilities as to circumstances:

- 1) May be confined within a single ship – passenger on cruise ship may suffer personal injury.
- 2) May involve more than one ship – collision between 2 ships.

Pick

High Seas	v	Territorial/Coastal Seas	
(law of registration of ship)		(law of the state to which the seas belong)	

Then pick

One boat	v	more than one boat	
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Torts occurring in Territorial Seas of a Coastal State

If tort occurs within territorial waters of a coastal state, the place of the tort is the coastal state. The State exercises sovereign law over territorial seas.

McKinnon v Iberia Shipping Co: (1955) SC 20. Followed and applied by NSW Court of Appeal & English Admiralty Court. Involved Dominican Republic & its territorial sea (3 nautical miles). Within the 3 miles, was a British ship (registered in Scottish port of Glasgow) at anchor waiting to come into port. MacKinnon injured on board in an engine room accident. No doubt negligent failure of employer – workplace accident. When Mackinnon returns to home country he brings a personal injury

claim against operator of the ship. In 1955 no claim could be brought in Scotland unless there is civil liability in the place the tort was committed. In order to bring claim in Scotland, there needed to be civil liability for that head of damage, in the place that tort was committed. Under law of Dominican Republic, there was no head of damage known as pain and suffering. This is the current position of Australia TODAY in 2013.

This tort was to be treated as committed in the state of the Dominican Republic. No damages for pain and suffering existed in Dominican Republic therefore could not recover pain and suffering in Scotland.

Lord Carmont said doesn't matter if at anchor or navigating through the territorial waters. If ship is in sovereign territory of Dominican Republic then that is the law that applies.

This is an unresolved issue in NSW law – whether a ship was making innocent passage through the territorial waters. Court of Appeal said wasn't going to deal with that issue until it was raised as an issue in a matter.

Union Shipping New Zealand v Morgan: (2002) 54 NSWLR 690. Follows the McKinnon case.. accident on a NZ registered ship. Place of the tort? Tort on the ship is carried out in coastal state. NZ doesn't have common law damages for personal injury. Heydon J points out the absurdity that arises if member of crew injured and another person standing on the dock was injured. There was a matter left undecided in this matter; still unsettled – all 3 cases involve ships at anchor/moored. Would matter be different if ship was merely passing through coastal state – innocent passage? Case said highly unlikely it would make any difference.

Saldanha v Fulton Navigation: [2011] EWHC 1118. Followed above cases. Doesn't say anything new. Ship's engineer injured in an accident. Wales doesn't have its own private system of law – joins with England.

Torts occurring in High Seas

First distinction to draw is whether the tort involves one or more than one boat.

One Boat – law of the place of registration of the boat

If a tort is committed on and confined to one ship, then the place of the tort is the flag state of the ship.

Roerig v Valiant Trawlers: [2002] 1 WLR 2304. Concerned an accident which occurred off the coast of Africa (Morotania). A fatal accident that occurred abroad an English registered trawler, engaged in a fishing expedition. Precise location was the high seas at time of the accident. Surviving family of deceased member (wife) brought compensation to relatives claim in English High Court. **Place of tort issue for choice of law purposes... answer is very plain, English registered trawler on high seas – England!** But significant connections with the Netherlands as owner of trawler was Dutch company, deceased was Dutch etc, all connections with Netherlands. **But English CAppeal held apply English law.**

More than one Boat – the lex fori applies

If a tort is committed on the high seas, between 2 ships, the law to be applied is the lex fori - the law of the place where the claim is to be litigated. This includes collisions between a ship and an external object (ie iceberg, oil rig).

If maritime incident off coast of NSW, and matter heard in NSW, then law to be applied is lex fori. Even if 2 greek ships collided off NSW, if matter heard in NSW then the law to apply is the lex fori – law of NSW. The lex fori, for these purposes will include general principles of maritime law.

The Esso Malaysia: [1975] QB 198. Involved a collision on the high seas in 1969 off the East coast of US. The Esso tanker, which was registered in Panama, collided with a trawler registered in Latvia. All Latvia crew were killed. Arising from this incident, which has no apparent connection with England, the surviving members of crew brought a compensation to relatives claim in England – therefore English law to be applied. A fatal accident claim arising out of the death of foreign seafarers in a collision between two foreign ships on the high seas is governed by the lex fori, including the forum's fatal accident legislation.

HCA: Parker v Cth: (1965) collision of NSW coast between 2 Australian warships.

Collisions with external objects

- a. **Submarine Telegraph Company v Dickson** (1864) – ship collided with submarine cable. English law as lex fori applied.
- b. **Oceanic Steam Navigation Co Ltd v Mellor** (1913) - Loss of the Titanic. Litigation in US federal courts. British registered ship collided with iceberg. If claims arising from incident being litigated in US courts, then applicable law is lex fori – US law.

Crimes at Sea

In Australia, Cth legislation applies - Crimes at Sea Act. Applies Australian criminal law and Cth criminal code aboard an Australian registered ship anywhere in the world. Applies also to Australian citizen/national on board a foreign ship (except if a crew member) outside travelling in foreign waters/high seas.

- c. **R v Anderson:** quite apart from legislation, even at common law there is criminal jurisdiction with respect to a crime committed board an Australian registered ship even if that ship is in coastal seas of another state. US citizen, member of British ship, 45 miles up French river. Killed a crew member.
- d. **R v Disun; R v Nurdin:** concerned with the aftermath of the Tampa incident, August 2001. Involved the rescue at sea by the Norwegian ship, Tampa, of Indonesian refugees, which then proceed to Xmas Island, and when in the territorial waters of Xmas Island (aust waters), indonisian refugees charged under Migration Act. had federal police violated extradition treaty between Norway & Aust. Interesting argument: Indonesian crew members said, Tampa, being an Norway registered ship, was a 'floating part of Norway'. Aust violated treaty by boarding ship. Argument