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Reform of choice of law rules for tort

Jack Wass, Stout Street Chambers and Maria Hook, University of Otago, on the double actionability rule

INTRODUCTION

When cases involve a cross-border dimension, choice of law rules tell the court which body of substantive law applies to determine the parties' rights and obligations. For example, if a New Zealand employee contracted mesothelioma from exposure to asbestos in unsafe workplaces in Malaysia and Belgium, what law should govern their claim in negligence against their employer? What if they sue the Australian parent of their New Zealand employer instead?

English law traditionally applied the 'double actionability' rule to tort claims. There is now a broad judicial and academic consensus that the rule is outdated and no longer fit for purpose. It has been abolished in the United Kingdom, Australia and Canada.

We therefore welcome the introduction of the Private International Law (Choice of Law in Tort) Bill (the Bill), which Parliament referred to the Justice and Electoral Select Committee at the end of 2016. The Bill proposes to abolish the double actionability rule, instead requiring the court to apply the law of the place where the events giving rise to the claim occurred (the *lex loci delicti*), subject to a flexible exception that enables the court to apply the law of another country if it has a substantially closer relationship to the parties and the dispute.

THE DOUBLE ACTIONABILITY RULE

The double actionability rule applies to torts committed outside New Zealand. It has two elements:

(a) The plaintiff must establish *both* that the tort would have been actionable in New Zealand if it had been committed here *and* that the tort is actionable under the law of the country in which it was committed. If both elements are satisfied, the court nevertheless applies New Zealand law to the substance of the claim.

(b) However, if one country has the most significant relationship with the occurrence and with the parties, the substantive law of that country can be applied (to the exclusion of the other law): *Chaplin v Boys* [1971] AC 356 (HL), *Red Sea Insurance Co Ltd v Bouyges SA* [1995] 1 AC 190 (PC).

As originally developed in the nineteenth century, the rule consisted of the first element only so that the law of the forum would always govern the claim (*Phillips v Eyre* (1870) LR 6 QB 1); that betrayed its genesis in a time when foreign law was difficult to prove and English courts were suspicious of foreign legal systems.

It has been generally assumed that the double actionability rule forms part of New Zealand law. No case has squarely confronted the question of whether that is or should be so (although Mahon J discussed the issue in an *ex parte* context in *Richards v McLean* [1973] 1 NZLR 521 and Potter J acknowledged the issue in *Waterhouse v Contractors Bonding Ltd* [2012] NZHC 566). Since the rule has never been considered by the appellate courts, it is arguable that the High Court would be entitled to adopt a different rule even without legislative intervention. Hopefully that will prove unnecessary, except perhaps for cases arising out of events prior to the enactment of the Bill. In the meantime, the rule continues to occupy the courts, as demonstrated by the High Court's recent consideration of the relationship between double actionability and the scope of the statutory bar in the Accident Compensation Act 2001 (*McGougan v DePuy International Ltd (No 1)* [2016] NZHC 2511, [2017] 2 NZLR 119).

ALTERNATIVE APPROACHES

There is no good reason to retain the double actionability rule. Despite valiant judicial efforts to shape the doctrine into an effective choice of law rule by the development of the flexible exception, most notably by Lord Wilberforce in *Chaplin v Boys*, it remains parochial, overly elaborate, difficult to articulate and as a consequence of its progressive evolution enduringly uncertain.

While the United States had already developed its own concept of the 'proper law' of the tort — most notably through the *Restatement (Second) of the Conflict of Laws* in 1972 — it was not until the late twentieth century that Commonwealth jurisdictions fully seized the nettle. Change was brought about by judges in Canada (*Tolofson v Jensen* [1994] 3 SCR 1022) and Australia (*John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Régie Nationale des Usines Renault SA v Zhang* (2003) 210 CLR 491) and by legislation in the United Kingdom (the Private International Law (Miscellaneous Provisions) Act 1995 (the UK Act)). Its abolition by statute has been proposed in Singapore, but in the meantime the courts still apply the double actionability rule (*Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 (CA)).

The real question is what rule should replace double actionability. There are at least three alternatives:

(a) Apply the law of the place where the tort was committed (the *lex loci delicti*) without exception. This is the rule adopted in Australia.

(b) Apply a general *lex loci delicti* rule, but displace that rule where the case is substantially more closely connected with another country. This is the approach adopted in Canada and the United Kingdom and proposed in Singapore.

(c) Apply the 'proper law' of the tort by asking which jurisdiction has the 'most significant relationship' with the case and the parties. This is the approach proposed

in the *Restatement (Second) of the Conflict of Laws*, and adapted in various ways in the jurisdictions of the United States.

Special note should be made of the European approach. Civilian legal systems have traditionally favoured the *lex loci delicti*, but the Rome II Regulation that now governs choice of law in tort across the European Union adopts as the basic rule the law of the place where the damage occurred (the *lex loci damni*) with various exceptions and special rules for individual torts (Regulation (EC) No 864/2007, Recitals (15)–(19)).

The three alternatives are on a spectrum: the Australian approach is predictable but rigid; the Canadian and English approaches ameliorate that rigidity by allowing an exception, but only in rare cases; while the 'proper law' approach gives the court the greatest scope to identify the most appropriate law to govern the case in light of the parties' circumstances, but that flexibility means that the result in a given case may be uncertain.

The English approach was settled after a comprehensive law reform process, including two joint reports of the English and Scottish Law Commissions (Working Paper No 87/ Consultative Memorandum No 62 (1984) and Report No 193/ Report No 129 (1990)). The UK Act applied from 1995 until the Rome II Regulation came into force in 2009 (and continues to apply to cases falling outside the material scope of the Regulation). The New Zealand Bill is modelled on the UK Act, and with a few exceptions adopts its precise wording. This was a wise choice. It should be noted that the Explanatory Note to the Bill suggests that the 'presumptive choice of law rule for tort is that the proper law applies'. That is potentially misleading, since the Bill does not propose the adoption of the 'proper law of the tort' approach as that concept is generally understood, but the *lex loci delicti*.

THE BILL'S PROPOSED CHOICE OF LAW RULE

Clause 7 provides the general rule: the applicable law is that of the jurisdiction in which the elements constituting the tort occur. Where they occur in different jurisdictions, the applicable law for property damage is the location of the property when it was damaged, and otherwise the jurisdiction in which the most significant element/s of the events constituting the tort occurred.

Clause 8 allows the court to displace the general rule where it is substantially more appropriate for the law of another jurisdiction to govern the claim, in light of the significance of the factors connecting the tort with each jurisdiction. Those factors include those relating to the parties, the events constituting the tort, and the circumstances or consequences of those events.

Although the United Kingdom, Australia and Canada all apply the *lex loci delicti*, there is an important difference in implementation between the jurisdictions. In Australia, for example, courts must identify the 'place of the tort', and to do so they 'look back over the events constituting [the tort] and ask, where in substance did this cause of action occur?' (*Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458). The High Court of Australia has acknowledged how difficult that can be (*Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at [43]). In the case which inspired the fact scenario described at the start of this article, a minority of the Victorian Court of Appeal decided that the tort was committed where the employee was exposed to asbestos in the overseas factories, a majority of the Court found that the tort was committed in New Zealand where the employer was based, and the High Court of Australia found that it was not possible to make even a preliminary finding on the question in advance of trial (*Puttick v Tenon Ltd* (2008) 238 CLR 265).

The Bill (following the UK Act) cuts through these difficulties by asking where the events constituting the tort occurred. Where those events occurred in different countries, the most significant element or elements of the tort determine the applicable law. For property damage, this is deemed to be the country where the property was located when it was damaged. Although this test still requires a value judgement, it avoids the fiction that a tort is a unitary construct that occurs in one place, where it is really an aggregation of acts, omissions and consequences which may have occurred in different countries.

The UK Act also provides, as a companion to the property damage rule, a special rule for personal injury cases, likewise focusing on the place where the victim was located when they suffered the injury. The Bill omits this limb, presumably because the statutory bar in s 317 of the Accident Compensation Act 2001 severely curtails personal injury litigation in New Zealand. But the statutory bar only applies where there is cover, and even then it may be necessary for the court to decide what law is applicable to a personal injury claim. Although the courts would be free to achieve the same result by the application of the general rule, we suggest that Parliament reinstate a personal injury rule to make the matter clear.

Clause 8 of the Bill allows the general rule to be displaced where it is substantially more appropriate for the law of another country to apply, taking into account the significance of the factors connecting the tort with each jurisdiction. This deliberately imposes a high threshold, and the equivalent provision in the UK Act has been successfully invoked on very few occasions (Lord Collins (gen ed) *Dicey, Morris and Collins on the Conflict of Laws* (15 ed, 2012) at [35–148]).

POLICY ISSUES

We now address some specific policy issues that have arisen out of New Zealand and overseas experience.

Defamation

The UK Act controversially excluded claims in defamation, which continue to be governed by the double actionability rule. This ensures that English defendants may continue to rely on defences available under English law (such as fair comment or qualified privilege) that might not be available under the law of the place of publication.

The Bill does not make special provision for defamation, which will accordingly be treated like any other tort. In our view that is appropriate: sustaining the double actionability rule for this limited purpose would be perverse and inefficient. In principle a defendant who chooses to publish a statement overseas ought to be prepared to answer for it under the law of that jurisdiction, and the New Zealand courts will retain their power to disapply any rules of foreign law that conflict with public policy (see cl 9(3)(a) of the Bill).

Intellectual property

Particular difficulties have arisen with respect to breach of intellectual property rights, including where the plaintiff alleges infringement of a right created by another country's legislative intellectual property regime.

In *Kabushiki Kaisha Sony Computer Entertainment v van Veen* HC Wellington CIV-2004-485-1520, 14 December 2006, Sony sued Mr van Veen *inter alia* for breaches of the United Kingdom and Hong Kong copyright legislation alleged to have been committed in those countries.

The first question was whether the *Moçambique* rule applied, which precludes the court from hearing claims involving questions of title to foreign immovable property (*British South Africa Co v Cia de Moçambique* [1893] AC 602). MacKenzie J found that the court could entertain a claim where title was not disputed but breach was in issue. Goddard and McLachlan have argued that the *Moçambique* rule should be abolished entirely, leaving the matter to the court's power to decline jurisdiction where New Zealand is not the appropriate forum (*Private International Law: Litigating in the Trans-Tasman Context and Beyond* (NZLS, 2012) at 157). Such reform should be comprehensive, and is beyond the scope of the Bill.

The second question in *Sony* was whether the double actionability rule barred the claim. MacKenzie J decided that for the purpose of applying the first limb of the rule (whether the act complained of would have been actionable in New Zealand if it had been committed here), it was necessary to 'effect a notional transfer to New Zealand, for consideration under New Zealand law, of both the infringing act, and the intellectual property infringed' (at [25]). Otherwise, an action for infringement of foreign intellectual property could never be prosecuted in New Zealand and separate proceedings might be required in every jurisdiction. The abolition of the double actionability rule renders such mental gymnastics unnecessary: the court can simply apply the law of the place where the breach occurred, including the intellectual property regime applicable in that country.

There remains the question whether special rules ought to be included in the Bill to specify the law applicable to defamation and breach of intellectual property rights (as for damage to property). Proposed legislation in Singapore specifies that the law applicable to infringement of intellectual property is the law of the country where the infringement occurred (Draft Torts (Choice of Law) Bill 2003, s 5(2)(c)). Whether or not such a case would be caught by the general property rule in cl 7(2)(b) of the New Zealand Bill, we consider that the general choice of law rules in the Bill are sufficient and it is not necessary to make specific provision for defamation or breach of intellectual property.

Should the Bill exclude renvoi?

When the court is directed to apply the law of a foreign country, does this include that country's conflict of laws rules? If so, those rules might direct the court back to New Zealand law. This is the doctrine of *renvoi*. In *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331, the High Court of Australia held that *renvoi* applied to tort claims. The plaintiff had been injured in an apartment provided by her husband's employer in China. The *lex loci delicti* rule directed the application of Chinese law, but Chinese choice of law rules made an exception to that rule where both parties were nationals of another country. A majority held that applying the 'whole of the foreign law' resulted in the application of Australian law to the substance: otherwise the Court risked applying Chinese law when Chinese courts themselves would not have done so. McHugh J dissented, arguing that it was logically impossible to apply the whole of the foreign law, in particular because that could include Chinese *renvoi* rules and result in infinite regression.

Clause 5(3) of the Bill, following the UK Act, excludes *renvoi*. The English and Scottish Law Commissions concluded that the application of *renvoi* would create uncertainties and would not meet the parties' reasonable expectations (1990, [3.56]). The debates in the High Court of Australia about the difference between single and double *renvoi* and the potential for infinite regression also demonstrate why the inclusion of *renvoi* would cause more harm than good. As the Law Commissions pointed out, the whole point of choice of law rules is to identify the body of substantive law that the New Zealand court considers should govern the claim; whether or not a foreign court would choose that law is beside the point.

Agreement as to the applicable law

It is well established in New Zealand law that parties can choose the law to govern their contractual relationship. An increasingly common feature of choice of law rules overseas is that parties may agree to choose the law applicable to their whole relationship, including tort claims (see, most relevantly, art 14 of the Rome II Regulation). The Bill does not expressly permit parties to choose the law applicable to tort claims. This omission is consistent with the UK Act, and it is in line with the Bill's relatively modest purpose of abolishing the double actionability rule. But the omission gives rise to some uncertainty. In particular, it is unclear whether the Bill would preclude a court from giving effect to such an agreement at common law. If a New Zealand employer and an employee based in Belgium had contracted that New Zealand law should govern any dispute between them, including any issues relating to tort, could the court give effect to the parties' intention despite the choice of law rules in cls 7 and 8?

On the current drafting of the Bill, the court could apply the chosen law if there was already an established common law rule that recognises the parties' choice and takes precedence over the double actionability rule (because cl 9(2) confirms that the Bill is only intended to affect those issues that are currently governed by double actionability). However, it is doubtful that such a rule has crystallised in New Zealand. The court may still be able to give *indirect* effect to the parties' intention by relying on the flexible exception in cl 8 (see, for example, *Kingspan Environmental Ltd v Borealis A/S* [2012] EWHC 1147). But it would strain the wording of cl 8 — which requires 'a comparison of the significance of the factors' connecting the tort with the affected jurisdictions — to suggest that the chosen law would necessarily displace the generally applicable law.

In light of the growing importance of the principle of party autonomy in the conflict of laws, it would be shortsighted to close the door to common law development in this area. We suggest that Parliament clarify that the Bill is confined to the realm of objective choice of law — that is, the determination of the applicable law in the absence of agreement — which will leave the courts free to develop rules giving effect to choice of law agreements in appropriate cases. ❐