



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Private International Law (Choice of Law in Tort) Bill

01/02/2017

Private International Law (Choice of Law in Tort) Bill

1. Summary

- 1.1 The New Zealand Law Society welcomes the opportunity to comment on the Private International Law (Choice of Law in Tort) Bill (Bill).
- 1.2 The Law Society supports the Bill's abolition of the double-actionability choice of law rule for tort, and the establishment in its place of a simplified place-of-the-wrong choice of law rule with a flexible exception for appropriate circumstances.
- 1.3 The Bill largely adopts the scheme and language of Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (UK) (the UK Act). The fact that the Bill is almost identical to the UK Act is likely to be helpful by providing recourse to a body of case law in the United Kingdom to assist with the interpretation and application of the legislation in New Zealand.
- 1.4 The Law Society's comments on the Bill relate to those areas in which the Bill departs from the UK Act. In summary, the Law Society recommends that:
 - 1.4.1 Clause 5(1) of the Bill concerning characterisation should be amended to better correspond to the equivalent provision of the UK statute, so as to avoid any suggestion of an intention different to the UK provision.
 - 1.4.2 The Bill should include a sub-paragraph in clause 7 that adopts the language of section 11(2)(a) of the UK Act to provide a general choice of law rule for personal injury cases.
 - 1.4.3 Clause 9 of the Bill should contain a more explicit protection for freedom of speech and other rights by including express reference to the New Zealand Bill of Rights Act 1990, and making it clear that where a foreign law infringes on freedom of expression or other rights protected by the Act, that factor may be taken into account by the courts in determining whether it is appropriate to displace the general rule.

2. Clause 5(1) – characterisation a matter for the courts

- 2.1 Clause 5(1) of the Bill states:

For the purposes of private international law, the characterisation of issues arising in a claim as issues relating to tort is a matter for the courts.
- 2.2 The wording of the sub-clause differs slightly from the equivalent provision of the UK Act.¹ The UK provision states:

The characterisation for the purposes of private international law of issues arising in a claim as issues relating to tort ... is a matter for the courts of the forum.

“Forum” is then defined² in section 9(7) as England and Wales, Scotland or Northern Ireland, as the case may be.
- 2.3 The difference in wording between the Bill and the UK provision has the potential to be confusing and to suggest that the intention is something other than that of the UK statute. The intention of the United Kingdom provision is well understood: the process of characterisation is a question for the court of the forum but is carried out for the purposes of private international law.

¹ Section 9(2) of the UK Act.

² Section 9(7) of the UK Act.

Accordingly, the court should have regard to the nature and content of the foreign rule so as to determine whether it falls within the general rubric of liability in tort, flexibly interpreted.³ (“[T]he word ‘tort’ in section 9(1) and (2) is to be construed broadly, so as to embrace non-contractual civil wrongs that give rise to a remedy”.⁴) The claim does not have to sound in tort in domestic law – that would be irreconcilable with the primary purpose of the legislation, which is to abolish the requirement of double actionability.

- 2.4 Assuming that clause 5(1) of the Bill is intended to serve the same purpose as section 9(2) of the UK Act, it would be helpful to clarify this by adding the words “of New Zealand” at the end of the existing words of the sub-clause.

3. Clause 7 – general rule and omission of specific rule for personal injury

- 3.1 Clause 7 of the Bill sets out the general rule that the applicable law is the law of the jurisdiction in which the events constituting the tort occur – or, in cases where those events occur in different jurisdictions, the jurisdiction where the most significant elements occur, with a specific rule for damage to property, being the law of the jurisdiction where the property was when it was damaged.
- 3.2 The effect of clause 7 is that, where the general rule results in the applicable law being the law of another jurisdiction, defendants to proceedings in the New Zealand courts may be held civilly liable under a foreign law for conduct which may not give rise to civil liability under New Zealand law.
- 3.3 The clause is almost identical to section 11 of the UK Act but omits section 11(2)(a), which sets out a specific choice of law rule for torts causing personal injury as being the law of the country where the individual was when the injury was sustained. It is not clear why this subsection of the UK Act has been omitted. Choice of law issues are often particularly problematic in personal injury cases and identifying a general rule is therefore highly desirable.
- 3.4 It may be that the drafters of the Bill considered that provision for personal injury cases was unnecessary in view of the statutory bar on personal injury claims in section 317 of the Accident Compensation Act 2001. However, while the section is likely to apply to most personal injury claims that have a significant connection with New Zealand, cover may not exist in all circumstances. Moreover, the statutory bar only prevents claims for compensatory damages. Claims for exemplary damages, and potentially other remedies, remain available. The existence of the statutory bar does not obviate the desirability for a clear general choice of law rule for personal injury.
- 3.5 The Law Society accordingly recommends the inclusion of a sub-paragraph in clause 7 that adopts the language of section 11(2)(a) of the UK Act to provide a general rule for personal injury cases. To avoid any risk of this being seen to compromise the effect of the statutory bar, we recommend also adding a further sub-paragraph to clause 7 stating expressly that nothing in the Act affects the application of the Accident Compensation Act 2001. In the Law Society’s view, this would make it sufficiently clear that the statutory bar, where applicable according to the terms of that Act, prevails over the application of foreign law to a personal injury claim.

4. Defamation claims

- 4.1 Unlike the UK Act, which expressly excludes defamation claims, the Bill makes no specific provision for defamation. As a consequence, under the regime to be introduced by the Bill, where a statement made in New Zealand has been published overseas, the courts may find that the applicable law is the law of the foreign jurisdiction in which the publication took place, on the grounds that publication is the most significant element of the tort. This gives rise to the risk that speech that would be protected under New Zealand law, for example, by qualified privilege, may

³ See *Dicey, Morris & Collins The Conflict of Laws* (15th edition, 2012) at 35-134.

⁴ *Trafigura Beheer BV v Kookmin Bank Co* [2006] EWHC 1450 (Comm) at [70].

be subject to an action in the New Zealand courts applying a foreign law that does not recognise the same privilege. The Law Society considers that the Bill should be amended to some extent to reflect the values of New Zealand society in respect of freedom of speech and other fundamental rights and freedoms.

- 4.2 The issue in respect of defamation was identified by the Law Commissions of England and Scotland in their joint report preceding the introduction of the UK Act: *Private International Law Choice of Law in Tort and Delict*.⁵ The Report commented (at 3.28):

The tort of defamation has given rise to some particularly intractable problems, for a number of reasons. The primary difficulty concerns the implication of reform for the right of free speech of those who make statements in the United Kingdom. If a foreign law is to govern the liability of a defendant who makes a statement in the United Kingdom, the defendant could be held liable when, under our domestic law, he may have had available defences of absolute or qualified privilege, fair comment or justification or perhaps all of these.

And (at 3.29):

Another problem is that a statement may originate in this country but be disseminated in many countries. The maker of the statement may have little or no control, over where it goes.

The Law Commissions concluded (at 3.31):

The fact that there is no uniform concept of defamation in different regimes of private international law, and the fact that the relevant foreign law would impose liability when English or Scots law would not, are not factors which are unique to defamation. However, we believe that, given the public interest in free speech and in the proper functioning of public institutions, it is not desirable that those who make statements in this country should have their freedom of expression circumscribed by the application of foreign law, especially if they are to be held liable in our courts for torts which we do not recognise, for example, invasion of privacy.

- 4.3 The Law Commissions therefore recommended (at 3.32) that where a jurisdiction within the UK was the origin of the statement in question, the relevant UK law should apply, regardless of where the statement was subsequently published. This proposal was not adopted in the UK Act but the status quo (requiring double-actionability) was preserved by section 13, which excludes defamation from the general rule established by the Act.
- 4.4 The Law Society agrees with the English and Scottish Law Commissions that the difficulty of limiting publication of a statement (especially via the internet) to specific jurisdictions does provide a rational basis to distinguish between defamation and other torts. By comparison, a manufacturer of goods has a greater (if not complete) measure of control over the jurisdictions to which they export.
- 4.5 However, the Law Society does not consider that the approach proposed by the Law Commissions or taken in the UK Act should be adopted in New Zealand. The Law Society does not consider that foreign law should never govern a defamation claim, irrespective of the circumstances. Rather, the Law Society proposes that the Bill be amended to specify that New Zealand values regarding freedom of speech should be taken into consideration when determining the applicable law in the context of defamation claims.
- 4.6 The Bill already provides mechanisms by which the courts can potentially give effect to these values

⁵ December 1990, Law Com. No.193, Scot. Law Com. No. 129.

– either through the application of clause 8, which provides for displacement of the general rule where it is “substantially more appropriate” for the applicable law to be the law of another jurisdiction, or clause 9(3), which preserves the existing common law bar against the application of a foreign law which is contrary to principles of public policy. However, in the case of the former, the focus is on the factors of the case that connect a tort with a particular jurisdiction, and in the case of the latter, the courts have generally confined the public policy exception to a very narrow range of circumstances.

- 4.7 Given the importance of the issues at stake, the Law Society suggest that consideration is given to providing more explicit protection to freedom of speech and other rights by including express reference to the New Zealand Bill of Rights Act 1990 to make it clear that where a foreign law infringes on freedom of expression or other rights protected by the Act, that factor may be taken into account by the courts in determining whether it is appropriate to displace the general rule. Clause 9 would seem to be the proper place for a provision to this effect.

Conclusion

- 5.1 The Law Society does not wish to be heard, but is available to meet with the officials advising on the Bill if the Committee considers that this would be of assistance.

A handwritten signature in black ink, appearing to read 'Kathryn Beck', written over a horizontal line.

Kathryn Beck
President
1 February 2017