

Choice of law, forum non conveniens and asbestos in the Victorian Court of Appeal

In Australia, the applicable law in negligence cases is the law of the place of the tort: *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491; [2002] HCA 10. On a number of occasions in recent years, Australian courts have dealt with difficult choice of law issues arising out of negligent omissions, asbestos-related injuries and overseas plaintiffs: see, eg, *James Hardie Industries v Hall* (1998) 43 NSWLR 554; [1998] NSWSC 434; *James Hardie Industries v Grigor* (1998) 45 NSWLR 20; [1998] NSWSC 266; *Amaca Pty Ltd v Frost* [2006] NSWCA 173.

In *Puttick v Fletcher Challenge Forests Pty Ltd* [2007] VSCA 264, the Victorian Court of Appeal recently considered the related question of whether Victoria was *forum non conveniens* for an action in which the Victorian-resident plaintiff sued the New Zealand-incorporated holding company, Fletcher, of his former New Zealand-incorporated employer for negligence in relation to his exposure to asbestos in factories in Belgium and Malaysia which the plaintiff visited at the direction of his employer. At the relevant time, the plaintiff was resident in New Zealand and was employed there.

In accordance with the High Court's decisions in *Zhang* and *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; [1990] HCA 55, a stay of proceedings on the grounds of *forum non conveniens* would only be granted if Victoria was a 'clearly inappropriate forum'. This is a more difficult test to satisfy than showing that another forum is a 'more appropriate forum': cf *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460. The first instance judge concluded that many witnesses and relevant documents would be located in New Zealand, but that this, of itself, did not mean that Victoria was a clearly inappropriate forum. However, his Honour then concluded that the applicable law was that of New Zealand and that this, taken with the other factors, meant that Victoria was a clearly inappropriate forum. The key issue on appeal was whether New Zealand law applied.

A 2:1 majority of the Court of Appeal (Warren CJ and Chernov JA; Maxwell P dissenting) agreed with the trial judge that New Zealand law did apply and, accordingly, that Victoria was *forum non conveniens*. The negligence asserted by the plaintiff was that Fletcher: (1) caused or permitted him to be exposed to asbestos in Belgium and Malaysia; (2) failed to provide and maintain a safe system of work for him whilst he was working in Belgium or Malaysia; and (3) failed to warn or instruct him or his employer about the need for protective clothing and equipment whilst working with or exposed to asbestos dust.

The majority considered that each of these acts occurred in New Zealand, there being no act or failure to act in Belgium or Malaysia to which the plaintiff could point which constituted an alleged wrong. Any action which Fletcher should have taken (eg to give further warnings or instructions) would have been taken in New Zealand, and the instructions to visit Belgium and Malaysia were given by the employer and received by the plaintiff in New Zealand.

In contrast, the minority characterised the plaintiff's complaint as having been exposed to unsafe workplaces in Malaysia and Belgium. Fletcher's conduct in New Zealand created the risk of harm to the plaintiff, but that risk did not assume significance (i.e. the negligent conduct was not completed) until the plaintiff was exposed, without warning or protection, to asbestos in Malaysia and Belgium.

Both the majority and the minority sought to argue that their respective positions were supported by the cases mentioned above in which Australian courts have previously considered similar issues. Ultimately, cases such as *Puttick* exemplify the difficulties associated with locating the place of the tort in cases of negligent omission. It remains to be seen whether the plaintiff will seek special leave to appeal this decision to the High Court.