Proof of Foreign Law in Australia

In Australia, as in England, foreign law is treated as a matter of fact, not law, and its content must therefore be pleaded and proved if a party wishes to rely on it. On the other hand, the principle traditionally known as the "presumption of similarity" (or "presumption identity") means that foreign law will be assumed to be the same as local law unless the contrary is demonstrated. For this reason, local law is generally applied by default even in cases otherwise governed by foreign law, as it is usually in neither party's interests to go to the trouble of researching and proving foreign law. However, in rare cases Australian judges have declined to apply Australian law by default, the leading example being *Damberg v Damberg* (2001) 52 NSWLR 492.

Now, in *National Auto Glass Supplies (Australia) Pty Ltd v Nielsen & Moller Autoglass (NSW) Pty Ltd* [2007] FCA 1625 (26 October 2007), Graham J of the Federal Court of Australia doubted the applicability of the New South Wales law of defamation to a case otherwise governed by Hong Kong and mainland Chinese law, and denied the applicants relief because they failed to prove the relevant foreign law. The case concerned (among other things) an allegedly defamatory email read by recipients in Hong Kong and mainland China. His Honour observed that:

> *"In making these findings [about the allegedly defamatory] email I have assumed that the defamation law in the Special Administrative Region of Hong Kong and in the remainder of the People's Republic of China is the same as it is New South Wales. However, as I said [earlier in the judgment, after discussing Damberg v Damberg and other cases on the presumption of identity]:*
>
> *'… the general presumption that, in the absence of evidence to the contrary, foreign law is the same as Australian law is not inflexible. Where the law of the forum is governed by a statute and the law within Australia is itself lacking in uniformity, I doubt whether it could be presumed that the defamation law in China, including the Special Administrative Region of Hong Kong, is the same as it is in New South Wales.'*
>
> *In the absence of evidence as to the relevant defamation law in the Special*

> *Administrative Region of Hong Kong and in the remainder of the People's Republic of China or at least that part where [the recipient] was located at the time when he received the … email, I do not consider that any award of damages should be made referable to the transmission of the … email to [the recipients in Hong Kong and China]. The relevant defamation law (if any) has not been proven."*

While the default application of Australian law is usually just and convenient, there are certain areas of law in which this default application should be overridden because it would be unfair or anomalous, especially so when local law is idiosyncratic. Although some judges have applied Australian defamation law by default in other cases governed by foreign law, defamation is an area of law which differs markedly around the world, and until the recent uniform Defamation Acts, the law of NSW was particularly idiosyncratic even in comparison with the other Australian States. Thus, it could hardly be said that the "presumption of similarity" was a realistic or fair approximation of the actual content of foreign law in this case.

Note: Although the common law "place of publication" choice of law rule continues to apply in Australia regarding defamatory material published overseas (see *Dow Jones v Gutnick*), the uniform Defamation Acts altered the rule applicable to material published within Australia so as to apply the law of the "Australian jurisdictional area with which the harm occasioned by the publication as a whole has its closest connection".