

Forum Shopping - ACT Supreme Court

By: Dianna Prosser, ACT

Dawson -v- Baker Marchant -v- Brown Brown -v- Marchant, 22 June 1994 - ACT Supreme Court.

Three cross-vesting applications recently came before the Full Court of the Australian Capital Territory Supreme Court (coram: Miles C.J., Gallop and Higgins JJ.) after being referred by a single judge pursuant to section 13 of the Supreme Court Act 1933 (ACT). Single judge decisions in the court had left the legal profession in some doubt as to the approach by the court to claims being brought by plaintiff's in the ACT where accidents occurred in other states. It had become rather difficult to advise clients on the appropriate jurisdiction.

In each of the cases there was a motor vehicle accident in NSW and the plaintiff's brought their claims in the ACT. Two of the matters were related. The parties were each claiming that the other caused the accident when their motor cycles collided. Liability was fairly simple in the third matter. In two of the matters the defendants did not live in the ACT. Service had been effected pursuant to the Service and Execution of Process Act 1992 (Cth).

Each of the defendants applied to remove their matter to NSW, where the legislation restricts recovery of damages. There was substantial argument on the issue of onus of persuasion for transfer. Higgins J (in a judgment adopted by Miles C.J., and Gallop J.,) said, "At the end of the day, the issue as to whether or not the proceedings are to be transferred must be determined on the basis that the Court has been persuaded that the interests of justice require it. A party seeking that result therefore has the task of persuading the Court in which the action is pending that the interests of justice require a transfer". He went on to say that the "real issue is as to the range and relative weight of matters which are relevant to whether a transfer of proceedings is or is not in 'the interests of justice'".

Higgins J. noted that the interests of justice would vary from case to case, but some guidance can be gained from decided cases. He set out some matters which will be significant in determining the 'interests of justice'. They included:

Application of substantive law. If the law to be applied is that of the transferee jurisdiction, transfer will be favoured if that law is peculiar to that jurisdiction. This would be particularly significant if the validity or interpretation of local legislation was in issue.

Forensic advantage or detriment conferred by procedural law. If there is a proper forensic advantage which a party might gain or lose by a transfer then that is relevant.

The choice made by the plaintiff of a forum and the reasons for that choice. The more cogent the reasons for a choice of forum the more weight can be afforded that choice whether or not the procedural laws are relevantly different. For example, the desire in Baffsky of the plaintiff to avoid possible unfair prejudice from a "home town" jury was of some weight.

Substantive connections with the forum Residence, domicile, place of occurrence and choice of law will all be relevant.

Balance of convenience to parties and witnesses. The comparative cost and delay will be relevant. However, there is a proviso that one court will not usually draw any adverse conclusion about the ability of another to deal as fairly and expeditiously with the matter as would the transferor court. Delay resulting from the transfer itself would be a relevant consideration.

Convenience to the court system.

Finally, Higgins J. said, "It is appropriate to transfer actions which have no relevant connection to the chosen jurisdiction. These matters each have a genuine and proper connection with the Territory. There is no reason, on balance, to interfere with the choice of forum made by the plaintiff."

Most matters will remain in the ACT Supreme Court if the plaintiff commences their action in that court and resides in that jurisdiction (and particularly if there are witnesses, including treating doctors, in the jurisdiction). Until the ACT Government introduces legislation limiting damages, there is a significant benefit in commencing actions in the ACT.