IN THE HIGH COURT OF AUSTRALIA

McGEE

V.

YEOMANS

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on THURSDAY, 23 SEPTEMBER 1976

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JUDGMENT

MASON J.

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On 11th April 1975 the plaintiff issued a writ out of the Principal (New South Wales) Registry of this Court against the defendant claiming damages for negligence for personal injury. On the same day the plaintiff filed a statement of claim which alleged that the action was one in which the Court had original jurisdiction because the plaintiff was a resident of New South Wales and the defendant was a resident of Victoria (s. 75(v) of the Constitution). The cause of action pleaded was that on 14th April 1969 the plaintiff was injured when a Ford motor vehicle which he was driving on a public road at Ingleburn in New South Wales was struck by a Mazda sedan negligently driven by Maurice Henry Yeomans ("the deceased"). The statement of claim then alleged that the deceased died and that on 28th October 1969 letters of administration in his estate were granted to the defendant by the Supreme Court of Victoria. The writ was filed and not served. It was renewed for a period of six months on 8th April 1976 and was subsequently served on 15th July 1976.

The defendant then took out a notice of motion seeking orders setting aside the writ and service of the writ on a variety of grounds of which only one has been pressed in argument. This ground is that the statement of claim discloses no cause of action in that the only grant of representation in

the estate of the deceased was to the defendant in Victoria and that no grant has been made in New South Wales. The notice of motion evidently proceeded on the assumption that this was a matter which went to the jurisdiction of the court, a notion now conceded to be erroneous, whereas in law it is a matter which in this Court goes to the existence of a cause of action. As such it should have been raised by demurrer or by an application to strike out the statement of claim under O. 26, r. 18 on the ground that the statement of claim does not disclose a reasonable cause of action. However, the plaintiff has not taken objection to the procedure which has been pursued and having heard argument I propose to deal with the motion as if it were an application to strike out the statement of claim on this ground. In so doing I put to one side the suggestion that the writ was irregular in that it did not bear endorsement making it plain that the defendant was sued in a representative capacity (O. 3, r. 3) because it is conceded that this constitutes at most an irregularity and does not reduce the writ to a nullity.

The defendant's point is that s. 79 of the Judiciary Act commands the court to apply the laws of the State in which the court is exercising jurisdiction - see Pedersen v. Young (1964), 110 C.L.R. 162, at pp. 165 and 167. In the present case that is the law of New South Wales where the action has come on for hearing and would be heard in the normal course of events. It has not been suggested that the action should be transferred for hearing to another State. Indeed, a change of venue to Victoria would have catastrophic consequences for the plaintiff because in that State the relevant limitation period had expired

before the action was commenced.

According to the defendant, the relevant New South Wales law to be applied by virtue of s. 79 includes s. 2 of the Law Reform (Miscellaneous Provisions) Act, 1944 (N.S.W.) ("the Act") which provides, so far as material:

> "2. (1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate . . ."

It is then said that, according to the law of New South Wales, the estate is represented, and only represented, by a legal personal representative to whom a grant of probate or letters of administration is made in New South Wales. An administrator appointed in a foreign State has no legal existence elsewhere and can neither sue nor be sued in another State, the principle being that a grant of representation is limited in effect to the State in which the grant is made and is not recognized outside it - see Electronic Industries Imports Pty. Ltd. v. Public Curator of the State of Queensland, [1960] V.R. 10; Boyd v. Leslie, [1964] V.R. 728; Cash v. The Nominal Defendant (1969), 90 W.N. (Pt. 1) (N.S.W.) 77; Finnegan v. Cementation Co. Ltd., [1953] 1 Q.B. 688; Minister of State for the Interior v. R. T. Company Pty. Ltd. (1962), 107 C.L.R. 1. The inevitable conclusion, according to the defendant's argument, is that he is not recognized under New South Wales law as the representative of the deceased and as New South Wales law is the law to be applied in the proceedings, that is an end of the matter.

In order to overcome the rule actio personalis moritur cum persona the plaintiff is compelled to rely on a

statute providing for the survival of his cause of action against the deceased so that it continues against the deceased's estate. In the circumstances of this case two statutory provisions present themselves. The first is s. 2(1) of the New South Wales Act to which I have referred. The other is s. 29(1) of the Administration and Probate Act 1958 (Vic.). It is no easy matter to decide how a provision like s. 2(1) should be construed. For some of the difficulties see the discussion by P.R.H. Webb and Ian Brownlie, "Survival of Actions in Tort and Conflict of Laws" (1965), 14 International and Comparative Law Quarterly 1; Hancock, Torts in the Conflict of Laws, p. 246 et seq.; Dicey and Morris, The Conflict of Laws, 9th ed., p. 960 et seq.; Kerr v. Palfrey, [1970] V.R. 825. As the subsection cannot be read as applying to all causes of action wherever situate, I would read it as relating, where a tortfeasor dies and his estate is the subject of a grant of administration in New South Wales, to causes of action subsisting against him, continuing them against his personal representative. I would not regard the subsection as providing for the survival of causes of action against foreign administrators. There would indeed be little point in giving s. 2(1) such an operation as the foreign administrator cannot be sued in New South Wales in the absence of a grant in that State. So understood, the provision forms part of the general body of law to be applied in New South Wales courts in proceedings by and against administrators. But, as it does not provide for the survival of a cause of action against a foreign administrator having no grant in that State, it does not avail the plaintiff when he seeks to assert that, according to the law of New South Wales, he has a cause of

action which survives against the defendant.

Section 29(1) presents the same problems of construction as those presented by s. 2(1) and it should receive the same construction as that provision. No doubt, but for the limitation provision which would be fatal to the plaintiff's action had it been commenced in the courts of Victoria, it would have been effective to continue the cause of action against the defendant as a Victorian administrator.

There is, however, no basis on which it can be incorporated in the law of New South Wales so as to be applied in the instant proceedings. Although Dicey and Morris (supra at p. 960) suggest that the question of survival of a cause of action in the event of the death of a tortfeasor is "governed by the law of the country from which the administrator derives his grant", this opinion is supported only by United States authority - see, for example, Grant v. McAuliffe (1953), 41 Cal. (2d) 859; 264 P.(2d) 944. But as Hancock and Webb and Brownlie observe, the United States cases speak with more than one voice. Moreover, they depend in part at least on the doctrine of the proper law of the tort, a doctrine which has not been accepted thus far in Australia - see Koop v. Bebb (1951), 84 C.L.R. 629. I am therefore not disposed to hold that according to the private international law rules of New South Wales the question of survival of the plaintiff's cause of action is governed by the law of Victoria, either as the lex domicilii of the deceased tortfeasor, or as the lex loci delicti or as the law of the principal place of administration of his estate. It is my opinion that the question is governed by s. 2(1) as a specific provision of New South Wales law, a provision which was initially

complemented by s. 2(3), until its repeal by s. 4(3) and Sched. 2 of Act No. 31 of 1969. Section 2(3) barred the maintenance of proceedings against the estate of a deceased tortfeasor unless they were pending at the date of the deceased's death or were taken not less than twelve months after his personal representative took out representation, subject to a proviso set out in the subsection.

In conclusion I should refer to Parente v. Bell (1967), 116 C.L.R. 528 where Windeyer J. sitting in this Court in Brisbane awarded damages to a plaintiff injured in Queensland as a result of the negligence of a New South Wales resident who died in consequence of the accident, administration of the tortfeasor's estate being granted to the defendant by the Supreme Court of New South Wales. It appears that no grant was made to the defendant in Queensland. The fact that the action was brought in the High Court in Queensland against an administrator who was by the law of that State a foreign administrator was not considered an obstacle to the plaintiff's success. But the point debated here was not argued.

In the result I order that the statement of claim be struck out and I dismiss the action.

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ORDER

Order that the statement of claim be struck out. Action dismissed with costs.