Davies bhnf McRae v Body Corporate for the Phoenician - [2016] NSWSC 973

Supreme Court

New South Wales

Medium Neutral Citation:	**Davies bhnf McRae v Body Corporate for the Phoenician [2016] NSWSC 973**
Hearing dates:	15 June 2016
Date of orders:	14 July 2016
Decision date:	14 July 2016
Jurisdiction:	Common Law
Before:	Rothman J
Decision:	(1) Note the undertaking of the defendant that should a Notice under Part 1 of the Personal Injuries Proceedings Act 2002 (QLD) be served and a declaration sought by the plaintiffs herein from the Supreme Court of Queensland to remedy its failure to comply with the time limit set by the foregoing Act, the defendant will not seek an order for its costs wasted as a result of the application; (2) Pursuant to s 5(2) of the Jurisdiction of Courts (Cross-Vesting) Act 1987 (NSW) , proceedings number 2016/13463 be transferred to the Supreme Court of Queensland; (3) Costs of this application and these proceedings thus far, shall be costs in the cause, as determined in the Supreme Court of Queensland. (4) The parties shall have liberty to make application within 7 days for any special or different order as to costs.
Catchwords:	CROSS-VESTING – tort in Queensland – personal injuries – defendant and possible cross-defendant resident in Queensland – plaintiffs and treating doctors in NSW – Queensland law different from NSW – transfer granted on undertaking from defendant that no costs sought as consequence.
Legislation Cited:	Civil Liability Act 2002 (NSW) Civil Liability Act 2003 (QLD) Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW) Motor Accidents Compensation Act 1999 (NSW) Personal Injuries Proceeding Act 2002 (QLD)
Cases Cited:	BHP Billiton Limited v Schultz [2004] HCA 61; (2004) 221 CLR 400 British American Tobacco Australia Services Limited v Laurie [2009] NSWSC 83 Finance Facilities Pty Limited v The Commissioner of Taxation [1971] HCA 12; (1971) 127 CLR 106 Hamilton v Merck & Co Inc; Hutchinson v Merck Sharp and Dohme (Australia) Pty Ltd [2006] NSWCA 55; (2006) 66 NSWLR 48 John Pfeiffer Pty Ltd v Rogerson [2000] HCA 36; (2000) 203 CLR 503 Kok v Sheppard [2009] NSWSC 1262 Pozniak v Smith [1982] HCA 39; (1982) 151 CLR 38 Robinson v Shirley [1982] HCA 1; (1982) 149 CLR 132
Category:	Procedural and other rulings
Parties:	Elen Louise Davies by her next friend Tracey Elen McRae (First Plaintiff/First Respondent) Tracey Elen McRae (Second Plaintiff/Second Respondent) Caillin Sarah Davies by her next friend Tracey Elen McRae (Third Plaintiff/Third Respondent) Body Corporate for the Phoenician CTS 27745 (Defendant/Applicant)
Representation:	Counsel: T Meakes (First, Second and Third Plaintiffs/First, Second and Third Respondents) P A Horvath (Defendant/Applicant) Solicitors: Hall Partners Pty Ltd (First, Second and Third Plaintiffs/First, Second and Third Respondents) HBM Lawyers (Defendant/Applicant)
File Number(s):	2016/13463

Judgment

1. By motion, notice of which was filed on 12 February 2016, the defendant seeks an order under s 5(2)(b)(iii) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) ("the Act") transferring the proceedings to the Supreme Court of Queensland.

2. The substantive proceedings involve a claim for damages arising from personal injury to the first named plaintiff. The first named plaintiff is now 13 years of age and was that age at the time of the filing of the statement of claim. The second named plaintiff is the mother of the first and third named plaintiffs. The third named plaintiff is 11 years of age.

3. The second and third named plaintiffs sue for nervous shock and the second named plaintiff is the mother and next friend of the first and second named plaintiffs.

4. The defendant is the owner occupier of premises known as the Phoenician Resort in Broadbeach, Queensland.

5. The injury suffered by the first named plaintiff and the shock said to have been suffered by the second and third named plaintiffs occurred at the Resort in Broadbeach.

6. Essentially the first named plaintiff was swimming in a pool and, it is said, her hair was "sucked into an underwater grate", as a result of which she sustained serious injuries.

7. The statement of claim alleges that the injuries suffered by the plaintiffs were sustained by the reason of the negligence of the defendant.

8. The defendant moves on the affidavit of Jillian McAuliffe, sworn 11 February 2016, who is the solicitor having carriage of the proceedings on behalf of the defendant.

9. In summary, the defendant's reasons for the motion are:

    1. The alleged incident occurred in Queensland;

    2. The defendant is located in Queensland;

    3. Many of the witnesses are located in Queensland; and

    4. Poolwise Pool and Spa Centre ("Poolwise"), an independent contractor, is expected to be joined to the proceedings as a cross-defendant, and is located in Queensland.

10. Poolwise was engaged by the defendant to replace plastic covers over the water intake inlets due to their deterioration. Poolwise supplied and installed the contracted stainless steel covers in or around August 2014 (some three months before the date of the accident) and, it seems, were contracted to maintain the grate and or the pool on a weekly basis.

Cross-vesting Legislation

11. The Supreme Court of New South Wales plainly has jurisdiction to hear and determine the proceedings commenced by the statement of claim by the plaintiffs. That is not the factor that determines the questions of transfer under the Act . The Act was promulgated in New South Wales and the equivalent thereof has been promulgated in each State and/or Territory and by the Commonwealth and overcomes the much stricter tests on transfer that arise under the common law. It is unnecessary to detail the previous common law tests.

12. The terms of s 5(2) of the Act provide for the transfer of proceedings from this Court to the Supreme Court of another State. The provision is in the following terms:

> "(2) Where:
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> (a) a proceeding (in this subsection referred to as the '**relevant proceeding**') is pending in the Supreme Court (in this subsection referred to as the '**first court**'), and
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> (b) it appears to the first court that:
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> (i) the relevant proceeding arises out of, or is related to, another proceeding pending in the Supreme Court of another State or of a Territory and it is more appropriate that the relevant proceeding be determined by that other Supreme Court,
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> (ii) having regard to:
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> (A) whether, in the opinion of the first court, apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction, the relevant proceeding or a substantial part of the relevant proceeding would have been incapable of being instituted in the first court and capable of being instituted in the Supreme Court of another State or Territory,
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> (B) the extent to which, in the opinion of the first court, the matters for determination in the relevant proceeding are matters arising under or involving questions as to the application, interpretation or validity of a law of the State or Territory referred to in sub-subparagraph (A) and not within the jurisdiction of the first court apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction, and
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> (C) the interests of justice,
>
> it is more appropriate that the relevant proceeding be determined by that other Supreme Court, or
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> (iii) it is otherwise in the interests of justice that the relevant proceeding be determined by the Supreme Court of another State or of a Territory, the first court shall transfer the relevant proceeding to that other Supreme Court."

13. During the course of argument the test required by the provisions of s 5(2)(b) of the Act were compendiously referred to as "in the interest of justice". The provision requires the Court to come to the view that "it is more appropriate" that the proceedings be transferred.

14. The Act requires the Court to transfer the proceedings if it appears to the Court that "it is more appropriate" that the proceedings be transferred having regard to three factors, the first and second of which are irrelevant because they apply in circumstances where this Court does not have jurisdiction to determine the issues (apart from jurisdiction that may be conferred by cross-vesting legislation), and the third of which requires consideration of "the interest of justice".

15. Nevertheless, the test to be satisfied is that it appears to the Court (in this case, the Supreme Court of New South Wales) that "it is more appropriate that the ... proceeding" be transferred having regard, relevantly, to the interests of justice.

16. The appropriate approach to the task to be determined by the Court was discussed by the High Court in *BHP Billiton Limited v Schultz* [1] in which the plurality judgment commented:

> "[14] In the context of the *Cross-vesting Act*, one is not concerned with the problem of a court, with a prima facie duty to exercise a jurisdiction that has been regularly invoked, asking whether it is justified in refusing to perform that duty. Rather, the court is required by statute to ensure that cases are heard in the forum dictated by the interests of justice. An application for transfer under s 5 of the *Cross-vesting Act* is brought upon the hypothesis that the jurisdiction of the court to which the application is made has been regularly invoked. If it appears to that court that it is in the interests of justice that the proceedings be determined by another designated court, then the first court "shall transfer" the proceedings to that other court. There is a statutory requirement to exercise the power of transfer whenever it appears that it is in the interests of justice that it should be exercised. It is not necessary that it should appear that the first court is a 'clearly inappropriate' forum. It is both necessary and sufficient that, in the interests of justice, the second court is more appropriate." [2]

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1. [2004] HCA 61; (2004) 221 CLR 400.

2. BHP Billiton Limited v Schultz at [14], per Gleeson CJ, McHugh & Heydon JJ; see also [77], per Gummow J, which is in the following terms:

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17. Further, the High Court in *Pozniak v Smi th* , [3] in discussing a remitter from the High Court to a Supreme Court, discussed the "balance of convenience" as to whether it should be a transfer to the Supreme Court of New South Wales or the Supreme Court of Queensland. In discussing that issue, the plurality said:

> "The convenience upon which Mr. Sharpe relies relates primarily to the likely preponderance of the number of witnesses resident in that State, the difficulties associated with moving a number of specialist medical witnesses from one State to another and physical difficulty which by reason of his injuries the plaintiff would have in travelling to Queensland for examination by the defendant's specialists. It may be conceded at once that these features of the case would be a source of inconvenience in the event of a hearing in Queensland, and that the balance does in fact favour a hearing in New South Wales. But

inconvenience is always a question of degree. In the present case, it does not spell impracticability. It does not spell injustice. For example, the defendant has offered to have the plaintiff examined in Sydney, and hence he would not have to travel to Brisbane for that purpose. If the difficulties associated with moving a number of medical witnesses to Brisbane became too great, the plaintiff could invoke the procedure of having their evidence taken upon commission. We do not seek to minimise the relevance of the factor of convenience in a case where the applicable law in the competing jurisdictions is substantially similar. It is then of great importance. However, in our opinion, it cannot go beyond that, unless the circumstances are wholly exceptional. The balance of convenience cannot be allowed to lead to injustice. The only safe course, in a case where the relevant law in the competing jurisdictions is materially different in its effect on the rights of the parties, is to remit to the State whose law has given rise to the cause of action." [4]

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3. [1982] HCA 39; (1982) 151 CLR 38.

4. Pozniak v Smith, per Gibbs CJ, Wilson and Brennan JJ at 46-47.

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18. To similar effect, are the comments of Mason J, who, after referring to the comments of Brennan J in *Robinson v Shirley* [5] said:

> "The attraction of this approach is obvious. It provides a clear and objective test which identifies that law which makes unlawful the act or omission complained of at the time when it occurs. Therefore it is, generally speaking, the law most closely connected with the circumstances giving rise to the cause of action. It immediately concedes to the plaintiff a cause of action against the wrongdoer, assuming of course that he survives." [6]

And, went on to comment:

> "All that I have said induces me to conclude that it would be a mistake to say that in every case of the class now under consideration we should apply an inflexible approach. We should preserve the width of the discretion, the object of which is to do justice between the parties. That will be done if, generally speaking, we select in personal injury cases, if not in all tort cases, the courts of the State where the injury occurred, so that the law of that State, the lex loci deliciti, will determine the rights and liabilities of the parties, unless, with respect to the particular issue, some other State has a more significant relationship with the occurrence and the parties, in which event the case will be remitted to that State and its law will be applied." [7]

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5. [1982] HCA 1; (1982) 149 CLR 132.

6. Pozniak v Smith at 52.

7. Ibid at 54; Aickin J, who sat to hear the appeal, passed away before delivery of judgment.

19. During the course of submissions, there was some discussion as to whether there was a residual discretion in the Court to refuse to transfer the proceedings. For my part, while unnecessary to decide the question, I would conclude there is no such residual discretion. The Act requires transfer, if any of the criteria in sub-section 5(2) of the Act are satisfied. Further, it is inconceivable that there would be a residual discretion not to transfer in circumstances where a court has concluded that it is more appropriate in the interests of justice, or otherwise in the interest of justice, for the proceedings to be transferred. [8]

8. Finance Facilities Pty Limited v The Commissioner of Taxation [1971] HCA 12; (1971) 127 CLR 106 at 133, 134, 138, and 139 . At 138 Owen J summarised with approval the argument as "if the Commissioner is satisfied that, having regard to all the circumstances, it would be reasonable to allow a rebate, it cannot be said that in the exercise of some further discretion he could refuse to allow that which he is satisfied it would be reasonable to allow ...".

20. This Court has dealt with the cross-vesting of matters to another Supreme Court on a number of occasions. In *British American Tobacco Australia Services Limited v Laurie*, [9] Harrison J summarised a number of the principles when considering an application under s 5(2) of the Act in the following terms:

> "[26] In *Spilliada Maritime Corp v Cansulex Limited* [1987] 1 AC 460 at 478 Lord Goff identified some of the 'connecting factors' which were of importance in the application of the principle of *forum non conveniens* in England:
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> 'So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as the availability of witnesses), but also other factors such as the law governing the relevant transaction ... and the places where the parties respectively reside or carry on business.'
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> [27] Those factors have been considered relevant in the assessment of the 'interests of justice' in the application of s 5(2)(b)(iii) of the Act : see *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711 at 730 E, *Barry* (supra) at [95] per Mason P; *Schultz* (supra) at [18] per Gleeson CJ, McHugh and Heydon JJ and at [163] per Kirby J. The location of the place of the wrong and the governing law of the wrong are also matters of prime importance in the exercise of the power of transfer under s 5(2)(b)(iii): see *Barry* (supra) at [7] per Spigelman CJ (a passage which was quoted with approval by Kirby J in *Schultz* (supra) at [165]). A further matter of importance in considering the 'interests of justice' is whether the assessment of any questions arising in the litigation is dependent on a degree of local knowledge: see *Bankinvest* (supra) at 729 D per Rogers AJA. There is no principle in the application of the

Act that the jurisdiction chosen by the plaintiff and regularly invoked is not lightly to be overridden: *Schultz* (supra) at [25] per Gleeson CJ, McHugh and Heydon JJ; at [72] and [77] per Gummow J; and [168] per Kirby J." [Footnotes omitted.]

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9. [2009] NSWSC 83 .

Consideration

21. Having summarised the principles to be applied, it is necessary to determine, on the basis of the particular circumstances of these proceedings and this claim for damage, how the principle should be applied and whether the circumstances amount to such that having regard to the interests of justice it is more appropriate that the proceedings be transferred to the Supreme Court of Queensland.

22. As earlier stated, the accident occurred in Queensland. The lex loci delicti is Queensland and the law that is applicable to liability and assessment of damages the law of Queensland. [10] The law of Queensland in relation to the assessment of damages for personal injury of this kind is significantly different from that which applies in New South Wales.

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10. John Pfeiffer Pty Ltd v Rogerson [2000] HCA 36; (2000) 203 CLR 503 [83]-[87], per Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ.

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23. In Queensland, the *Civil Liability Act 2003* (QLD) applies to the assessment of any damages. So too does the *Personal Injuries Proceeding Act 2002* (QLD), which imposes a procedure for the conduct of personal injuries litigation. The provisions are procedural, not substantive. [11]

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11. Hamilton v Merck & Co Inc; Hutchinson v Merck Sharp and Dohme (Australia) Pty Ltd [2006] NSWCA 55; (2006) 66 NSWLR 48, per Spiegelman CJ, Handley & Tobias JJA at [102]-[104], [143], and [165].

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24. As a consequence of the procedural nature of the operations of the *Personal Injuries Proceedings Act*, if the matter were litigated in New South Wales then those procedures would not be applied by the Court. If, on the other hand, the matter were litigated in Queensland, then the procedures would apply. [12]

12. Kok v Sheppard [2009] NSWSC 1262, per McCallum J.

25. Wherever the proceedings were conducted, the provisions of the *Civil Liability Act* (QLD) would apply. The *Civil Liability Act* (QLD) operates in a significantly different manner to the *Civil Liability Act 2002* (NSW) , particularly in relation to the assessment of damages.

26. By the provisions of s 61 of the *Civil Liability Act* (QLD), any injury occurring after 1 December 2002 (in other words, the current injuries for which damages are claimed) must be assessed by the Court on the basis of a scale of general damages that have been prescribed, including a scale that differentiates certain psychiatric or shock injuries. That scale and its operation is a matter on which the Supreme Court of Queensland would be far more familiar and involves the application and interpretation of a peculiarly Queensland statute. In the scale of issues upon which transfer should occur, this is an important, if not the most important, aspect.

27. If the matter is to be transferred to Queensland then, as earlier stated, the *Personal Injuries Proceedings Act* will apply and the procedures there adopted would have to be followed by the parties. Those procedures, if applicable, oblige the plaintiffs to serve a Part 1 Notice of the Claim, in accordance with the *Personal Injuries Proceedings Act*. [13] The Part 1 Notice would, ordinarily, be required to be given within the period ending nine months after the accident or one month after the claimant first instructs a law practice to act on the claimant's behalf. Nice questions arise as to whether the term "law practice" in s 9 of the *Personal Injuries Proceedings Act* refers to a law practice in Queensland.

13. Personal Injuries Proceedings Act 2002 (QLD), s 9 .

28. Nevertheless, there are provisions [14] that allow for a late service of a Part 1 Notice of Claim, either by agreement or on application to the Court, which either declares that the non-compliance has been remedied or otherwise authorises the claimant to proceed despite non-compliance. There may be costs consequences of a failure to serve a Part 1 Notice in time, to which consequences I will return.

14. Personal Injuries Proceedings Act 2002 (QLD), s 18 .

29. Once the Part 1 Notice has been served the entity upon whom or upon which it is served is required, within one month after receiving it, to provide a preliminary response to the claimant, in default of which there are monetary penalties. Failure to provide acknowledgment that the entity is a proper respondent, or to deny same, will lead to a conclusive presumption that the entity is satisfied that the Notice complies with the Act .

30. Further, by the provisions of sections 14 and 15 a claimant or a respondent may add further respondents, again, under very strict time limits. In the case of a person added by a respondent, the person may be added as a "contributor". [15]

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15. See s 16 of the Personal Injuries Proceedings Act.

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31. In the case of the first and third named plaintiffs, each of whom is under a legal disability because of age, the period within which the obligation is to be complied with begins when the legal disability ends. As a consequence, in their case, there may have been no non-compliance.

32. The *Personal Injuries Proceedings Act* prescribes procedures for the resolution or attempted resolution of the claim including, in a manner similar to the *Motor Accidents Compensation Act 1999 (NSW)*, a requirement to admit or deny liability, claim contributory negligence and make an offer of settlement, where liability may be admitted. The offer of settlement is made by the claimant under the Act to which the respondent replies, or, if the claimant makes no offer, the respondent is required to invite the claimant to make such an offer. [16]

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16. Personal Injuries Proceedings Act 2002 (QLD) s 20 .

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33. Whether or not an offer has been made and whether or not it has been accepted, the respondent is required to make a fair and reasonable estimate of the damages to which the injured person "would be entitled". There are requirements for any offer or counter offer to be accompanied by medical reports, assessments of cognitive, functional or vocational capacity and all other material relevant to assessing economic loss.

34. Pursuant to the provisions of Division 4 of Part 1 of the *Personal Injuries Proceedings Act*, prior to the claim proceeding to a judicial hearing, there is required to be a compulsory conference within six months of the receipt of a Part 1 Notice of Claim. The process for the compulsory conference requires the exchange of material and a mediator may be appointed to assist. If the parties cannot agree on the identity of mediator, the mediator will be appointed by the Registrar of the relevant court.

35. Further, if the dispute is not settled at the compulsory conference, the parties are required (unless the Court dispenses with the obligation) to exchange written final offers either at the conference or within 14 days of the date of the agreement, or order of the court, dispensing with the conference. [17]

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17. Personal Injuries Proceedings Act 2002 (QLD) s 39 .

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36. The aforesaid final offers must be filed in the relevant court in a sealed envelope at the time that a statement of claim is lodged or the proceedings in the court are commenced and at the time that a defence is filed, respectively. A proceeding in the court should be started within 60 days after the conclusion of the compulsory conference.

37. As can be seen from the foregoing, the procedures that would be applied, if the matter were to be heard in Queensland, not only offer the prospect of the matter being dealt with more expeditiously through a compulsory conference procedure and the obligation to provide information, but also provide for a speedy resolution of the court proceedings.

38. The other factors to be taken into account in dealing with the application are those that relate to the convenience of witnesses, but as has been outlined, when dealing with the principles, the "convenience" or "inconvenience" of witnesses or parties may be a subsidiary matter to the issues of the proper law to be applied, where that law is substantially different.

39. In this matter, the procedures, under s 61 of the *Civil Liability Act* (QLD) and the regulations pursuant thereto, have the effect that medical specialists who are familiar with the relevant table of maims prescribed by the Queensland Act would be in a far better position to apply the law of Queensland than would medical specialists unfamiliar with the process. Obviously, treating specialists would be required to give evidence and such treating specialists would be resident in New South Wales, as are the plaintiffs.

40. The plaintiffs are resident in New South Wales, as stated above, and that is a factor, albeit not a factor that, in these proceedings, ought to override the issue associated with the particular law that must be applied. As to the number of witnesses, particularly if, as is suggested, there were a second defendant, either named by the plaintiffs or by cross-claim, which the defendant is also situated in Queensland and whose officers are situated in Queensland, they would be divided more or less equally as between the plaintiffs and defendants.

41. Thus, the issue of the "interests of justice" and the appropriateness of a transfer falls to be decided on a balance between the Supreme Court of Queensland exercising its jurisdiction and

interpreting and applying law that is significantly different in Queensland or the Supreme Court of New South Wales applying that same law, the effect, if any, of the *Personal Injuries Proceedings Act*, and the choice of the plaintiffs to commence in New South Wales.

42. Plainly, it would be more convenient for the plaintiffs to have the matters determined in New South Wales. The treating medical practitioners are all in this State and the plaintiffs are residents here.

43. In that balance is the issue associated with s 18 of the *Personal Injuries Proceedings Act*, relating to conditions that the Court might impose, including conditions as to costs, because the plaintiffs have not filed, in the time prescribed, a Part 1 Notice of Claim. This was a matter raised with the defendant by the Court.

44. The defendant has, in response to the question from the Court provided, by email to the Court's staff, an undertaking in the following terms:

> "[If] the matter is cross-vested to Queensland, should the plaintiffs provide such a Notice and make an application under s 18 of the *Personal Injuries Proceedings Act* 2002 for a declaration that the claimant has remedied its failure to give a complying Part 1 Notice, the defendant will not seek an order (pursuant to s 18(2) of PIPA or otherwise) for its costs wasted as a result of the application."

45. As a consequence of that undertaking there seems to be no prejudice to the plaintiffs, other than the prejudice of inconvenience to which I have referred. While I would expect, if the Part 1 Notice of Claim is in proper form, the defendant would waive compliance pursuant to the terms of s 18(1)(b) of the *Civil Liability Act* (QLD) and thereby avoid the need for any application to be made to the Court in Queensland, I cannot say that the undertaking as given is an unreasonable one or other than an answer to the question posed by the Court during the proceedings.

46. For the aforesaid reasons, applying the principles that apply to the transfer of proceedings and particularly the need to have the Supreme Court of Queensland apply its own different law with which it is far more familiar, it is, having regard to the interests of justice, more appropriate that these proceedings be determined by the Supreme Court of Queensland. If that not be sufficient, it is otherwise in the interests of justice that these proceedings be determined by the Supreme Court of Queensland and the Court makes orders in the following terms:

    1. Note the undertaking of the defendant that should a Notice under Part 1 of the *Personal Injuries Proceedings Act 2002* (QLD) be served and a declaration sought by the plaintiffs herein from the Supreme Court of Queensland to remedy its failure to comply with the time limit set by the foregoing Act, the defendant will not seek an order for its costs wasted as a result of the application;

    2. Pursuant to s 5(2) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW), proceedings number 2016/13463 be transferred to the Supreme Court of Queensland;

3. Costs of this application and these proceedings thus far, shall be costs in the cause, as determined in the Supreme Court of Queensland.

4. The parties shall have liberty to make application within 7 days for any special or different order as to costs.

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Endnotes

"[77] The phrase 'otherwise in the interests of justice' in sub-par (iii) of s 5(2)(b) of the Cross-vesting Act requires the Supreme Court to determine a transfer application by identifying the more appropriate forum without any specific emphasis in favour of the choice of forum made by the plaintiff. That being so, error is disclosed in the treatment by the Supreme Court of BHP's application. The consequence is that the appeal to this Court should be allowed, unless this Court supports the primary judge's order on further or alternative grounds to those relied upon by his Honour. No such support appears."

Decision last updated: 14 July 2016