

# **Private International Law (Choice of Law in Tort) Bill**

Member's Bill

As reported from the Justice and Electoral Committee

## **Commentary**

### **Recommendation**

The Justice and Electoral Committee has examined the Private International Law (Choice of Law in Tort) Bill and recommends that it be passed with the amendments shown.

### **Introduction**

The Private International Law (Choice of Law in Tort) Bill is a member's bill in the name of Sarah Dowie. The bill would establish rules that would apply when deciding which law should be used in cases of tort that have an international element.

A tort is a wrongful act, other than a breach of contract, that results in civil liability. Currently, where an action is brought in a New Zealand court for a tort committed outside New Zealand, the common law rule of double actionability applies. Double actionability is the rule that where a tort is committed outside New Zealand, a tort claim is only successful if it is actionable both in New Zealand and the other country where the events constituting the tort took place. In such a case, New Zealand's law would apply.

The bill would abolish the rule of double actionability, and establish the general rule that the applicable law is the law of the country where the events constituting the tort occurred. If the tort relates to property damage, the applicable law would be the law of the country where the property was located when damaged. In any other case, the applicable law would be the law of the country where the most significant element, or elements, of the event occurred.

This commentary covers the main amendments that we recommend to the bill. It does not discuss minor or technical amendments.

## **Structure of the bill**

We recommend changes to the structure of the bill, including dividing the bill into parts and inserting standard provisions such as the interpretation clause. We also recommend changing the arrangement of clauses to follow a more logical order.

## **Crown Proceedings Act**

Clause 4 is a standard clause in New Zealand legislation stating that the bill would bind the Crown. This means that the choice of law rules would apply to tort claims by and against the Crown.

The Crown Proceedings Act 1950 contains rules relating to the Crown's civil liability and rights, and would usually apply to tort proceedings involving the Crown. Because this bill could result in the application of a foreign tort law, there may be confusion about whether the rules of the Crown Proceedings Act apply.

To remove doubt, we recommend amending clause 4 to make it clear that nothing in the bill would limit or affect the application of the Crown Proceedings Act to any claim in tort by or against the Crown.

## **Torts committed in New Zealand**

The bill as introduced does not specify that the bill would also apply to torts committed in New Zealand. To clarify this, we recommend inserting clause 5(4) to state that the bill would apply to events occurring in New Zealand as it applies to events occurring in any other country.

## **Personal injury**

As personal injury claims can arise despite the current statutory bar on personal injury claims in section 317 of the Accident Compensation Act 2001, we think it is desirable to amend clause 7 to state specifically how the bill would treat personal injury. Our proposed insertion of clause 7(2)(aa) would make it clear that the applicable law would be the law of the country where the individual was when they were injured.

We also recommend inserting clause 7(3) to include a definition of "personal injury". This would clarify that it means a physical injury, or mental injury, or both a physical and mental injury, and includes disease or infection.

We note that the bill would not affect the operation of the Accident Compensation Act.

## **Party autonomy to choose the law to apply to claims in tort**

As introduced, the bill does not mention whether parties can enter into agreements choosing the law to apply to tort claims (known as "party autonomy"). It is common for parties to international commercial contracts to choose the applicable law, sometimes including claims based in tort, not just in contract. Courts tend to respect parties' intentions and their choice of law, subject to mandatory provisions. This promotes legal certainty in the contract.

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We recommend inserting clause 11(2)(c) to make it clear that this legislation would not preclude the recognition or development of a choice of law rule. This would allow the courts to determine whether and when parties can choose the law applicable to a tort claim.

### **Distinction between substance and procedure**

Clause 11(2)(b) specifies that questions of procedure are to be determined according to New Zealand law. It is desirable that the distinction between substance and procedure should be able to evolve over time. We recommend inserting clause 11(3) to clarify that the courts would be able to further develop this distinction through case law.

## **Appendix**

### **Committee process**

The Private International Law (Choice of Law in Tort) Bill was referred to the committee on 7 December 2016. The closing date for submissions was 2 February 2017. We received and considered two submissions from interested groups and individuals.

We received advice from the Ministry of Justice and the Parliamentary Counsel Office.

### **Committee membership**

Sarah Dowie (Chairperson)

Jacinda Ardern

Chris Bishop

Paul Foster-Bell

Marama Fox

Jono Naylor

Denis O'Rourke

Maureen Pugh

Metiria Turei

Louisa Wall

David Clendon replaced Metiria Turei for this item of business.

**Key to symbols used in reprinted bill**

**As reported from a select committee**

text inserted unanimously

~~text deleted unanimously~~



*Sarah Dowie*

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Member's Bill

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**The Parliament of New Zealand enacts as follows:****1 Title**

This Act is the Private International Law (Choice of Law in Tort) Act **2016**.

**2 Commencement**

This Act comes into force ~~on the day~~ 15 days after the date on which it receives the Royal assent. 5

**Part 1****Preliminary provisions****3 Purpose**

The purpose of this Act is to establish rules for choosing the law to be used for determining issues relating to tort ~~(the applicable law)~~. 10

**3A Transitional, savings, and related provisions**

The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.

**3B Interpretation** 15

In this Act, unless the context otherwise requires,—

**applicable law** means the law to be used for determining issues relating to tort

**claim** means a claim in tort

**country** means a country in the sense of private international law.

**4 Act binds the Crown** 20

(1) This Act binds the Crown.

(2) Nothing in this Act limits or affects the application of the Crown Proceedings Act 1950 in respect of any claim in tort by or against the Crown.

Compare: Private International Law (Miscellaneous Provisions) Act 1995 s 15 (UK)

**Part 2** 25**Substantive provisions****5 General principles**

(1) ~~For the purposes of private international law, the~~ The characterisation for the purposes of private international law of issues arising in a claim as issues relating to tort is a matter for the courts of New Zealand. 30

(2) The applicable law is to be used for determining the issues arising in a claim, that have been characterised as relating to tort, including the question of whether an actionable tort has occurred.

- (3) ~~The applicable law to be used for determining the issues arising in a claim excludes any choice of law rules forming part of the law of the jurisdiction country or jurisdictions countries concerned.~~
- (4) To avoid doubt, this Act applies in relation to events occurring in New Zealand as well as to events occurring in any other country. 5  
 Compare: Private International Law (Miscellaneous Provisions) Act 1995 s 9 (UK)
- 6 Abolition of certain common law rules**
- The rules of the common law, insofar as they—
- (a) ~~require actionability under both New Zealand law and the law of another jurisdiction, for the purpose of determining whether a tort is actionable;~~ 10  
~~or~~
- (b) ~~allow (as an exception from the rules falling within **paragraph (a)**) for the law of a single jurisdiction to be applied for the purposes of determining the issues, or any of the issues, arising in the case in question—~~  
~~are hereby abolished so far as they apply to any claim in tort.~~ 15
- 7 General rule**
- (1) The general rule is that the applicable law is the law of the jurisdiction country in which the events constituting the tort in question occur.
- (2) Where elements ~~for~~ of those events occur in different jurisdictions countries, the applicable law under the general rule is ~~taken as being—~~ 20
- (aa) for a cause of action in respect of personal injury caused to an individual or death arising from personal injury, the law of the country where the individual was when he or she sustained the injury; and
- (a) for a cause of action in respect of damage to property, the law of the jurisdiction country where the property was when it was damaged; and 25
- (b) in any other case, the law of the jurisdiction country in which the most significant element or elements of those events occurred.
- (3) In this section, **personal injury**—
- (a) means a physical, mental, or physical and mental injury (even if the injury causes death); and 30
- (b) includes disease or infection.
- Compare: 2010 No 110 s 17(4), (5); Private International Law (Miscellaneous Provisions) Act 1995 s 11 (UK)
- 8 Displacement of general rule**
- (1) If it appears, in all the circumstances, from a comparison of— 35
- (a) ~~the significance of the factors that connect a tort with the jurisdiction whose law would be the applicable law under the general rule; and~~

(b) ~~the significance of any factors connecting the tort with another jurisdiction—~~

~~that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other jurisdiction, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other jurisdiction.~~

(2) ~~The factors that may be taken into account as connecting a tort with a jurisdiction for the purposes of this section include, but are not limited to, factors relating to—~~

~~(a) the parties; or~~

~~(b) any of the events that constitute the tort in question; or~~

~~(c) any of the circumstances or consequences of those events.~~

## **8** When general rule displaced

(1) The general rule is displaced if the court determines in accordance with **subsection (2)** that in all the circumstances it is substantially more appropriate for the law of another country (**country B**) to be the applicable law.

(2) The court must make its determination by comparing the following:

(a) the significance of the factors that connect a tort with the country whose law would be the applicable law under the general rule; and

(b) the significance of any factors connecting the tort with any other country.

(3) The factors that may be taken into account as connecting a tort with a country for the purposes of this section include, but are not limited to, factors relating to—

(a) the parties; or

(b) any of the events that constitute the tort in question; or

(c) any of the circumstances or consequences of those events.

(4) If the general rule is displaced under this section, the law of country B (excluding any choice of law rules forming part of the law of that country, in accordance with **section 5(3)**) applies for the purposes of determining the issues, or any issue, arising in the case.

Compare: Private International Law (Miscellaneous Provisions) Act 1995 s 12 (UK)

## **9** Transitional provision and savings

(1) ~~Nothing in this Act applies to acts or omissions that give rise to a claim before the commencement of this Act.~~

(2) ~~Nothing in this Act affects any rule of law (including rules of private international law) except those abolished by **section 6**.~~

- (3) Without limiting the generality of **subsection (2)**, nothing in this Act—
- (a) ~~authorises the application of the law of a jurisdiction outside New Zealand as the applicable law for determining issues arising in any claim in so far as to do so—~~
- (i) ~~would conflict with principles of public policy; or~~ 5
- (ii) ~~would give effect to such a penal, revenue, or other public law as would not otherwise be enforceable under the law of New Zealand; or~~
- (b) ~~affects any rules of evidence, pleading, or practice or authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of New Zealand.~~ 10
- (4) This Act has effect without prejudice to the operation of any rule of law that—
- (a) ~~has effect notwithstanding the rules of private international law applicable in the particular circumstances; or~~
- (b) ~~modifies the rules of private international law that would otherwise be so applicable.~~ 15

## **10 Rule of double actionability and related common law rules abolished**

The following rules of common law, to the extent that they apply to a claim in tort, are abolished:

- (a) the rules of common law, to the extent that they require actionability under both New Zealand law and the law of another country, for the purpose of determining whether a tort is actionable; 20
- (b) the rules of common law, to the extent that they allow (as an exception from the rules falling within **paragraph (a)**) for the law of a single country to be applied for the purposes of determining the issues, or any of the issues, arising in the case in question. 25

Compare: Private International Law (Miscellaneous Provisions) Act 1995 s 10 (UK)

## **11 Relationship between Act and other rules of law**

- (1) Nothing in this Act affects any rule of law (including rules of private international law) other than the rules that **section 10** abolishes. 30
- (2) Without limiting the generality of **subsection (1)**, nothing in this Act—
- (a) authorises the application of the law of a country outside New Zealand as the applicable law to the extent that doing so—
- (i) would conflict with principles of public policy; or
- (ii) would give effect to such a penal, revenue, or other public law as would not otherwise be enforceable under the law of New Zealand; or 35

- (b) affects any rules of evidence, pleading, or practice, or authorises questions of procedure in any proceedings, to be determined otherwise than in accordance with the law of New Zealand; or
  - (c) precludes recognition or development of a choice of law rule giving effect to an agreement as to the applicable law. 5
- (3) To avoid doubt, **subsection (2)(b)** must be applied in accordance with the rules of New Zealand private international law in force at the time that the rules or questions referred to in that provision fall to be applied or determined in relation to a claim.
- (4) This Act has effect without prejudice to the operation of any New Zealand rule of law that— 10
  - (a) has effect despite the rules of private international law applicable in the particular circumstances; or
  - (b) modifies the rules of private international law that would otherwise be applicable in the particular circumstances. 15

Compare: Private International Law (Miscellaneous Provisions) Act 1995 s 14 (2)–(4) (UK)

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**Schedule 1**  
**Transitional, savings, and related provisions**

**s 3A**

**Part 1**  
**Provision relating to this Act as enacted**

5

**1** **Transitional provision**

Nothing in this Act applies to acts or omissions that give rise to a claim that occur before the commencement of this Act.

**Legislative history**

22 September 2016  
7 December 2016

Introduction (Bill 181–1)  
First reading and referral to Justice and Electoral Committee