SUSAN O'BRIEN QC

James Docherty: Jurisdiction sorted – or a Pyrrhic Victory?

Compass Chambers Conference

23rd November 2018

Delegate Handout

CITATIONS

James Docherty's Executors and others against the Secretary of State for Business, Innovation and Skills 2018 CSIH 57.

(Lord President, Lord Brodie, Lord Menzies)

George Docherty and others against the Secretary of State for Business, Innovation and Skills 2018 CSOH 25

(Lord Tyre); and 2018 SLT 349 under the name "Docherty"

Louisa Docherty and others against the Secretary of State for Business, Innovation and Skills and Imperial Chemical Industries Ltd 2017 CSOH 54 (Lord Ericht); and 2017 SLT 671 under the name "Docherty"

Louisa Docherty and others against the Secretary of State for Business, Innovation and Skills and Imperial Chemicals Ltd 2015 CSOH 149 (Lord Boyd); and 2015 SLT 858 under the name "Docherty"

Article:

"*Place of the wrong in industrial disease litigation*"

Simon di Rollo QC – 2018 SLT 57s

AVERMENTS

Pursuers say about NEGLIGENCE:-

The deceased Mr Docherty "*was a mechanical fitter. He served an apprenticeship as a marine engineer with Scott's Shipbuilding and Engineering Company Limited at their shipyard premises in Greenock from in or about 1941 to 1947*." Then there are typical averments about exposure to asbestos. Next: "*From in or about 1954 to 1979 the Deceased was employed as a maintenance fitter by the Second Defenders at their plant at Wilton on Teeside*."

The first defender was the Secretary of State.

The First Defender says: "*Not known and not admitted that the deceased was employed by Scotts Shipbuilding and Engineering Company limited at their shipyard premises in Greenock from in or about 1941 to 1947, under explanation that the Pursuers have not provided any evidence of this employment. Quoad ultra denied. The Pursuers are called upon to lodge with the Court such documentary evidence as they hold showing the deceased's employment with Scotts Shipbuilding and Engineering Limited. They are further called upon to aver on Record the deceased's full employment history and in particular any periods of employment where he may have been exposed to respirable asbestos dust. Their failure to answer these calls will be founded upon."*

The Second Defenders were ICI. They said*: "In addition to his employment with the defenders, the deceased worked as a maintenance fitter in the Merchant Navy where he was exposed to asbestos. He also had a further period working in shipyards in the early 1950s, where he was again exposed to asbestos. The pursuers are called upon to aver which shipyards he worked in during this period and where they were located. They are called upon to aver the deceased's full employment history. Their failure to answer such calls will be founded upon."*

DISEASE/INJURY

The Pursuers say:

"As a result of his asbestos exposure the deceased developed asbestosis and pleural plaques. The deceased began to experience respiratory symptoms from around 2003 when he had a cough and wheeze was noted on examination of his chest. He was treated with a salbutamol inhaler. Thereafter, he continued to suffer from chest problems from time to time. In September he was admitted to the James Cook University Hospital, Marton Road, Middlesbrough TS4 3BW with fever and breathlessness. Chest x-ray showed multiple ill-defined peripheral opacities and a CT scan showed basal bronchiectasis with fibrosis, mild pleural thickening and consolidation (infection) in his right upper lobe....."
They go on to describe treatment by the GP during 2011, diagnosis of COPD in July 2011, admission to hospital in August 2011, deterioration and various symptoms, all ending with his death.

PROCEDURE ROLL – LORD BOYD

The Second defenders (ICI) argued that the case was irrelevant, as the wrongs complained of (so far as the Second defenders were concerned) occurred exclusively in England, and accordingly the case pled under the 2011 Act could not apply. The parties both accepted that the Scottish court had jurisdiction over them, on the basis that the pursuer sought joint and several liability against them both. Both parties agreed that "*the question of jurisdiction was distinct from the applicable law."* [4] A plea of **forum non conveniens** was not insisted upon. He submitted that the pursuer had to demonstrate double actionability under common law, and that the remedy to which she was entitled was regulated by the **lex loci delicti**, which was English law. The deceased had lived for most of his life in Teesside, and died there. The wrong complained of, so far as the Second Defenders were concerned, occurred in England. It was wrong in principle that the pursuer should be able to claim damages in Scotland, under Scots law, for a wrong committed in England simply because jurisdiction was established in Scotland. The issue was: for what were the second defenders legally responsible? [5] Tom Marshall, Solicitor Advocate for the Pursuers, countered that asbestosis was a cumulative disease, and all exposure could be said to have led to the single result, which was death. Liability was at common law, which was essentially the same in Scotland and England. The heads of damage were expressed in different terms, but they were essentially the same. If Mr Docherty had raised proceedings when he was alive, he could have raised them in either country. He said that McElroy could be distinguished on the facts, and on the law. [8-11]

Both sides concentrated on Lord President Cooper's question in McElroy.

(McElroy v McAllister 1949 SC 110 – 7 judge decision on double actionability)

Lord Boyd decided:

[10] The issue falls to be determined under common law…It is accepted that the common law position as set out in McElroy the ratio of which can be found in the opinion of Lord Cooper at p135 (p149). After discussing Naftalin he said that the Scottish courts would not recognise any specific ***jus actionis*** *which is denied to the pursuer by the* ***lex loci delicti****. 'In other words, when considering whether the act or omission complained of is 'actionable' by the* ***lex loci delicti,*** *the Scottish courts will… extend it to the further question – on whom does the* ***lex loci delicti*** *confer a* ***jus actionis****, and for what?'*

[11] Applying McElroy it is clear that a claim for damages against the second defender under the 2011 Act must fail….Joint and several liability does not establish the proper law to be applied to the claim….you cannot have joint and several liability if you have not first established individual liability for the claim."

He notes at [13] that there is a difference between a claim under s4 of the 2011 Act, which vests in a relative of the deceased, and the position under the 1976 Act where the right to bring an action is at the hands of the executor.

He rejected the argument that the relatives "*who have no claim in England for a tort committed in England can not only bring an action for damages in Scotland but seek a remedy not available under English law."* [14]

He intimated that he intended to dismiss the action against the second defenders (etc), but gave the pursuers a chance to consider amendment.[15]

DOUBLE ACTIONABILITY

McElroy v McAllister – 1949 SC 110.

- A right of action in delict in Scotland, based on a delict committed outside Scotland, will fail unless the pursuer can show that the specific **jus actionis** he invokes is available to him both by Scots law and by the **lex loci delicti;**
- It is not enough that the conduct is actionable in the abstract by **the lex loci delicti;** it must be the specific **jus actionis** which is available in that other system;
- It is not enough that the pursuer had the right of action under the **lex loci delicti** at the date of the act complained of; the right of action must still subsist under the foreign law at the time the Scots court decides the case- if the right of action has prescribed, or the defender's action was later made lawful by retrospective legislation, the pursuer's claim in Scotland will fail;
- If the conduct is actionable under the foreign **lex loci delicti**, the action will fail if the same conduct would not ground an action in Scotland;
- Even if the action started in such a form that it satisfied all these requirements at that moment, if things change the action may still fail eg if the pursuer dies after an action has been raised, and the law in both jurisdictions does not permit an executor to carry on his/her claim, the action fails;
- Quantification of damages is regarded as a procedural matter and the **lex fori** applies, but remoteness of damages and heads of damage are regarded as matters of substance. Damage which is too remote under either the **lex fori** or the **lex loci delciti** will not be recoverable. The same applies to heads of damage.

(McElroy continued)

- A ceiling on the amount of damages recoverable under the lex fori will be applied by the courts in Scotland, provided it is classified as substantive.
- Anton says that there is an absence of authority on whether the choice of law rule in delict applies to issues of vicarious liability, though it is likely that it does. (!)
- Prescription is fraught with complexity; this is just to alert you to assume nothing.
- "*The question whether to apply the applicable law of the insurance contract or the applicable law in delict to the issue of a direct action against an insurer by the victim of a wrong has been described as an "insoluble dilemma""*- Anton, page 49.

CHOICE OF LAW

1. ROME II

Regulation (EC) 864/2007, or "Rome II", applies to "*events giving rise to damage which occur after its entry into force*" (Article 31.)

SSI 2008/404 brought this into force in Scotland, and

SI 2008/2986 brought it into effect in England, Wales, and Northern Ireland

on the same date, namely 11 January 2009.

It is important to appreciate that a choice of law question applying to jurisdictions **within** the United Kingdom is governed by Rome II.

……..

2, THE PRIVATE INTERNATIONAL LAW (MISCELLANEOUS PROVISIONS) ACT 1995

Most of the Act applies to the whole of the UK

NB NB NB Most of the Act was disapplied by Rome II (see sections 15A and 15B)

Part III governs the "Choice of Law in Tort and Delict".

It explicitly excludes the domestic national law in the countries concerned, ie the common law, and it abolishes the double actionability rule for all cases which fall within its scope. (s10)

The key concepts are at s 11 and s12

"11. (1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.

(2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being-

(a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;

(b) ...damage to property…

(c) …any other case…

(3) In this section "personal injury" includes disease or any impairment of physical or mental condition."

(Section 12 goes off into displacement of the general rule where there are significant other factors connecting a tort or delict with another country.)

But for disease cases-

"*14. –(1) Nothing in this Part applies to acts or omissions giving rise to a claim which occur before the commencement of this Part*."

3 SCOTS COMMON LAW (according to Anton, second edition 1990)

"In many cases the place where the wrong occurs is obvious because all the elements in the delict of quasi-delict, for example, in a traffic accident, take place within one jurisdiction. However, the place of the wrong is less clear where difference elements of the delict take place in different jurisdictions, for example, products manufactured in one country and causing damage in another. In terms of the present double actionablity choice of law rule in reparation actions in Scotland it is necessary to establish the place where the delict of quasi-delict took place – the locus delicti- in order to ascertain the lex loci delicti. It is not clear whether the locus delicti is the place where the defender acted (the place of the acting), the place where the harm to the victim took effect (the place of harm or result), or the place where the substance of the wrongdoing occurred." **(pages 412-413).**

(1) The place of acting; Anton finds some support for taking that approach in some old English cases – but only in one Scottish one- which concerns passing off whisky in Honduras. (John Walker and Sons v Dounglas McGibbon and Co – 1972 SLT 128- Lord Avonside).

(2) The place of the harm or result**; "***Support for the locus delicti being the place where the delict is completed, where the harm takes effect, is given by a number of writers."* (page 414- quoting various textbooks). Some Scottish cases also support this approach, including Evans and Son v Stein and Co – 1904 7F 65, which concerns the sending of a defamatory telegram from Scotland to England- the First Division found the **locus deliciti** was England, ie only once the telegram was read.

(3) The substance of the wrongdoing – derived from an English case Cordova Land Co Ltd v Black Diamond Steamship Corpn – 1966 1WLR 793 at 798. This has been followed in several English and Privy Council cases. It has not been followed in Scotland. (Anton disapproves of this as being no use for articulation of a choice of law rule.)

Anton discusses the reports by both Law Commissions, and notes that their final recommendations were awaited. However, provisionally they preferred to define the **locus delicti** as the place of result (place of harm) in relation to cases of personal injury, death and damage to property. They had a different answer for liability when it came to making defamatory statements, economic delicts etc. (415) **Anton and his editors "*suggest that a better balance between certainty and refinement would be achieved by the adoption of the place of harm (result) as the locus delciti in all cases."* (416)**

RIGHT OF ACTION

Rothwell v Chemical and Insulating Co Ltd 2008 1AC 281

Lord Hope:-

47 "*…… It is well settled in cases where a wrongful act has caused personal injury there is no cause of action if the damage suffered was negligible. In strict legal theory a wrong has been done whenever a breach of the duty of care results in a demonstrable physical injury, however slight. But the policy of the law is not to entertain a claim for damages where the physical effects of the injury are no more than negligible. Otherwise the smallest cut, or the lightest bruise, might give rise to litigation the costs of which were out of all proportion to what was in issue. The policy does not provide clear guidance as to where the line is to be drawn between effects which are and are not negligible. But it can at least be said that an injury which is without any symptoms at all because it cannot be seen or felt and which will not lead to some other event that is harmful has no consequences that will attract an award of damages. Damages are given for injuries that cause harm, not for injuries that are harmless."*

(Rothwell also) Lord Rodger:-

"83. So far as the law of tort is concerned, it is trite that "the ground of any action based on negligence is the concurrence of breach of duty and damage" and that "a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible": Watson v Fram Reinforced Concrete Co (Scotland) Ltd and Winget Ltd 1960 SC (HL) 92, 109 per Lord Reid, and Cartledge v E Jopling & Sons Ltd [1963] AC 758, 771-772 per Lord Reid, respectively. These statements need to be refined slightly for the purposes of the present appeals.

84. The asbestos fibres cannot be removed from the claimants' lungs. In theory, the law might have held that the claimants had suffered personal injury when there were sufficient irremovable fibres in their lungs to cause the heightened risk of asbestosis or mesothelioma. But the courts have not taken that line.

85. In Cartledge v E Jopling & Sons Ltd [1963] AC 758, 779, Lord Pearce, with whom the other members of the House agreed, saw the relevant question as being "whether a man has suffered material damage by any physical changes in his body." The physical changes that Lord Pearce had in mind were those associated with the actual onset of pneumoconiosis. Indeed the whole question in the case revolved around the plaintiffs having that disease before they could know of it, not around the noxious dust having accumulated in their lungs during their employment between 1939 and 1950.

86. The point was focused in Brown v North British Steel Foundry Ltd 1968 SC 51 when the pursuer tried an argument that had not been run in Cartledge. The Law Reform (Limitation of Actions etc) Act 1954 was passed on 4 June 1954 but was not to affect any action or proceeding if the cause of action arose before that date. The Lord Ordinary found that the pursuer did not begin to suffer from pneumoconiosis until 1955. But the pursuer contended that the injury had been done to his lungs by 1949 because he had been inhaling dangerous dust for some years before that and, as subsequent events showed, he was susceptible to pneumoconiosis in 1949. So the cause of action had arisen at that date. The First Division of the Court of Session rejected that argument. Lord President Clyde held that there was no cause of action in 1949 and added, at pp 64-65:

> *"To create a cause of action, injuria and damnum are essential ingredients. In the present case there is no evidence of any injuries to the workman's lungs in 1949. He had then merely a deposit of dust in his lungs, which might or might not subsequently create an injury. But, in addition, he had then sustained no damnum. He could not then have been awarded damages for any loss, because at that stage he had sustained no loss of wages and had suffered none of the discomforts and disabilities which, he avers, followed upon the onset of pneumoconiosis and which in fact flowed from the outbreak of that disease in 1955."*

As Lord Guthrie pointed out, at p 68, the problem considered by this House in Cartledge v E Jopling & Sons Ltd could not have arisen if the pursuer's contention had been sound.

87. In summary, three elements must combine before there is a cause of action for damages for personal injuries caused by a defendant's negligence or breach of statutory duty. There must be (1) a negligent act or breach of statutory duty by the defendant, which (2) causes an injury to the claimant's body and (3) the claimant must suffer material damage as a result."

PROCEDURE ROLL: LORD TYRE in DOCHERTY

"[23] ...a cause of action in delict does not arise unless and until there has been both a wrongful act and resultant injury. Specifically, the presence of asbestos dust in an employee's lungs does not of itself constitute injury, and (subject to the Scottish statutory provisions regarding pleural plaques) no cause of action arising out of negligent exposure arises until it does.

[24] As the recitals to the Rome Convention recognised, use of the Latin phrase ***lex loci delicti*** *is apt to create uncertainty because it is open to more than one interpretation. An English translation such as "the law of the place of the harmful event" does not take matters much further where the act or omission causing injury and the injury itself take place at different times in different places. It seems to me, however, that since injury is an essential ingredient of an actionable wrong, and since injury obviously cannot take place until after the breach of duty has occurred, the place of the harmful event (or* ***locus delicti****) is where the injury takes place and not, if different, where the antecedent negligent act or omission occurred."*

DOCHERTY: INNER HOUSE- LORD PRESIDENT-

"[14] ...The lex loci delicti is the law of the place where the fault, omission, or offence takes place (see Trayor's Latin Maxims at 338: locus delicti). It is the place of the act of the defender which constitutes the wrong (see...) It sets the law to be applied to a person's actings as the place where those actings occurred and not where any resultant harm chances to emerge. That is not to say that the place where harm occurred, rather than that of an initiating act, will not be the locus of the delict depending on the circumstances.....The delict (or quasi delict) is the act of the defender in exposing the deceased to asbestos. So far as this action is now concerned, this occurred in Scotland, which is thus the locus delicti..."

[15] Although, in earlier times, it may have been that, once jurisdiction in Scotland had been established, choice of law followed... ....the idea, that the law of the country where the allegedly wrongful act occurred should play a part, quickly took hold...Although this developed into the double actionability rule, the fundamental principle, which is entirely sensible, is that, as a generality, acts committed at a particular place ought to be governed by the law of that place and not that of a country which chances to afford jurisdiction over the defender..."

[17] In establishing the ***lex loci delicti****, the emphasis is on the place of the defender's actings, and not the place where the injury emerges...In short, the focus is on the locus of the defender's actions and not that where injuria meet damnum, (sic) thus giving rise to an action of damages (Rothwell...).Exposure to asbestos is, in the circumstances averred, a delict and quasi delict which is completed, and incidentally actionable by interdict, whether or not an injury is proved to have been sustained....*

[18] .....Each case will depend upon its own facts. Suffice it to say, at the risk of unnecessary repetition, wrongful exposure to asbestos in Scotland is, in an action in this jurisdiction, governed by Scots law."

.....

LORD BRODIE:

"[24] The case against the second defender, at the instance of all of the pursuers, has now been dismissed. It follows that all the averments in support of that case, including the averments of exposure to asbestos dust in England, can, at least for present purposes, be laid aside. What is left for consideration is a claim for damages in reparation brought in a Scottish court of competent jurisdiction in respect of alleged breaches of duty owed by a single Scottish employer to its then Scottish resident employee while he was working in his employer's shipyard in Scotland. The acts and omissions founded on....were all committed or omitted exclusively in Scotland.

[25] It might therefore not be thought to be remarkable that the pursuers present their claims under reference to Scots law."

He then goes on to look at:-

*"**The suggested foreign element requiring a choice of law**"*

[26] Scottish courts generally apply Scots law (the lex fori) to the resolution of the issues before them but they do not always do so. Where a case has a "foreign element" (the expression used both in Anton Private International Law (3rd edit) at para 1.10 and Dicey, Morris and Collins The Conflict of Laws (14th edi) at para 1-001) there is the recognition, expressed through the body of Scots private international law, that it may be more appropriate and more likely to produce a just outcome that a Scottish court should apply the rules of the foreign system. Whether the circumstances so require is determined by the relevant Scots choice of law rule...."

[27]The analysis of the present case as including a material foreign element depends upon the pathology of asbestosis...It is a "long-tailed" disease; it is caused by the inhalation of asbestos dust but the presence of dust within the respiratory system produces no immediate pathological changes to tissue, let alone symptoms of ill health, rather, these only emerge, or may only emerge, after a long period of years...."

[29] In the present case, whereas on the pursuers' case there should be taken to have been asbestos in the deceased's lungs by reason of exposure in Scotland between 1941 and 1947, it was only in 2003 that he can be said to have suffered injury and damage. By that time he was resident in England (as

he had been for many years). This, the defender contends and the Lord Ordinary accepted, introduces a foreign (ie English) element into the case which requires a Scottish court, notwithstanding that it is seised with jurisdiction, to make a choice as to which system of law should be applied to determine the substantive issues."

*[34]The **locus delicti** is a concept rather than a matter of pure objective fact. Identifying it involves a mixed question of fact and law. ... there are at least three possible approaches to that question: identifying the locus by reference to the place of the relevant wrongful act, identifying the locus by reference to the place of the relevant harm, and identifying the locus by reference to the place of the substance of the delict. Whereas a legal system might adopt one of these approaches to the exclusion of others I do not understand Scots law to have done so prior to the supersession of the common law...."*

*[35] The approach adopted by the Lord Ordinary was to fix the **locus delicti** by reference to what he saw as being the place of the relevant harm or, as it is sometimes referred to in the literature, the place of "the final event" which completes the delict or tort....Thus,... a cause of action does not arise unless and until there has been a wrongful act and resultant injury. Specifically, the presence of asbsestos dust in the employee's lungs does not of itself constitute injury...Accordingly, on the Lord Ordinary's analysis, the present case was an action in respect of a harmful event which had occurred in England, because...*

"...since injury is an essential ingredient of an actionable wrong, and since injury obviously cannot take place until after the breach of duty has occurred, the place of the harmful event (or locus delicti) is where the injury takes place and not, if different, where the antecedent negligent act or omission occurred."

*[36]...(*numbering goes wrong in Opinion*)*

*[36] There is no Scottish authority stating, as a matter of principle, how the **locus delicti** should be identified for the purpose of choice of law. The second edition of Anton at pp 412 to 413 considered the matter not to be clear....*

*[40] On the facts in the present case, I can only conclude that the **locus delicti** is Scotland. That is where Scott's shipyard was located. That is where the deceased was employed. That is where he was exposed to and inhaled asbestos dust. A consequence of these facts was that Scott's, as the deceased's employer, were bound, but also entitled, to conduct their operations by reference to the requirements of Scots law.... they would have cause for*

complaint if they were held responsible by reference to the rules of some other system...

*[41] I am reinforced in my conclusion that the **locus delicti** in the present case was Scotland by consideration of just how peripheral to the delict in question was the place where the deceased happened to be when the relevant changes began to develop within his body. In a sense these purely internal changes have no relationship whatsoever with England as a geographical location. On the pursuers' case, the pathology of the deceased's condition was entirely independent of any external event of occurrence that had anything to do with England...Given the decisions in Brown and Rothwell, the separation in time as between breach and harm must be accepted, but what I have more difficulty in accepting is that there was any relevant separation in place. As matters have turned out, what was necessary to give rise to the pursuers' causes of action was the presence of the deceased in Scott's shipyard in Greenock in circumstances in which he inhaled asbestos dust. That is all the pthe pursuers have to prove in relation to a specific place....Indeed, one might even go the distance of questioning whether there is truly any foreign element in this case at all."*

THE POST BREXIT FUTURE

No Rome II

No 1995 Act for diseases caused by negligence prior to 1995

The Common Law applies (always was the lex loci delicti)

This means- and will mean in choice of law cases - ???? - :-

Lex loci delicti

- a wrongful act committed in Scotland,
- it is not necessary that there should be the concurrence of injuria and damnum in Scotland
- the damage caused may be so negligible that it would not give rise to any right of action
- the concurrence of injuria and damnum can be outside Scotland
- there may also be negligence elsewhere which caused or contributed to the injuria ??
- but there is a right of action in Scotland