SUPREME COURT OF QUEENSLAND

CITATION:	*Martens v Stokes & Anor* [2012] QCA 36
PARTIES:	**FREDERICK ARTHUR MARTENS** (appellant) **v** **TANIA ANN STOKES** (first respondent) **COMMONWEALTH OF AUSTRALIA** (second respondent)
FILE NO/S:	Appeal No 3514 of 2011 SC No 613 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	2 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	12 August 2011
JUDGES:	Margaret McMurdo P and White JA and Margaret Wilson AJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. Set aside the order striking out the claim and statement of claim.** **3. Instead, order that the statement of claim be struck out.** **4. Order that the appellant have leave to file and serve a further statement of claim on or before 13 April 2012.** **5. Order that any application for interlocutory orders be made to the Trial Division.** **6. The parties are to provide written submissions as to costs in accordance with Practice Direction No 2 of 2010 paragraph 52.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – GENERAL WORDS – where the appellant contended that his claim was outside the scope of the *Personal Injuries Proceedings Act* 2002 (Qld) – where the appellant contended that his injuries did not arise out of "an incident" within the meaning of s 6 *PIPA* – where appellant contended that his claim for malicious prosecution could not be described as "a claim" under the Act – where

appellant failed to comply with necessary procedure – whether statement of claim was so unsatisfactory that it was unclear whether certain claims were beyond the scope of the Act

CONSTITUTIONAL LAW – OPERATION AND EFFECT OF COMMONWEALTH CONSTITUTION – GENERAL MATTERS – RELATIONSHIP BETWEEN COMMONWEALTH AND STATES GENERALLY – EFFECT OF STATE LAWS ON THE COMMONWEALTH – PARTICULAR CASES – where the claim was within the jurisdictional competence of the Supreme Court of Queensland pursuant to s 56(1)(b) of the *Judiciary Act* 1903 (Cth) – where the *Personal Injuries Proceedings Act* 2002 (Qld) applied by virtue of s 64 *Judiciary Act* 1903 (Cth) – where *Personal Injuries Proceedings Act* 2002 (Qld) applied to appellant's claims by virtue of s 79 *Judiciary Act* 1903 (Cth) – where the appellant claimed inconsistency between State and Commonwealth laws – where the state law was found to apply to both the appellant and Commonwealth alike – whether the appellant's submission on inconsistency was rejected

PRIVATE INTERNATIONAL LAW – CHOICE OF LAW – TORTS – GENERAL PRINCIPLES – where the appellant claimed that the Commonwealth is jointly liable for torts committed by one of its officers – where the appellant alleged conspiracy to pervert the course of justice, malicious prosecution, misfeasance in public office, breach of statutory duty, defamation, breach of international obligations to the sovereign state of Papua New Guinea, negligence and perjury – where the appellant submitted that the *lex loci delicti* was the common law of Australia – where this submission was not accepted – where, in the case of an intranational tort, the *locus delicti* is the State or Territory where the tort occurred – where in so far as torts occurred in Australia, they occurred in Queensland – where *lex loci delicti* is Queensland law – where *Personal Injuries Proceedings Act* 2002 (Qld) applicable in claims for personal injuries

Acts Interpretation Act 1954 (Qld), s 14A, s 32C(a)
Australian Federal Police Act 1979 (Cth), s 64B
Commonwealth Constitution (Cth), s 75(iii), s 78, s 109
Criminal Code 1899 (Qld), s 672A
Judiciary Act 1903 (Cth), s 39(2), s 56(1)(b), s 64, s 79, s 80
Motor Accident Insurance Act 1994 (Qld)
Personal Injuries Proceedings Act 2002 (Qld), s 4, s 5, s 6(1), s 7, s 9, s 18, s 57, Schedule Dictionary

Agtrack (NT) Pty Ltd v Hatfield (2005) 223 CLR 251, [2005] HCA 38, cited
Blunden v The Commonwealth (2003) 218 CLR 330, [2003] HCA 73, cited

Dao v Australian Postal Commission (1987) 162 CLR 317, [1987] HCA 13, cited
John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503, [2000] HCA 36, cited
Koop v Bebb (1951) 84 CLR 629; [1951] HCA 77, cited
Maguire v Simpson (1977) 139 CLR 362; [1977] HCA 63, cited
Martens v Stokes [2011] QSC 65, cited
Regie Nationale des Usines Renault SA v Zhang (2002) 210 CLR 491, [2002] HCA 10, cited
The Commonwealth v Evans Deakin Industries Ltd (1986) 161 CLR 254, [1986] HCA 51, cited
The Commonwealth v Mewett (1997) 191 CLR 471, [1997] HCA 29, cited

COUNSEL: M P Sumner-Potts for the appellant
R W Gotterson QC, with S A McLeod, for the respondents

SOLICITORS: Daniel Towne and Associates for the appellant
Australian Government Solicitors for the respondents

[1] **MARGARET McMURDO P:** I agree with Margaret Wilson AJA's reasons for allowing this appeal in part and with the orders proposed by her Honour.

[2] **WHITE JA**: I have read the reasons for judgment of Margaret Wilson AJA and agree with her Honour's reasons and the orders which she proposes.

[3] **MARGARET WILSON AJA**: On 24 August 2004 the appellant was charged with two offences of engaging in sexual intercourse with a person under the age of 16 years in Papua New Guinea ("PNG"), contrary to s 50BA of the *Crimes Act* 1914 (Cth).

[4] In the Trial Division of this Court, he was tried and convicted of one of the charges, and sentenced to five and a half years imprisonment with a non-parole period of three years. The Court of Appeal dismissed his appeal against conviction and refused his application for leave to appeal against sentence.[1] Subsequently, the Court of Appeal allowed an appeal and quashed the conviction on a reference by the Federal Attorney-General pursuant to s 672A of the *Criminal Code* 1899.[2]

[5] The second charge was withdrawn.

[6] On 29 November 2010 the appellant commenced this proceeding in the Trial Division against the first defendant (a member of the Australian Federal Police) and the Commonwealth of Australia. The claim arises out of alleged deficiencies in the AFP investigation. He has pleaded the following causes of action: conspiracy to pervert the course of justice, malicious prosecution, misfeasance in public office, breach of statutory duty, defamation, breach of international obligations to the sovereign state of PNG,[3] negligence and perjury.[4] He claims that pursuant to s 64B

---

1 [2007] QCA 137.
2 [2009] QCA 351.
3 Whether the appellant has standing to claim damages for breach of international obligations to another sovereign state was not argued on this appeal.
4 Perjury is not a civil wrong but a crime. P Vaut (ed), *Torts - The Laws of Australia* (2nd ed), 2007, p 564.

of the *Australian Federal Police Act* 1979 (Cth) ("the *AFP Act*") the second defendant (the Commonwealth) is jointly liable with the first defendant for torts committed by her. He claims damages, including exemplary damages and interest, for physical, emotional, psychological and financial injury. There is no claim for damages for loss of reputation, and as I shall explain, no clearly articulated claim for damages other than damages for personal injuries.[5]

[7] This appeal is against an order striking out the claim and statement of claim for non-compliance with the pre-litigation requirements of the *Personal Injuries Proceedings Act* 2002 ("*PIPA*").[6] There were two principal issues argued –

(a) whether this claim is within the scope of *PIPA* on its proper construction; and

(b) the implications of federal jurisdiction.

Background

[8] The appellant was employed as a commercial pilot flying light aircraft within PNG and between PNG and Australia.

[9] On 24 August 2004 at Cairns International Airport he was arrested by the first defendant and charged with the following offences –

> "That between 10 September 2001 and 16 September 2001, in Port Moresby, Papua New Guinea, Frederick Arthur MARTENS, did engage in sexual intercourse with a person who was under 16 years of age, namely [GN], contrary to section 50BA of the Crimes Act 1914" and
>
> "That on a date in mid to late 1996, in Port Moresby, Papua New Guinea, Frederick Arthur MARTENS, did engage in sexual intercourse with a person who was under 16 years of age, namely [DM], contrary to section 50BA of the Crimes Act 1914."[7]

[10] It was the charge involving GN which went to trial. The prosecution alleged that the appellant twice flew her from Morehead in the Western Province of PNG to Port Moresby – first in March 2001 to obtain a passport and then on a Friday between 10 and 16 September 2001. The prosecution alleged that on the second occasion GN went with the appellant as a result of subterfuge on his part, and that on arrival in Port Moresby he took her to his home where she spent the night, during which there was an act of non-consensual intercourse.

[11] The appellant denied any act of sexual intimacy with GN. He maintained that he flew her from Morehead to Port Moresby only once – on 10 August 2001, for the purpose of making a passport application.

[12] The AFP did not obtain relevant PNG Civil Aviation Authority records before charging him. Nor did they obtain them before the trial, despite being alerted to their existence by a letter from his solicitors to the Commonwealth Director of Public Prosecutions dated 29 December 2004. Those records confirmed the appellant's assertion that he did not fly from Morehead to Port Moresby as alleged

---

5 See paragraphs [33] and [34] of these reasons.

6 In particular, ss 9, 18 and 57.

7 Statement of claim paragraph 13.

in September 2001, and their production as fresh evidence led ultimately to the conviction being quashed.

The statement of claim

[13] The appellant alleges that the first respondent arrested him on 24 August 2004 and charged him with the two offences.[8] He alleges that the first respondent, while giving evidence at the committal, said she would carry out investigations suggested by the appellant, but that she "failed, refused and neglected properly" to do so.[9] He alleges that the first respondent did not question the complainant about her differing statements,[10] that she failed to trace the complainant's movements,[11] and that she failed to assess the credit worthiness of witnesses.[12]

[14] The allegations in the statement of claim are diffuse. It is difficult to determine precisely what conduct of the respondents is relied on as constituting the various causes of action. In so far as the pleading refers to investigations undertaken or that should have been undertaken in PNG before the appellant was arrested,[13] it is not clear whether this is intended to be background to conduct in Australia, or elements of one or more of the causes of action.

[15] The appellant pleads that circumstances which occurred in Queensland gave rise to a duty of care –

> "16. By:
>
> a) charging an offence against Australian law,
>
> b) in Australia,
>
> c) vigorously opposing bail to enable the plaintiff to go to Papua New Guinea to obtain evidence to defend himself,
>
> d) defying a court order granting bail by refusing to return his passport so that he could go to Papua New Guinea,
>
> e) being told by letter hereinafter referred to, prior to committal, of various avenues of inquiry the results of which would demonstrate that he could not have committed the offences alleged,
>
> f) acceptance by the first defendant while giving evidence at committal that she would carry out investigations on behalf of the plaintiff,
>
> the defendants placed themselves in a position of proximity to the plaintiff such as to give rise to a duty of care to investigate the allegations competently, honestly, diligently

---

8 Statement of claim paragraph 13.
9 Statement of claim paragraphs 16 and 17.
10 Statement of claim paragraph 47.
11 Statement of claim paragraph 52.
12 Statement of claim paragraph 62.
13 For example, paragraphs 34 – 50.

> and without negligence to establish the truth of the matter."[14]

He also pleads a prosecution which was commenced and undertaken in Queensland;[15] alleged irregularities in the course of conducting the prosecution in Queensland;[16] an alleged cover-up in Queensland;[17] imprisonment in Queensland;[18] and injuries sustained thereby.[19]

The scope of *PIPA*

[16] Sections 5 and 6(1) of *PIPA* provide –

> "**5 Act binds all persons**
>
> (1) This Act binds all persons, including the State and, to the extent the legislative power of the Parliament permits, the Commonwealth and the other States, unless otherwise provided.
>
> (2) However, the Commonwealth or a State can not be prosecuted for an offence against this Act.
>
> **6 Application of Act**
>
> (1) This Act applies in relation to all personal injury arising out of an incident whether happening before, on or after 18 June 2002."

The balance of s 6 provides for a number of exceptions, namely, personal injury within the meaning of the *Motor Accident Insurance Act* 1994, relevant workers' compensation legislation and other acts.[20]

[17] Section 9 provides that, before starting a proceeding in a court based on a claim for personal injury, a claimant must give the person against whom the proceeding is proposed to be started a written notice of claim in the approved form. The section goes on to deal with the required contents of the notice and the time within which it must be given.

[18] The appellant did not serve a notice of claim on either of the respondents before commencing this proceeding.

[19] Section 7 makes the requirement to give the notice pursuant to s 9 a provision of substantive law; it must therefore be complied with before valid proceedings can be instituted.[21] Further, s 18 provides that a claimant who fails to give a notice of claim complying with the legislative requirements, may not proceed further with the claim except in certain defined circumstances (none of which arose in the present case).

---

14 Statement of claim paragraph 16.
15 Statement of claim paragraphs 13, 22 and 23.
16 Statement of claim paragraphs 50, 53, 54, 57, 61, 66, 71 and 81.
17 Statement of claim paragraphs 82 - 89.
18 Statement of claim paragraph 23.
19 Statement of claim paragraphs 92, 93.
20 *Motor Accident Insurance Act* 1994, s 6(2) and (5).
21 *State of Queensland v Coffey* [2005] QSC 212, [6]; *Holmes v Adnought Sheet Metal Fabrications Pty Ltd* [2004] 1 Qd R 378, [22] – [26].

[20] The primary judge held that the appellant could pursue his claim for personal injuries only under the statutory regime imposed by *PIPA.* Because he had not done so, his claim should be struck out.[22]

[21] Counsel for the appellant submitted that his client's personal injuries did not arise out of "an incident" within the meaning of s 6, and further that the proceeding was not a "claim" within the meaning of the Act.

[22] "Incident" is defined in the dictionary which is a schedule to the Act –

> "***incident***, in relation to personal injury, means the accident, or other act, omission or circumstance, alleged to have caused all or part of the personal injury."

By s 32C(a) of the *Acts Interpretation Act* 1954 words in the singular include the plural.

[23] Counsel for the appellant's submission as to why *PIPA* does not apply to his client's claim was, with respect, somewhat confused. He submitted that s 6 requires a positive act of short duration with a direct causal link to ensuing personal injury, such as a car accident or falling off a ladder. He submitted that the conduct complained of is not within the definition of "incident" because it was a course of conduct over a very extended period of time. When asked why a course of intimidatory conduct such as bullying, whether or not physical, which resulted in psychological and emotional damage would not be a circumstance or circumstances within the definition, he responded that "circumstance" implies a passive condition, and seemed to characterise such a course of intimidatory conduct as positive conduct over an extended time.

[24] A course of conduct necessarily consists of acts and omissions. Even if counsel for the appellant's submission that a circumstance implies a passive condition is correct, there is no reason why a course of conduct should not fall within the definition of incident on the basis that it consisted of acts or omissions which caused the personal injury of which the claimant complains.

[25] Invoking the purposive approach to statutory interpretation[23] counsel for the appellant submitted –

> "The Act is designed to address issues concerning actions for damages in the context, for example, of a motor car accident, industrial accident, or similar event, particularly where third party, or other liability insurance is, or is likely to be, available.
>
> …
>
> It can hardly be supposed that it was within the contemplation of the legislature that the affordability of insurance would be affected by a claim against the Commonwealth for oppressive or improper conduct of one sort or another."

[26] He relied on s 4 of *PIPA*, which provides –

---

22 *Martens v Stokes* [2011] QSC 65.

23 *Acts Interpretation Act* 1954, s 14A.

"**4 Main purpose**

(1) The main purpose of this Act is to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury.

(2) The main purpose is to be achieved generally by—

(a) providing a procedure for the speedy resolution of claims for damages for personal injury to which this Act applies; and

(b) promoting settlement of claims at an early stage wherever possible; and

(c) ensuring that a person may not start a proceeding in a court based on a claim without being fully prepared for resolution of the claim by settlement or trial; and

(d) putting reasonable limits on awards of damages based on claims; and

(e) minimising the costs of claims; and

(f) regulating inappropriate advertising and touting."

He referred also to the Minister's Second Reading Speech when the legislation was before the Parliament.[24] After referring to the insurance crisis over the previous 12 months, the Minister said –

> "State governments have the power to change laws concerning negligence and the framework that influences compensation payments. Our government has responded with this Personal Injuries Proceedings Bill as our primary initiative of legislative reform. The purpose of this bill is to give certainty to those involved in personal injuries litigation and streamline the claims process. The bill is framed around three key strategies:
> - reducing the costs of legal proceedings;
> - reducing the number of frivolous claims for minor injuries; and
> - capping the size of large claims."

The Minister outlined the provisions of the bill, and continued –

> "There are a number of broader issues that are yet to be dealt with concerning the operation of the law of negligence. These are being considered at a national level and the Queensland government is actively involved in developing these issues through the appointment of an expert panel. However, this bill is the first and most significant step in the process of reform. It will provide a framework that streamlines and gives certainty to injured persons, insurers and the

---

[24] RJ Welford, Queensland, Legislative Assembly, *Parliamentary Debates (Hansard)*, 18 June 2002, pp 1848 – 1850.

> broader public about claims for compensation. It draws upon the proven success of the Queensland motor accident and WorkCover schemes in addressing the fundamental operation and costs of the compensation system.
>
> This bill is balanced and fair and will provide a basis for the continued viability of the various insurance schemes in our state. This bill restores commonsense to compensation awards for personal injuries and it sends a clear signal to insurance companies to reduce their premiums. I commend the bill to the House."

[27] The long title of *PIPA* is –

> "An Act to regulate particular claims for and awards of damages based on a liability for personal injuries, and for other purposes."

Although its main purpose is to assist the ongoing affordability of insurance, on the plain reading of ss 5 and 6 its application is not limited to claims against which there is insurance. And as the Minister made plain in the Second Reading Speech, it was intended to provide a framework that streamlined and gave certainty to injured persons, insurers and the broader public about claims for compensation.

[28] There is no reason why its application should be limited to "a positive act of short duration" such as a car accident or falling off a ladder. In fact, personal injuries within the meaning of the *Motor Accident Insurance Act* 1994, and relevant workers' compensation legislation are expressly excluded from its operation[25] - no doubt because such injuries are the subject of discrete statutory insurance schemes. There are several other express exclusions.[26] Counsel for the appellant specifically referred to s 6(4), which relates to personal injury caused by an unlawful intentional act done with intent to cause personal injury or unlawful sexual assault or other unlawful sexual misconduct. The Act applies to such injury: all that the subsection makes inapplicable are certain costs provisions.

[29] "Claim" is used in *PIPA* in the sense of a demand or assertion of rights. It is defined thus –

> "***claim*** means a claim, however described, for damages based on a liability for personal injury, whether the liability is based in tort or contract or in or on another form of action including breach of statutory duty and, for a fatal injury, includes a claim for the deceased's dependants or estate."

"Damages" and "personal injury" are defined as follows –

> "***damages*** includes any form of monetary compensation."
>
> "***personal injury*** includes—
> (a) fatal injury; and
> (b) prenatal injury; and
> (c) psychological or psychiatric injury; and
> (d) disease."

By s 9, notice of such a claim must be given before litigation is commenced.

---

25 *Personal Injury Proceedings Act* 2002, s 6(2).

26 *Personal Injury Proceedings Act* 2002, s 6(3), (5).

[30] By contrast, "claim" as used in the *Uniform Civil Procedure Rules* 1999, is the name given to initiating process. Neither the "claim" by which a proceeding is commenced nor the "statement of claim" is to be confused with the "claim" referred to in *PIPA*. But when litigation is commenced, the "claim", in the sense of demand or assertion of rights, is articulated in the court documents and the facts relied on in support of it are set out.

[31] In his claim and statement of claim the appellant has not identified the damages he contends he may recover in each cause of action pleaded. Rather, he has listed a number of causes of action,[27] and alleged simply that –

> "92. By reason of the premises [he] has suffered loss and damage, and been otherwise damnified.
>
> 93. ... [he] has been severely injured physically, emotionally, psychologically and financially by the actions of the defendants…"[28]

[32] In the circumstances I do not accept counsel for the appellant's submission that the claim for malicious prosecution may not properly be described as "a claim for damages based on a liability for personal injury".

[33] In my view the course of conduct alleged against the respondents was an "incident" as defined in *PIPA*, and the alleged physical, emotional and psychological injury was "personal injury" as defined in that Act. It is not clear from the pleading what is meant by "financial injury". In so far as it means economic loss recoverable as part of the damages for personal injuries, the claim is one for "damages" as defined in that Act. Not having complied with the pre-litigation requirements of *PIPA*, subject to any relevant implication of the Supreme Court's exercise of Federal jurisdiction, the appellant was not entitled to commence this proceeding in so far as it is a claim for personal injuries.

[34] It may be that the appellant's claim for financial injury is intended to include damages for loss of reputation. Further, he alleges that he was "the owner" of a number of companies which operated businesses which required his services to operate, and which collapsed when he was prevented from returning to Port Moresby.[29] The basis on which he claims to be entitled to recover losses sustained by the companies is not apparent from the pleading. The pleading is so unsatisfactory that it is unclear whether some of the claims are beyond the scope of *PIPA*.

Implications of federal jurisdiction

[35] Both the appellant and the respondents acknowledged that the Supreme Court of Queensland is exercising federal jurisdiction in this matter. By s 75(iii) of the *Constitution* (Cth) the High Court of Australia has jurisdiction to hear a matter in which the Commonwealth or a person being sued on behalf of the Commonwealth is a party. State courts are invested with federal jurisdiction by s 39(2) of the *Judiciary Act* 1903 (Cth). The claim is within the jurisdictional competence of the Supreme Court of Queensland pursuant to s 56(1)(b) of the *Judiciary Act*, which

---

27 Statement of claim paragraph 91.

28 Statement of claim paragraphs 92 93.

29 Statement of claim paragraphs 94 - 96.

provides that if a claim made against the Commonwealth arises in a State, that claim may be brought in the Supreme Court of that State.

***Judiciary Act* s 64**

[36] The primary judge held that, by virtue of s 64 of the *Judiciary Act*, *PIPA* applies to the appellant's claim. That section provides –

> "**64 Rights of parties**
>
> In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject."

[37] The leading High Court decision on s 64 is *Maguire v Simpson.*[30] Its substance was summarised in the majority judgment in *The Commonwealth v Evans Deakin Industries Ltd*[31] as follows –

> "…That case establishes that in every suit to which the Commonwealth is a party s. 64 requires the rights of the parties to be ascertained, as nearly as possible, by the same rules of law, substantive and procedural, statutory and otherwise, as would apply if the Commonwealth were a subject instead of being the Crown. That result seems entirely just; the Commonwealth acquires no special privilege except where it is not possible to give it the same rights and subject it to the same liabilities as an ordinary subject. The section is ambulatory, and is therefore capable of applying rights resulting from changes made to State legislation after s. 64 was enacted: *Maguire v. Simpson.*[32] There can be no doubt that the Commonwealth Parliament has full power to make laws governing the liability of the Commonwealth. It is unnecessary to consider whether s. 78 of the Constitution (which enables the Parliament to 'make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power') is the sole source of that power. In *Maguire v. Simpson* Barwick C.J. and Jacobs J. thought that it was, and held that s. 78 is not limited to matters of procedure.[33] It is more doubtful whether the Commonwealth Parliament has a general power to legislate to affect the substantive rights of the States in proceedings in the exercise of federal jurisdiction, but that question does not arise in the present case, since *Maguire v. Simpson* establishes that the provisions of s. 64 in their application to suits in which the Commonwealth is a party are not to be confined by considerations which might operate to limit their scope in their application to suits in which a State is a party. Certainly s. 64 is validly enacted in so far as it deals with the rights and liabilities of the Commonwealth."

In *Evans Deakin* the High Court determined that the *Subcontractors' Charges Act* 1974 applied in proceedings instituted in Queensland by a sub-contractor against the Commonwealth as employer.

---

30 (1977) 139 CLR 362, 388.
31 (1986) 161 CLR 254, 262 – 263.
32 (1977) 139 CLR 362, 388, 395, 397, 407.
33 (1977) 139 CLR 362, 370, 404 – 405.

[38] Subject to any directly applicable and relevantly inconsistent Commonwealth legislation, *PIPA* applies to the appellant's claim by virtue of s 64.

***Judiciary Act* s 79**

[39] As counsel for the respondents submitted, the primary judge could equally have held that *PIPA* applies to the appellant's claim by virtue of s 79 of the *Judiciary Act*.[34] That section provides –

> "**79 State or Territory laws to govern where applicable**
>
> (1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.
>
> ...
>
> (3) This subsection covers a law of a State or Territory that would be applicable to the suit if it did not involve federal jurisdiction, including, for example, a law doing any of the following:
>
> (a) limiting the period for bringing the suit to recover the amount;
>
> (b) requiring prior notice to be given to the person against whom the suit is brought;
>
> (c) barring the suit on the grounds that the person bringing the suit has charged someone else for the amount.
>
> ..."

Section 79 operates on State and Territory statutory law, as in force from time to time. The single common law of Australia is not a law "of" a State or Territory, and is instead applied by s 80 of the *Judiciary Act*.[35]

Inconsistency: *Constitution* s 109

[40] In *Dao v Australian Postal Commission*[36] the High Court discussed s 109 of the *Constitution* and s 64 of the *Judiciary Act*. Section 109 of the *Constitution* provides –

> "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

The High Court said[37] –

---

34 See *Commonwealth v Mewett* (1997) 191 CLR 471, 520-521 per Gaudron J and 551-552 per Gummow and Kirby JJ.

35 G Hill and A Beech, "Picking up' State and Territory laws under s 79 of the Judiciary Act – three questions" (2005) 27 *Australian Bar Review* 25; *Commonwealth v Mewett* (1997) 191 CLR 471, 526.

36 (1987) 162 CLR 317.

37 (1987) 162 CLR 317, 331 – 332.

> "In a case such as the present which raises issues involving both s. 109 of the Constitution and s. 64 of the *Judiciary Act*, the constitutional provision, as the basic law, must receive prior consideration.
>
> …
>
> That section [s. 64] was intended to fill what would otherwise be lacunae or gaps in the law of the Commonwealth. It is not to be understood as intended to have the practical effect of overriding s. 109 of the Constitution by indirectly applying a provision of a law of a State to circumstances to which its direct application is invalidated by reason of inconsistency with a provision of an existing law of the Commonwealth. A fortiori, s. 64 should not be construed as intended to manufacture a new kind of indirect inconsistency between a provision of a State law and a provision of a law of the Commonwealth by applying a provision of a State law to a situation to which it does not purport to apply in circumstances where, if rendered directly applicable, it would be relevantly inconsistent with the direct operation of the provision of the law of the Commonwealth. Rather, the section should and must be construed as intended to extend a litigant's rights in a suit in particular circumstances only if, and to the extent that, there be no directly applicable and inconsistent (in the relevant sense) Commonwealth law already regulating those circumstances. It follows that if examination of the relevant law leads to the conclusion that the State Act is inconsistent with the Commonwealth Act with the result that by force of s. 109 of the Constitution the State Act cannot directly apply to the Commission in respect of its engagement and dismissal of staff then, whatever other difficulties may have confronted the appellants in their attempted reliance upon s. 64 of the *Judiciary Act*, there remains no foothold at all for an argument invoking that section."

[41] Before the primary judge, counsel for the appellant submitted that *PIPA* is in conflict with the *AFP Act*, and that the inconsistency resulted in the laws of the Commonwealth prevailing so as to exclude *PIPA*. He relied on a combination of s 78 of the *Constitution*, which provides that the Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power, and s 64B of the *AFP Act*, contending that the *AFP Act* "covers the field to the extent that a State Act such as PIPA has no force or effect"[38].

[42] Section 64B of the *AFP Act* provides –

> "(1) The Commonwealth is liable in respect of a tort committed by a member or a protective service officer in the performance or purported performance of his or her duties as such a member or a protective service officer in like manner as a person is liable in respect of a tort committed by his or her employee in the course of his or her employment, and shall, in respect of such a tort, be treated

---

38 [2011] QSC 65, [10] [11].

for all purposes as a joint tortfeasor with the member or the protective service officer.

(2) In a claim by the Commonwealth for damages in respect of a tort, an act or omission of a member or a protective service officer in the performance or purported performance of his or her duties as a member or a protective service officer may be relied on as constituting contributory negligence by the Commonwealth if the act or omission could have been so relied on if it had been done by an employee of the Commonwealth in the course of his or her employment.

(3) The liability of the Commonwealth under subsection (1) does not extend to a liability to pay damages in the nature of punitive damages.

(4) Without limiting the application of subsection (1), the Commonwealth may:

(a) where proceedings have been instituted against a member or a protective service officer with respect to a tort committed by the member or the protective service officer in the performance or purported performance of his or her duties as a member or a protective service officer—as joint tortfeasor with the member or the protective service officer (whether or not the Commonwealth is a party to the proceedings):

(i) pay to the plaintiff, on behalf of the member or the protective service officer, the whole or a part of any damages or costs (not being damages in the nature of punitive damages) that the member or the protective service officer has been ordered by the Court in the proceedings to pay to the plaintiff; and

(ii) pay to the member or the protective service officer any costs incurred by him or her in the proceedings and not recovered from the plaintiff; or

(b) where a member or a protective service officer has entered into a settlement of a claim by another person that has, or might have, given rise to proceedings of a kind referred to in paragraph (a)—as joint tortfeasor with the member or the protective service officer (whether or not the Commonwealth is a party to the settlement), pay to that other person the whole or a part of the amount that, under the terms of the settlement, the member or the protective service officer is liable to pay to that other person.

(5) For the purposes of this section:

(a) an act or omission of a member in the capacity of a constable shall be deemed to have been done in the performance of his or her duties as a member; and
(b) a reference to a plaintiff includes a reference to a defendant counter-claiming; and
(c) a reference to a member includes a reference to a special member; and
(d) a reference to a protective service officer includes a reference to a special protective service officer."

[43] His Honour rejected that argument, for these reasons [39] -

"[14] The paramountcy of Commonwealth legislation arises by s 109 of the Constitution and that occurs only to the extent of inconsistency between Commonwealth and State laws. A similar issue was considered in *Re Residential Tenancies Tribunal ex parte Defence Housing Authority*[40] where the Authority sought to avoid the determination of the Tribunal set up pursuant to State legislation. The High Court held that the matters which the Tribunal dealt with did not fall within the exclusive power of the Commonwealth. The Commonwealth Act did not provide a comprehensive and exclusive code, rather it assumed the operation of common law modified by statute. In that case the plural judgment (Dawson, Toohey and Gaudron JJ) said:

> 'The purpose in drawing a distinction between the capacities of the Crown and the exercise of them is to draw a further distinction between legislation which purports to modify the nature of the executive power vested in the Crown – its capacities – and legislation which assumes those capacities [and] merely seeks to regulate activities in which the Crown may choose to engage in the exercise of those capacities.'

[15] The provisions of the *Australian Federal Police Act* do not, in my view, have the effect of covering the field in a way which limits the effect of s 64 of the *Judiciary Act*. There are some cases where s 64 will not operate to insert into consideration of the issue, provisions of State law. For example, in *Deputy Federal Commissioner of Taxation v Moorbank Pty Ltd*[41] it was held that in the general scheme of the *Income Tax Assessment Act* 1936 (Cwth) providing for the collection and recovery of income tax 'there is no room for the importation into them of such State Limitations Act provisions'[42].

[16] Counsel for the plaintiff does not point to any Commonwealth scheme which regulates the circumstances

---

39 [2011] QSC 65, [14] – [17].
40 (1997) 190 CLR 410.
41 (1988) 165 CLR 55.
42 (1988) 165 CLR 55, 66.

> in which a person may pursue a claim for breach of duty against a member of the AFP. So far as I am aware, there is none.
>
> [17] Here, PIPA regulates the pursuit of claims for personal injury arising in the State of Queensland. It is a State law of general application and it applies both to the plaintiff and in this instance the Commonwealth alike. It does not attempt to impair the capacities of the Commonwealth executive but rather to regulate the manner in which claims, including claims against the Commonwealth, are pursued. That being so, the plaintiff's claim for personal injuries can only be pursued under the statutory regime imposed by PIPA."

[44] The primary judge was, with respect, clearly correct.

[45] On appeal, counsel for the appellant's argument on inconsistency seemed to be limited to inconsistency between s 64B of the *AFP Act* (set out in paragraph [43] above) and s 57 of *PIPA*. Section 57 of *PIPA* provides –

> "A court can not award damages, or interest on damages, contrary to this chapter."

[46] Counsel for the appellant submitted –

> "24. … The 'tort' referred to in s 64B would be the common law of Australia.
>
> It is contemplated that damages at a normal (i.e. not capped) level would be payable, if proved. Since the Commonwealth as joint tortfeasor is not liable to indemnify an AFP employee for punitive damages it is, by implication, within contemplation that the employee can be sued for damages including punitive damages, which are not available under State legislation. It can hardly be supposed that a damages claim could include punitive, but only capped compensatory damages. The AFP Act should be considered as granting, or recognising, rights of action against both defendants, and to cover the field in a relevant sense, to the intent that a State Act such as PIPA, even if in its terms it covered the fact situation, has no force or effect.
>
> 25. Section 7 of PIPA (set out above in Spigelman CJ's judgment [in *Hamilton v Merck and Co Inc*[43]] provides that the kinds of damage, and the amount of damages, that may be recovered by a person, are provisions of substantive, as opposed to procedural, law.
>
> This reinforces the proposition that PIPA is in conflict with the AFP Act which is also part of the substantive law. There is no suggestion in the AFP Act that any restriction on common law damages applies. S.57 of PIPA which reads:
>
> **57 General regulation of court awards**
> A court can not award damages, or interest on damages, contrary to this chapter.

---

43 [2006] NSWCA 55.

> is a constraint on the AFP Act which constitutes a conflict such that it is inconsistent with a law of the Commonwealth within the meaning of s.80 of the Judiciary Act and being the substantive law, the AFP Act and the common law of Australia must be applied to the exclusion of the State Act.
>
> The two Acts cannot stand together."

Counsel did not explain what he submitted was "a relevant sense"; nor did he explain how, in his submission, the field was covered.

[47] Section 64B of the *AFP Act* creates a statutory vicarious liability on the part of the Commonwealth in respect of a tort committed by a member of the AFP in the performance or purported performance of his or her duties. That statutory liability does not extend to the payment of punitive damages. The section also provides for the payment of claims and costs by the Commonwealth where it is so vicariously liable.

[48] As counsel for the respondent submitted –

> "44. Section 64B has to do with the nature and extent of the Commonwealth's vicarious liability for tort. It has nothing to do with how either a claim against the Commonwealth based on such a liability or a tortious claim against the alleged tortfeasor, must or may be pursued. Section 64B and the PIPA do not intersect. The latter does not intrude upon the field of operation of the former.
>
> 45. Specifically, the PIPA does not intersect by virtue of the provisions in ss 9 and 18 or by virtue of s 57 to which the appellant refers. The PIPA does not, by s 57 or any other provisions, purport to enact to impose a vicarious liability on the Commonwealth for punitive damages."

[49] The appellant's submission on inconsistency should be rejected.

Choice of law

[50] Section 80 of the *Judiciary Act* provides –

> "**80 Common law to govern**
>
> So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters."

[51] The primary judge was correct when he observed that the claims are essentially tortious in character. For the purposes of the choice of law rules, breach of statutory

duty is treated as a tort.[44] It is not clear that the appellant has standing to claim damages for breach of international obligations to another sovereign state, but this was not argued on this appeal.

[52] Section 80 is one of the laws of the Commonwealth to which s 79 is subject.[45] Except where the plaintiff relies on a cause of action created by a Commonwealth statute,[46] s 80 applies the common law choice of law rules, subject to the statute law in force in the forum. If there is no relevant common law choice of law rule, but the forum has modified the common law, then s 80 will apply the forum's modification of the common law.[47]

[53] The High Court has held that the law of the place where the tort was committed (the *lex loci delicti*) should be applied by Australian courts as the law governing all questions of substance to be determined in a proceeding arising from an intranational tort[48] or a foreign tort.[49] In *John Pfeiffer Pty Ltd v Rogerson*, which concerned an intranational tort, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ said that for this purpose, laws bearing upon the existence, extent or enforceability of remedies, rights and obligations are to be characterised as substantive, not procedural,[50] while in *Regie Nationale des Usines Renault SA v Zhang*, which concerned a foreign tort, the same judges reserved for further consideration the question whether all questions about the kinds of damages, or amount of damages that might be recovered should be treated as substantive issues governed by the *lex loci delicti*.[51]

[54] On appeal the appellant relied on a choice of law argument not advanced below. His counsel submitted that the primary judge erred in applying Queensland law as the law of the forum (the *lex fori*). He submitted that his Honour should have applied the *lex loci delicti*, which, he submitted, was the common law of Australia. In the course of oral submissions he raised the possibility of some of the acts or omissions having occurred in parts of Australia other than Queensland – for example, failure to make relevant inquiries of a federal agency based in Canberra. This attempt to establish a *locus* in some part of Australia outside Queensland was, in my view, without foundation.

[55] Counsel for the respondent submitted that the appellant's argument was misconceived because he had not pleaded facts establishing a *locus delicti* for any of the alleged torts in any jurisdiction outside Queensland. Further, they submitted, the appellant's counsel did not identify a specific jurisdictional *locus* other than Queensland as the place where the torts were committed, or argue that the substantive law of that *locus* was the *lex loci delicti* which ought to have been applied. This harks back to the problems with the appellant's pleading to which I have already referred.

---

44 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 519; *Koop v Bebb* (1951) 84 CLR 629.

45 *Blunden v Commonwealth* (2003) 218 CLR 330, [18] per Gleeson CJ, Gummow, Hayne and Heydon JJ (Callinan J agreeing); *Commonwealth v Mewett* (1997) 191 CLR 471, 522 per Gaudron J.

46 *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251, 270 – 271.

47 G Hill and A Beech, "Picking up' State and Territory laws under s 79 of the Judiciary Act – three questions" (2005) 27 *Australian Bar Review* 25, pp 39 – 41.

48 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

49 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 520 [75].

50 (2000) 203 CLR 503, 544 [102].

51 (2002) 210 CLR 491, 520 [76].

[56] The correct approach to identifying the *locus* of a tort constituted by a series of events which occurred in different places in relation to choice of law has not yet been finally determined by the High Court.[52] But it is not necessary to explore this question in determining this appeal.

[57] This much is clear. Counsel for the appellant did not submit that the *locus delicti* was PNG. In submitting that the *lex loci delicti* was the common law of Australia, he must be taken as identifying the place of the tort as Australia. His submission as to the applicable law should not be accepted. The common law of Australia includes the choice of law rules. In the case of an intranational tort, the *locus delicti* is not Australia, but the State or Territory where the tort occurred.

[58] In so far as the torts occurred in Australia, they occurred in Queensland, and the *lex loci delicti* is Queensland law. It is not necessary to consider whether, despite s 7 of *PIPA*, the pre-litigation requirements prescribed by that Act would be classified as procedural rather than substantive by the law of some other Australian State or Territory.

Conclusion

[59] In so far as the appellant's claim is one for personal injuries, the primary judge was correct in his conclusion that it can be pursued only under the statutory regime imposed by *PIPA*. The difficulties with the pleading are such that it is not clear whether he is seeking to pursue other claims as well. He should have the opportunity to replead any claim that is not a claim for personal injuries.

[60] I would make the following orders:

(1) Allow the appeal.
(2) Set aside the order striking out the claim and statement of claim.
(3) Instead, order that the statement of claim be struck out.
(4) Order that the appellant have leave to file and serve a further statement of claim on or before 13 April 2012.
(5) Order that any application for interlocutory orders be made to the Trial Division.
(6) The parties are to provide written submissions as to costs in accordance with Practice Direction No 2 of 2010 paragraph 52.

---

[52] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 562 – 563 per Kirby J; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 521 [74] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; 621 – 622 [100] – [101] et seq per Kirby J; *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575, 637 - 639 [145] – [150] per Kirby J.