SUPREME COURT OF QUEENSLAND

CITATION:	*Robinson v Studorp Ltd* [2013] QSC 238
PARTIES:	**LANCE JOHN ROBINSON** (plaintiff) v **STUDORP LTD** (defendant)
FILE NO:	BS 11966 of 2012
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	9 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	22 August 2013
JUDGE:	Jackson J
ORDERS:	**The order of the court is:** **1. the application is dismissed; and** **2. the applicant pay the respondent's costs of the application to be assessed.**
CATCHWORDS:	PRIVATE INTERNATIONAL LAW – RESTRAINT OF PROCEEDINGS – OF LOCAL PROCEEDINGS: CLEARLY INAPPROPRIATE FORUM – GENERALLY – where the plaintiff claims damages for personal injuries caused by the defendant's negligence in New Zealand – where the defendant filed an application to stay the proceeding pursuant to *Uniform Civil Procedure Rule* 1999 (Qld), r 16 – where the plaintiff is a resident of and has previously brought a similar proceeding in New South Wales – where the parties agree that the lex causae is the law of New Zealand – where the *Trans-Tasman Proceedings Act* 2010 (Cth) will affect the procedure of the trial – whether this Court is a "clearly inappropriate forum" – whether a stay of proceeding should be allowed *Evidence Act* 1977 (Qld), s 68 *Jurisdiction of Courts (Cross Vesting) Act* 1987 (NSW), s 4 *Limitation Act* 2010 (NZ), s 4, s 59 *Supreme Court Act* 1991 (Qld), s 62 *Trans-Tasman Proceedings Act* 2010 (Cth), s 17, s 19, s 23, s 31, s 48, s 50, s 96 *Trans-Tasman Proceedings Act* 2010 (NZ), s 23

Trans-Tasman Mutual Recognition Act 1997 (Cth)
Trans-Tasman Mutual Recognition Act 1997 (NZ)
Uniform Civil Procedure Rules 1999 (Qld), r 16, r 124, r 312, r 745, r 765

Hook, "New Zealand's Accident Compensation Scheme and Man-Made Disease", [2008] *Victoria University of Wellington Law Review* 15
Miller, "Trends in Personal Injury Litigation: the 1990s", [2003] *Victoria University of Wellington Law Review* 407
Mortenson, "A Trans-Tasman Judicial Area: Civil Jurisdiction and Judgments in the Single Economic Market", (2010) 16 *Canterbury Law Review* 61
Todd S, "Forty Years of Accident Compensation in New Zealand", *Thomas M Cooley Law Review*, Volume 28:2, 189

Amaca Pty Ltd v Booth [2010] NSWCA 344, cited
Amaca Pty Ltd v Hannell (2007) 34 WAR 109; [2007] WASCA 158, cited
Anns v Merton London Borough Council [1978] AC 728, cited
Baynes v Union Steamship Company of New Zealand Ltd [1953] NZLR 616, cited
Bryan v Maloney (1995) 182 CLR 609; [1995] HCA 17, cited
Cook v Cook (1986) 162 CLR 376; [1986] HCA 73, cited
Couch v Attorney-General [2008] 3 NZLR 725; [2008] NZSC 45, cited
CSR Ltd v Eddy (2005) 226 CLR 1; [2005] HCA 64, cited
CSR Ltd v Wren (1997) 44 NSWLR 463, cited
Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32; [2002] UKHL 22, cited
Donoghue v Stevenson [1932] AC 562; [1932] UKHL 100, cited
G D Searle & Co v Gunn [1996] 2 NZLR 129, cited
Grant v Australian Knitting Mills Ltd [1936] AC 85, cited
Griffiths v Kerkemeyer (1977) 139 CLR 161; [1977] HCA 45, cited
Home Office v Dorset Yacht Co [1970] AC 1004; [1970] UKHL 2, cited
Invercargill City Council v Hamlin [1996] AC 624, cited
Jaensch v Coffey (1984) 155 CLR 549; [1984] HCA 52, cited
Lowes v Amaca Pty Ltd [2011] WASC 287, cited
McKain v RW Miller & Co (SA) Pty Ltd (1991) 174 CLR 1; [1991] HCA 56, cited
McKenzie v Attorney-General [1992] 2 NZLR 14; [1991] NZCA 105, cited
Mokbel v R [2013] VSCA 118, cited
Murakami v Wiryadi & Ors (2010) 268 ALR 377; [2010] NSWCA 7, cited
Perre v Apand Pty Ltd (1999) 198 CLR 180; [1999] HCA 36, cited

Public Trustee v Auckland Electric Power Board [1944] NZLR 782, cited
Puttick v Tenon Ltd (2008) 238 CLR 265; [2008] HCA 54, considered
Seltsam Pty Ltd v McNeill [2006] NSWCA 158, cited
Seltsam Ltd v Minahan (1996) 13 NSWCCR 410, cited
Studorp Ltd v Robinson [2012] NSWSC 148, cited
Studorp Ltd v Robinson [2012] NSWCA 382, cited
Sullivan v Moody (2001) 207 CLR 562; [2001] HCA 59, cited
Sutherland Shire Council v Heyman (1985) 157 CLR 424; [1985] HCA 41, cited
Voth v Manildra Flour Mills Pty Ltd (1990) 170 CLR 538, applied
Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515 at 540-541; [2004] HCA 16, cited

COUNSEL: PCB Semmler QC and S Tzouganatos for the plaintiff
G Watson QC and J Sheller for the defendant

SOLICITORS: Turner Freeman Lawyers for the plaintiff
DLA Piper Australia for the defendant

[1] **JACKSON J**: Mr Robinson, the plaintiff, claims damages for personal injuries he says were caused by the defendant's negligence. The claim was filed on 12 December 2012. On 11 March 2013, the defendant filed a conditional notice of appearance and on 25 March 2013 the defendant filed an application to stay the proceeding pursuant to *UCPR* 16.[1]

[2] The hearing of the application to stay took place on 22 August 2013. The principal ground is that the court should decline to exercise its jurisdiction because it is a clearly inappropriate forum. This basis has been confirmed as part of the unitary common law of Australia since *Voth v Manildra Flour Mills Pty Ltd*.[2] Where in these reasons I refer to the common law as at the present day, the reference is to the common law of Australia. The common law of another country will be described as such.

[3] The parties agree that the question is whether this court is a clearly inappropriate forum. The answer is informed by the principles discussed by the High Court in *Voth* and other cases, most recently in *Puttick v Tenon Ltd*.[3]

[4] A stay granted on this ground is an exercise of discretionary power based on the underlying principle that it may be "oppressive, vexatious or an abuse of process" for a proceeding to be heard,[4] even though the proceeding is within the usual

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1 The application does not specify that an order for a stay is sought but the parties proceeded as if it did.
2 (1990) 170 CLR 538.
3 (2008) 238 CLR 265 at [27]; [2008] HCA 54.
4 *Voth* at 554; *Puttick* at [29].

territorial jurisdiction[5] or the "exorbitant"[6] jurisdiction under rules of court. The "clearly inappropriate forum" ground is not an end in itself.

Basic facts

[5] Mr Robinson says that between 1968 and 1974 he was exposed to asbestos at Auckland in New Zealand. At that time, he says, the defendant manufactured and supplied building products using asbestos in Auckland, including asbestos concrete sheeting. Mr Robinson says that his father was a builder who acquired the products and used them in his occupation. As a boy and youth, Mr Robinson used to accompany his father at work. He says he was exposed to asbestos dust or particles in that context, at the defendant's premises while collecting the products, while travelling in his father's work vehicle loaded with the products, on building sites where the products were cut, and through the impregnation of his father's clothes with asbestos dust. As a result, he says that he now suffers from a form of asbestos related lung disease.

[6] The defendant is a New Zealand incorporated corporation which is neither registered nor carries on business in Australia. It used to be named James Hardie & Coy Pty Limited.

[7] Mr Robinson says that after a career in New Zealand as a sailmaker and elite yachtsman, in 1988 he moved to live in Australia. Initially, he was engaged in an occupation as a marine trimmer or upholsterer at the Gold Coast and after that he was employed in a tourist holiday park in Tweed Heads. He has lived for years now in Tweed Heads. He works there for the council as a holiday parks supervisor.

[8] Since 2006, he says that he has suffered from lung disease or illness, attended with significant pain and shortness of breath and consequential interferences with everyday life. There has been a long series of investigations and treatments, some surgical. They include thoracotomies, drainages of fluid from his lungs and bronchoscopic investigation and biopsy. He says some of the treatments have been very painful.

[9] On 2 February 2010, he was diagnosed with asbestos related lung disease. This diagnosis and subsequent treatment occurred in Brisbane. He has also had many treatments since first suffering symptoms at the Gold Coast, including in-patient periods of treatment in hospital there.

[10] This is the primary factual matrix against which the question whether this court is a clearly inappropriate forum is to be answered. The parties also tendered evidence as to factors which would affect the trial of the proceeding in this court. They joined

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5 At common law, that is by service within the jurisdiction, meaning within the country or in the case of the Australian States within the State as a "law area": *Laurie v Carroll* (1958) 98 CLR 310 at 330; [1958] HCA 4.

6 Described as such in *Agar v Hyde* (2000) 201 CLR 552 at [42]; [2000] HCA 41 citing *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50 at 65-66; [1983] 3 WLR 241: *"…*an exorbitant jurisdiction, ie, it is one which, under general English conflict rules, an English court would not recognise as possessed by any foreign court in the absence of some treaty providing for such recognition. Comity thus dictates that the judicial discretion to grant leave under this paragraph [of the rules] should be exercised with circumspection in cases where there exists an alternative forum, viz. the courts of the foreign country where the proposed defendant does carry on business, and whose jurisdiction would be recognised under English conflict rules."

battle over the significance of those factors and over the significance of New Zealand law as the substantive law of the alleged tort - the lex causae.[7] However, before addressing those points, the relevant facts include two twists that should be identified.

First twist: the NSW proceedings

[11] The first twist is that this proceeding is not Mr Robinson's maiden voyage on the seas of litigation in his efforts to recover damages for negligence for this injury from the defendant.

[12] On 11 April 2011, he commenced proceedings in the Dust Diseases Tribunal ("DDT") in New South Wales based on the same facts. The proceedings were purportedly served in New Zealand.

[13] On 21 November 2011, the defendant applied in the Supreme Court of New South Wales ("NSWSC") for an order setting aside the service or an order staying the proceedings on the ground that the DDT was a clearly inappropriate forum.

[14] On 1 March 2012, the NSWSC set aside service of the proceedings. The court also declared that the Dust Diseases Tribunal was not a clearly inappropriate forum.[8]

[15] On 29 November 2012, the Supreme Court of New South Wales Court of Appeal ("NSWCA") ordered that the declaration that the DDT was not a clearly inappropriate forum be set aside.[9] The court declined to make a determination to the contrary effect, namely that the DDT was a clearly inappropriate forum, but in dicta inclined to the view that it was.

[16] After the order of 1 March 2012 but before the order of 29 November 2012, Mr Robinson had started fresh proceedings upon his claim in the NSWSC. Following the NSWCA's order of 29 November 2012, he discontinued those proceedings and started the proceeding in this court. There is a difference between the damages he claims in this court and those he claimed in the DDT. They do not include a claim for damages for gratuitous care provided or to be provided to him by others. By doing that and by starting the proceeding in this court which will not be remitted to the DDT, he seeks to avoid two of the factors identified in the reasons of the NSWCA as supporting the conclusion that the DDT was a clearly inappropriate forum.

[17] Both parties sought to support their positions on the present application by reference to the NSWCA's reasons for judgment.

Second twist: the overhang of the *Trans-Tasman Proceedings Act* 2010 (Cth)

[18] The parties agree that if the proceeding were tried in this court, the lex causae will be the law of New Zealand.[10] Each of them has tendered evidence of New Zealand law, as a matter of fact. It is accepted that, at common law, the law of a foreign

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7 An expression first used in the High Court in *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; [1991] HCA 56 by Mason J.

8 *Studorp Ltd v Robinson* [2012] NSWSC 148.

9 *Studorp Ltd v Robinson* [2012] NSWCA 382.

10 Conformably with the proposition that questions of substance are to be determined according to the place where the tort occurred: *Puttick* at [10].

country is a subject matter which is dealt with as a question of fact on which evidence may be tendered. This contrasts with the common law itself, which may not be the subject of opinion evidence.

[19] As between the Australian States, even before the recognition of a separate unitary common law of Australia, the law of another State was not treated as a foreign country, even though the other State was treated as a separate jurisdiction or law area for the application of private international law. Section 118 of the *Constitution* may have put paid to any suggestion to the contrary. The point of that reference is that the courts of the States and Commonwealth courts have, since federation, if not before, commonly engaged in ascertaining the law of a relevant State and applied it without receiving evidence as to that law.

[20] I suspect it would have surprised some in the middle of the last century if it were suggested that evidence would be received as a matter of fact on a question of the common law of New Zealand, as to the liability of a manufacturer or supplier of a potentially harmful product for the tort of negligence in an Australian court. At that time, the Privy Council was the ultimate court of appeal from both courts of common law in Australia and courts of common law in New Zealand, as well as many other places which had adopted the common law of England as a matter of history. When *Donoghue v Stevenson*[11] was decided in 1932 there was no question whether it represented the common law in Australia.[12] At that time, Australian common law and English common law were regarded as one.[13] The position was not different in New Zealand.[14]

[21] It is unnecessary to essay the prior law, because it may be accepted that from 1986, consequent upon the *Australia Acts* of both the Commonwealth and Imperial Parliaments, there has been a clear recognition of a separate common law of Australia.[15] That also follows from the proposition that the High Court of Australia is the ultimate appellate court for all cases decided at common law in this country. However, in New Zealand the change occurred later. From 1986 until 2004 the common law of New Zealand was still determined by the Privy Council as its ultimate appellate court. Nevertheless, the Privy Council in 1996 was astute to recognise that the conditions in New Zealand may well be a basis for a different common law of negligence in that country.[16]

[22] Notwithstanding the differences in their laws of stare decisis, or the recognition that there are different common laws of England and Wales, Australia, and New Zealand, if there will be few countries in the world where the common law similarities are greater than those between New Zealand and Australia. In many respects, common sense suggests that the common law presumption the foreign law is the same as the law of the forum, in the absence of contrary proof, is not only convenient but accurate. In any event, the research of New Zealand case law is both possible and, to some, routine, in accordance with the respect that decisions of its

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11 [1932] AC 562 at 599; [1932] HCA 100.

12 *Grant v Australian Knitting Mills Ltd* [1936] AC 85.

13 In the New Zealand Court of Appeal's eyes as well: *R v Ford* (1913) 32 NZLR 1219 at 1224.

14 For example, see *Public Trustee v Auckland Electric Power Board* [1944] NZLR 782 at 826; *Baynes v Union Steamship Company of New Zealand Ltd* [1953] NZLR 616 at 631.

15 The topic of the development of an Australian common law is worthy of a more detailed treatment, but here it is enough to refer to *Cook v Cook* (1986) 162 CLR 376; [1986] HCA 73.

16 *Invercargill City Council v Hamlin* [1996] AC 624 at 642-643.

superior courts commands. Is it "notorious" so as to be the subject of judicial notice?[17] I proceed on the assumption that it is not, which was shared by the parties to this application.

[23] The state of similarity in economic, legal and social affairs is also recognised at many levels by the Governments of the two countries. That is not to deny the differences between the two societies. But in the practical world, it is notorious that there are a large number of people born in one country living in the other. There are over half a million New Zealand born Australian residents. At the legal level, there are also matters which must be recognised in making the assessment whether this court is a clearly inappropriate forum.

[24] First, the *Trans-Tasman Mutual Recognition Act* 1997 (Cth) and the *Trans-Tasman Mutual Recognition Act* 1997 (NZ) confer a right on a legal practitioner of one country to practise as a legal practitioner in the other country. Thus, the Government of New Zealand has recognised the competence of an Australian legal practitioner to appear in New Zealand courts in a proceeding involving the application of New Zealand common law to a claim for damages for negligence for personal injury. If an Australian legal practitioner has that legal competence, should an Australian court readily shrink from the ascertainment and application of New Zealand's common law?

[25] As to the courts themselves, it is certainly true to say the development of the principles of the law of the tort of negligence in each jurisdiction has proceeded with a firm eye on what has happened in the other country. Thus, decisions of the High Court of Australia have frequently reasoned by reference to decisions on comparable questions in New Zealand, as well as those of the United Kingdom and Canada, without any suggestion that there is any difficulty for an Australian court to ascertain what the laws of those places on these questions might be. Consider, for example, the discussion of New Zealand case law in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*.[18] Needless to say, perhaps, but the case law, digests and monographs of New Zealand are held in the law libraries of Australian courts.

[26] I make those points by way of introduction to the dispute between the parties as to the significance of the factor that if this court tries this case it will be required to apply the common law of New Zealand for the tort of negligence and the assessment of loss. My starting point is that the contention that the common law of New Zealand in a manufacturer's liability case for the tort of negligence is so "foreign" as to be a matter of difficulty, in ascertaining and applying that law in this court, seems counterintuitive.

[27] My initial impression appears to be one which is shared at least at some level by the polities of both the Australian and New Zealand Governments. In 2008, those governments made what is described as the Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement at Christchurch on 24 July 2008.

[28] To give effect to that agreement, the Commonwealth of Australia enacted the *Trans-Tasman Proceedings Act* 2010 (Cth) ("the Act"). Most of its provisions are

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17 *Mokbel v R* [2013] VSCA 118 at [26].

18 (2004) 216 CLR 515 at 540-541; [2004] HCA 16 at [54]-[55].

proclaimed to come into force in mid-October this year.[19] There is a corresponding *Trans-Tasman Proceedings Act* 2010 (NZ) ("the New Zealand Act").[20]

[29] A few features of the legislation must be identified. For brevity, I will only refer to an Australian court although the Act extends to tribunals.

[30] Because they will not come into effect until mid-October this year, some provisions of the Act will not apply to this proceeding and the remainder do not apply yet. However, some will undoubtedly apply to any trial of this proceeding. I will identify the steps in this proceeding which have not taken place under the Act, as well as those which will do so.

[31] Service of this proceeding was made under *UCPR* 124(1)(l) on the ground that Mr Robinson suffered part of the damage in Queensland for the defendant's alleged tortious acts or omissions in New Zealand.

[32] From mid-October 2013, s 9 of the Act provides for service in New Zealand of an initiating document issued by an Australian court, irrespective of the subject matter of the proceeding.

[33] The present application for a stay is made under the common law and pursuant to *UCPR* 16, as previously stated.

[34] From mid-October 2013, Pt 3 of the Act provides for an Australian court to decline jurisdiction on the ground that "a New Zealand court is a more appropriate forum". A defendant may apply for a stay on that ground under s 17(1). The ground for a stay in most trans-Tasman cases will no longer be that this court is a "clearly inappropriate forum". If a New Zealand court has jurisdiction to determine all the matters in dispute, the question will be whether it "is the more appropriate court to determine those matters".[21] That question is to be determined having regard to a list of nine specified factors,[22] which are comparable to the factors taken into account in determining transfer applications under the cross-vesting legislation, rather than those which at common law determine whether the local jurisdiction is the "clearly inappropriate forum". Such an application will have to be made within a limited time, either within 30 working days after the day of service or any longer period the Australian court considers appropriate.[23]

[35] I turn to the provisions of the Act which will apply to this proceeding if it is not stayed on the present application. First, the provisions of Pt 5 relating to subpoenas provide for the service of a subpoena in New Zealand, provided leave is granted by the Australian court,[24] either to give evidence or to produce documents in the Australian court. Secondly, the provisions of Pt 6 relating to remote appearances[25] provide for the remote appearance by a party or the party's legal practitioner who is

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19 Trans-Tasman Proceedings Commencement Proclamation 2013 as made on 25 July 2013.

20 I acknowledge the comprehensive description of the arrangements in Mortenson, "A Trans-Tasman Judicial Area: Civil Jurisdiction and Judgments in the Single Economic Market", (2010) 16 *Canterbury Law Review* 61.

21 Section 19.

22 Section 19(2).

23 Section 17.

24 Section 31.

25 Remembering the right given to a legal practitioner to practise in the other country under the *Trans-Tasman Mutual Recognition Acts.*

a New Zealand lawyer, with the leave of the Australian court, if it is convenient and appropriate, and whether or not the New Zealand lawyer is otherwise entitled to appear before the Australian court or to practise as a legal practitioner in Australia.[26] Thirdly, similar provision is made for the remote appearance of witnesses, with the leave of the Australian court, on the ground of convenience.[27]

[36] Further, s 97 will apply to a proceeding in an Australian court.[28] It provides:

> "(1) Proof is not required about the provisions in coming into operation (in whole or in part) of:
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> (a) a New Zealand Act or an Imperial Act enforced in New Zealand; or
> (b) a regulation, rule or by-law made, or purporting to be made, under such an Act; or
> (c) a proclamation or order made, or purporting to be made, by the Governor-General of New Zealand under such an Act; or
> (d) an instrument of a legislative character …
>
> (2) The Australian court, or the person or body, may inform itself about those matters in any way it considers it appropriate."

[37] The Act does not make provision for an Australian court to inform itself as to the common law of New Zealand. It may well follow that the common law in that respect has not been altered. But that point was not argued and should be passed by for the moment.

[38] What is clear is that after the Act comes into effect an Australian court which is seized of a proceeding served in New Zealand will proceed to try it, unless a proceeding is stayed under s 19 of the Act. It follows that any appeal will be heard by the court which usually hears appeals from the Australian court.

[39] If this court hears the trial in this proceeding, any appeal will lie to the Supreme Court of Queensland Court of Appeal.[29] The same will be true of any proceeding served out of this Court and in New Zealand after the Act comes into effect. In this way, the Act necessarily accepts, to some extent,[30] that the law of New Zealand might be ascertained and applied by an Australian court.[31] There is nothing xenophobic in this observation. It applies equally in the other direction. The Government of Australia reposes exactly the same confidence in the courts of New Zealand as to Australian law, including common law, by the Agreement and the provisions of the New Zealand Act which give effect to it.

[40] It may be expected that in the administration of the Act and the New Zealand Act the courts will be sensitive to the proposition that the authority for the determination

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26 Section 48.
27 Section 50.
28 Section 96. Compare s 68(b) of the *Evidence Act* 1977 (Qld).
29 Section 62(1)(a) of the *Supreme Court Act* 1991 (Qld) and *UCPR* 745 and 765.
30 That is, subject to a stay ordered under s 19.
31 As foreign law is found as a matter of fact, the finding in one case does not operate in another case as a determination of a question of law.

of the law of the other jurisdiction reposes in the ultimate court of appeal of that jurisdiction. Section 19(2)(e) of the Act provides that upon an application for a stay under s 17 the Court "must take into account… the law that it would be most appropriate to apply in the proceeding" as one of the nine listed factors in considering whether to grant a stay. In a novel case, it may be that an Australian court would stay a proceeding upon an application made under s 17 of the Act on that ground.

[41] At the hearing of the application, neither party raised the Act. I sought their views as to its relevance. Mr Robinson did not seek to make much of it. The defendant submitted that it could not be taken into account because it is not yet operating law. However, in my view, it has the relevance set out above. I take that view because the question of whether the trial of the proceeding in this court is clearly inappropriate, as being in the nature of an abuse of process, cannot be assessed by closing one's eyes to the law as to the procedure, appearance and evidence which will apply to the conduct of the trial, because some of that law will not come into effect until a couple of months hence.

Mr Robinson is a resident of New South Wales

[42] The main thrust of the defendant's submissions was that it is inappropriate for this Court to try the proceeding where there are significant matters of New Zealand legal principle or application of that principle to be resolved. However, there were other factors relied upon which I will deal with first.

[43] The defendant emphasised, in more than one way, the contention that Mr Robinson's connection with Queensland is slight, and his connection with New South Wales is greater. He is a resident of New South Wales. But otherwise there is an air of unreality about the submission. The practical connection between him, his claim and this Court is little different to the practical connection between him, his claim and the DDT or NSWSC in Sydney. He lives about 100 kilometres from this Court compared to about 900 kilometres from Sydney.

[44] Mr Robinson relies on the convenience of this court as the court of trial for his witnesses. They start with himself, his wife and his father (who is elderly), all of whom live in Tweed Heads, and they also include numerous specialist medical practitioners who have treated him, some of whom are from Brisbane, with the remainder from the Gold Coast. His general practitioner is from Tweed Heads. It may be accepted that, in so far as his witnesses are concerned, Brisbane would be more convenient than Sydney or New Zealand, presumably in Auckland.

[45] In the end, with two qualifications, my view is that this court at Brisbane is an appropriate place for Mr Robinson to have brought his claim if it is brought in Australia. To my mind, the approach of the defendant ignored that the cross-vesting legislation invested each of the Supreme Courts of the States and Territories with the jurisdiction of the others,[32] specifically so that factors of convenience of the kind I have described above would determine where a proceeding should be brought and tried.

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32 *Jurisdiction of Courts (Cross Vesting) Act* 1987 (NSW), s 4.

[46] The first qualification is jurisdictional. Mr Robinson invoked the exorbitant jurisdiction of this court as authorising service out of Queensland and in New Zealand because he suffered part of the damage in Queensland. The damage relied upon was his pain and suffering while in Queensland for treatment. As the defendant did not challenge this contention as a basis for jurisdiction, it is unnecessary to say more about it.

[47] The second qualification is the fact that Mr Robinson started the earlier proceedings identified above in the DDT and in the NSWSC. However, his attempt to engage the jurisdiction of the former was ineffective because he was not authorised to serve its originating documents in New Zealand. And he discontinued the latter, apparently because of the NSWCA's expressed opinion that the DDT, to which the NSWSC proceedings would have to be remitted, may be a clearly inappropriate forum.

[48] In the result, in my view, Mr Robinson's position is not significantly devalued because he is a resident of Tweed Heads, compared with the position he would have been in if he lived on the other side of the border between that town and the neighbouring suburb of Coolangatta in the City of the Gold Coast.

Other factors as between New Zealand and Australia

[49] The defendant relied on the fact that the natural forum for the proceeding was New Zealand, because all of the events relating to liability occurred in Auckland. It urged that any liability witnesses (excepting Mr Robinson and his father) would come from Auckland, but none was identified. It should not be forgotten that the parties have been litigating over this claim since mid-2011, so the defendant has had ample opportunity to investigate the circumstances, to the extent that it can do so after the interval between 1968 to 1974 and the present. As well, the witnesses will be able to be subpoenaed to this court and, if leave is given, to give evidence remotely under the provisions of the Act.

[50] The defendant also urged that the documents relating to the question of liability will be in Auckland. Again, none was identified. In any event, the production of electronic copies of documents in this day and age is everyday stuff. There will be little difficulty in making New Zealand documents available here. As well, the documents will be able to be subpoenaed under the provisions of the Act, which also contains provision for their inexpensive production to the Supreme Court of New Zealand at the Auckland registry.

[51] The defendant relied on the circumstance that Mr Robinson's medical witnesses would be able to give evidence by video-link and it was prepared to agree to them doing so.[33] That doesn't deal with Mr Robinson, his wife or his father.

[52] Mr Robinson submitted that it would be more arduous for him, because of his health, and for his father, because of his age, if the trial of any proceedings were heard in New Zealand. That may be so, but I note that, from mid-2011 until this year, he was prepared for them to be conducted in Sydney in the DDT. Sydney may only be a little over an hour's flight from Coolangatta, but Auckland is no more than 3 and a half hours. In any event, if there is any significant hardship, Mr Robinson

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[33] They can appear by video-link in a New Zealand proceeding under the provisions of the New Zealand Act.

or his father could give evidence by remote appearance under the New Zealand Act. I do not accept that it is necessarily critical for him to be able to attend at the hearing of the trial in person as a witness, on what is presently known of the circumstances of this case. However, I acknowledge that some of the cases treat a plaintiff's inability to attend a trial in a foreign court as a factor in favour of the forum, on the footing that it is important that a plaintiff should be able to personally attend at the trial as a party.

[53] However, in the end, in my view, none of these factors operates significantly one way or the other. If regard is had to the convenience of witnesses or manner of proof of documents, there is nothing which weighs heavily at all.

[54] Not only that, in debating these issues, the parties drifted towards the question of which place would be more appropriate, and away from the distinct question whether this court is a "clearly inappropriate forum".

Main issue: significance of factor that New Zealand law is the lex causae

[55] The defendant submits that the determinative factor is that the lex causae is the law of New Zealand. The proposition was developed thus: "…any court here in Australia would have to predict what New Zealand law might be to determine Mr Robinson's claim because of the absence of personal injury proceedings since the introduction of its no fault scheme in the early 1970's."

[56] This language is overstatement. If this court were to decide Mr Robinson's claim, it would not predict New Zealand law. It would be required to ascertain and apply that law. Without seeking to foreclose that question in any way, the court will be concerned with "such issues as the knowledge that, in the era of [the plaintiff's] exposure, a reasonably careful [manufacturer] should have had of asbestos risks."[34] Secondly, the introduction of the *Accident Compensation Commission Acts* scheme[35] did not mean that personal injury proceedings in New Zealand are "absent".[36] Such proceedings may be few, but the express submission made by the defendant that the law in New Zealand in some significant way is "held back" in this area, is not to be accepted too readily.

[57] That said, the defendant pressed home its contention by the submission that there are no decided cases of negligence against a manufacturer or supplier of asbestos products in New Zealand courts, as showing the difference in the states of Australian and New Zealand legal discourse on the subject, and sought to develop the extent of potential differences by reference to the expert evidence on either side.

[58] In my view, it is right to consider those differences. However, in my view, the cut of them is not as trenchant as the defendant would have it. It is therefore necessary to deal with them in a little detail.

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34 *McKenzie v Attorney-General* [1992] 2 NZLR 14 at 16; [1991] NZCA 105.

35 As described in Todd S, "Forty Years of Accident Compensation in New Zealand", *Thomas M Cooley Law Review*, Volume 28:2, 189.

36 For example, a broad description of the state of affairs at the end of the 1990s appears in Miller, "Trends in Personal Injury Litigation: the 1990s", [2003] *Victoria University of Wellington Law Review* 407. And more specifically, see, Hook, "New Zealand's Accident Compensation Scheme and Man-Made Disease", [2008] *Victoria University of Wellington Law Review* 15.

[59] First, some reliance was placed on the different role that the concept of proximity plays in Australian and New Zealand law. It is not as though proximity, as a concept, is foreign to Australian law. It stems, after all, from the famous speech of Lord Atkin in *Donoghue v Stevenson*,[37] which is still treated as the seminal case of the modern law of the tort of negligence in both New Zealand and Australia. The status in Australia of Lord Wilberforce's speech in *Anns v Merton London Borough Council*,[38] and the subsequent rise[39] and fall[40] of the notion or concept of proximity as a determinant of whether a duty of care is owed, are well known, and it is not necessary to detail them. For a while, proximity was treated in Australian law as a determinant for the question of whether a duty of care is owed, first in the context of personal injuries,[41] and then in other categories of case,[42] where the question was whether a duty of care to avoid economic loss was owed. Sir Gerard Brennan's doubts from the start[43] were eventually heeded, leaving Australia with a pragmatic approach to the question,[44] shorn of a "top down reasoning" form of overall test.

[60] New Zealand did not follow suit. Nor did Canada. But the cases in which the different approaches were explored were not about the duty of care to avoid personal injury owed by a manufacturer of a potentially harmful product.

[61] Notwithstanding the non-acceptance in the High Court of the *Ann's* test and the rise and fall of the concept of proximity, the leading cases of relevance in Australian law are not based on an approach which is removed from the channel of cases which follow *Donoghue v Stevenson*. Among the leading cases upon the existence of the duty of care against personal injury and the limits of remoteness of damage against loss of that kind are those decided in the Privy Council in the 1960s. It would be captious to say that developments in the discourse of the duty of care in Australian common law, particularly against damage consisting of personal injury, has produced some tectonic shift in Australian law relevant to this case.

[62] It would not be helpful to essay the Australian cases at any length. However, some brief references may be made to gauge the likelihood that the questions under New Zealand law in the context of a claim like the present would differ.

[63] For example, in *Seltsam Ltd v Minahan*,[45] an employer was held not to be negligent because, when the employee's exposure to asbestos occurred in 1964, there was no suggestion that the exposure was to a level that was then known or suspected to give rise to any risk of injury."[46] Plainly, reasonable forseeability of harm was a critical factor in the determination of the duty of care in that case.

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37 [1932] AC 562 at 580-581; [1932] UKHL 100. At page 581, Lord Atkin saw proximity as a limiting notion introduced by Lord Esher and AL Smith LJ in *Le Lievre v Gould* [1893] 1 QB 491.

38 [1978] AC 728. See, for example, *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; [1985] HCA 41.

39 See *Jaensch v Coffey* (1984) 155 CLR 549 at 580ff; [1984] HCA 52.

40 See *Sullivan v Moody* (2001) 207 CLR 562 at [48]; [2001] HCA 59.

41 See *Jaensch* at 583.

42 See *Bryan v Maloney* (1995) 182 CLR 609; [1995] HCA 17.

43 Expressed in *Heyman* at 481

44 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 253ff; [1999] HCA 36 at [197]ff.

45 (1996) 13 NSWCCR 410.

46 BC 9600671 at 15.

[64] In *CSR Ltd v Wren*,[47] the duty of care of a company, which controlled a manufacturer of asbestos products, to workers at the manufacturer's factory, was analysed by reference to Lord Atkin's famous neighbourhood principle from *Donoghue v Stevenson*, the words of which were described as being of "gospellian stature".[48] The rise and fall of the concept of proximity was relied upon as negativing a duty of care under Australian principles. The NSWCA rejected that argument.

[65] In *Seltsam Pty Ltd v McNeill*,[49] the plaintiff's exposure to asbestos dust occurred in 1961 as a result of working with asbestos sheeting while helping a relative do some building work over several days. There was an extensive discussion of the applicable principles in determining whether a duty of care was owed, distinguishing between relevant categories of potential plaintiffs in asbestos litigation.[50] In my respectful view, the discussion represents an orthodox statement of common law principle.

[66] The same approach to the law relating to the finding of a duty of care was followed in a mesothelioma case of limited exposure to asbestos by reason of casual work in 1983 and 1985 in *Amaca Pty Ltd v Hannell*.[51]

[67] A recent detailed discussion of the factors affecting whether a duty of care was owed by a manufacturer in relation to the waste disposal of asbestos product between 1971 and 1973 appears in *Lowes v Amaca Pty Ltd*.[52]

[68] What is it in New Zealand law that is identified as operating differently? The defendant's expert centrally relies on the role and impact of "policy" considerations in the common law of New Zealand.

[69] So far as any specific consideration was mentioned, it was the scheme of compensation under the Accident Compensation Commission's jurisdiction. But by definition, not all claims fall within the scope of that system, apparently including Mr Robinson's claim. Those claims outside the system remain to be resolved according to the law of negligence. It is prima facie a contradiction to say that a claim which falls outside the system is to be resolved be reference to the "policy" considerations which may be seen to operate within or from the system. By way of analogy, in *McKenzie v Attorney-General*[53] Cooke P said this in relation to an employee's claim:

> "Those whose disease-causing employment ceased before 1 April 1974 are outside the Act, just as are those who suffered personal injury by accident in the ordinary sense before that date. There is no gap in the statutory provisions that has to be filled by a process of interpretation. Such persons have to fall back on whatever

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47 (1997) 44 NSWLR 463.

48 At 476. It should be remembered that those words are not to be taken "as if [they] were as inflexible as a statutory instrument": *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 86; [1963] HCA 15.

49 [2006] NSWCA 158. And see *Amaca Pty Ltd v Booth* [2010] NSWCA 344 at [159]-[180].

50 At [25] – [40].

51 (2007) 34 WAR 109; [2007] WASCA 158 at [294] and [348]-[352].

52 [2011] WASC 287 at [308]-[387].

53 [1992] 2 NZLR 14 at 16; [1992] NZCA 105 at 11.

> rights they may have at common law or under the Workers' Compensation Act 1956."[54]

[70] Beyond that, there seemed to be a suggestion that New Zealand courts are more likely to take "policy" considerations into account in deciding a claim for damages for negligence for personal injuries. That is a factor difficult to prove or assess. However, I note that almost all of the cases referred to in the discussion which is apparently intended to support that proposition are cases about whether a duty of care existed to protect against economic loss, as that concept is understood in this country.

[71] Tellingly, in my view, the only decision of the Supreme Court of New Zealand referred to, which dealt with a duty of care for personal injury or death (although in association with property damage), was *Couch v Attorney-General*[55] decided in 2008. That case may be identified with the line of cases starting with the House of Lords decision in *Home Office v Dorset Yacht Co*[56] in 1970. In *Couch*, the Supreme Court called up Lord Atkin's famous neighbourhood principle,[57] and said of the question whether a duty of care existed:

> "… Whether the defendant is under a duty of care to the plaintiff is a matter of judgment arrived at principally by analogy with existing cases and with no better organising tools than the broad labels of 'neighbourhood', foresight, proximity, remoteness and such other considerations of policy as may be prompted by the circumstances. Proximity, 'neighbourhood' and remoteness are general concepts which, as Professor Jane Stapleton has pointed out in relation to remoteness, may in fact be misleading if they are taken to suggest purely temporal or spatial concerns. Nor does the connection between plaintiff and defendant which gives rise to a duty of care in law depend on an existing relationship. Cardozo CJ described negligence as itself 'a term of relation'…
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> To these concepts of proximity and foreseeability, Lord Wilberforce in *Anns* acknowledged a controlling role for considerations of policy which 'ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise'. In this explanation he drew on Lord Reid's judgment in *Dorset Yacht*. There, Lord Reid declined the invitation to return to the days when the categories of negligence were 'virtually closed'. He thought the time had come to apply Lord Atkin's statement of principle in *Donoghue v Stevenson* to novel circumstances 'unless there is some justification or valid explanation for its exclusion'.
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> *Anns* has been consistently followed in New Zealand with acknowledgment that the ultimate judgment must be one that is 'fair, just and reasonable'. Despite refinement of the *Anns* test in subsequent decisions of the House of Lords and High Court of

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54 At 19.
55 [2008] 3 NZLR 725; [2008] NZSC 45.
56 [1970] AC 1004; [1970] UKHL 2.
57 At [50].

> Australia, in New Zealand we have tended to take the view that no substantial difference in result follows the changes in emphasis. The Supreme Court of Canada has similarly found it unnecessary to reconsider *Anns*. The leading case in New Zealand is *South Pacific Manufacturing*. As Cooke P pointed out in that case, the loose methodology described in *Anns* does not purport to be normative. It supplies no answers. It is simply an aid to analysis."[58] (citations omitted)

[72] In my respectful view, that lucid explanation, and the recognition that "no substantial difference in result follows the change in emphasis", does not support the defendant's contention that "New Zealand courts [are] particularly conscious of the policy dimensions of common law negligence claims" if that statement is meant to suggest that there is a difference of substance in the result of the process of reasoning as to whether a duty of care is owed.

[73] Thirdly, the defendant relied upon the difference in the development of the common law of England and Wales where a pragmatic approach has been taken to the difficulties for a plaintiff in proving causation of lung disease caused by a group of defendants where it is not practicable to prove the separate causal effect of each defendant's conduct ("the Fairchild principle").[59] Whether or not New Zealand common law follows that approach will be of no significance in deciding this case. The plaintiff does not make a claim against multiple defendants or for the effects of multiple exposures caused by different possible defendants.

[74] Fourthly, the defendant relied upon the difference in the development of the common law of Australia where damages are awarded for the value of services by way of care provided or to be provided to the plaintiff gratuitously, where the plaintiff would otherwise require paid care for those services.[60] Whether or not New Zealand common law follows that approach will be of no significance in deciding this case. Mr Robinson has avoided the question by electing not to make a claim for damages of that kind in this proceeding.

[75] It can be seen that the suggested areas of difference are not great, at first blush. But the question can not be so simply dealt with. The defendant has at least some support in the reasons of the NSWCA in *Robinson v Studorp Ltd*.

[76] It will be necessary to consider that case. But the defendant sought to cast its net more widely. It relied on the contention that "the need to prove foreign law is itself a source of prejudice… One of the difficulties… is the risk that important aspects of the foreign law will be lost in translation. The need to prove foreign law introduces levels of complexity, expense and uncertainty together with the risk of error on the application of foreign law": *Murakami v Wiryadi & Ors*.[61]

[77] The reliance on this passage shows the risk of using a passage out of context. The foreign law in *Murukami* was Indonesian law. There is no risk of loss in translation here: English is the common language of Australia and New Zealand. There is no

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58 At [48]-[52].

59 *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32; [2002] UKHL 22.

60 *Griffiths v Kerkemeyer* (1977) 139 CLR 161; [1977] HCA 45; *CSR Ltd v Eddy* (2005) 226 CLR 1; [2005] HCA 64.

61 (2010) 268 ALR 377 at [150]; [2010] NSWCA 7.

basis to think that the ascertainment of New Zealand law as to a manufacturer's liability for a potentially harmful product under the law of negligence is truly a matter of complexity or uncertainty, in the sense that a Judge of this court is likely to be uncertain as to the state of existing authority or principle in New Zealand upon submissions being made or evidence being led on those matters. If evidence as to the law is led, there will be some additional expense. Overall, it is hard to conceive that the passage relied upon is apt to the law relating to a manufacturer's liability claim like this one.

[78] Mr Robinson, in urging a contrary approach, submitted that asbestos litigation around the world is a well known category of case, as though I could take judicial notice of that fact. I do not go so far. Rather, I content myself with reference to the High Court's decision in *Puttick*, which concerned an asbestos claim for negligence against a New Zealand corporation, as employer, by a man who alleged he was exposed to asbestos in the course of his employment.

[79] In *Puttick*, the Supreme Court of Victoria ("SCV") had permanently stayed the proceeding on the ground that it was a clearly inappropriate forum. The two bases for that conclusion were, first, that the evidence and the documents were in New Zealand and, secondly, that the law of New Zealand was the lex causae. In the Supreme Court of Victoria Court of Appeal ("VSCA") the defendant further contended that any common law claim under the law of New Zealand for negligence was barred by statute (in effect by the *Accident Compensation Commission Acts*), because although it was a claim for negligence in exposing the plaintiff to asbestos, the alleged exposure occurred in the course of the plaintiff's employment by the defendant.

[80] The High Court reversed the finding of the courts below, that it was established that the law of New Zealand was the lex causae, as the plaintiff's exposure was alleged to have occurred, at least in part, in other countries, where he was required to go in the course of his employment. Accordingly, it also found that a conclusion that the SCV was a clearly inappropriate forum because of the need to apply New Zealand law could not be sustained and set aside the stay.

[81] In the course of their reasons, the plurality identified a statement by Warren CJ in the VSCA that there is a "general undesirability of a Victorian Court making a pronouncement upon a foreign legislative regime".[62]

[82] In that context, the High Court in *Puttick* specifically addressed the significance of the factor that the lex causae may be the law of New Zealand, saying:

> "The very existence of choice of law rules denies that the identification of foreign law as the lex causae is reason enough for an Australian court to decline to exercise jurisdiction. **Moreover, considerations of geographical proximity and essential similarities between legal systems, as well as the legislative provisions now made for the determination of some trans-Tasman litigation, all point against treating identification of New Zealand law as the lex causae as a sufficient basis on**

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62 As outlined previously, it does not presently appear that this proceeding would require any pronouncement on the operation of the *Accident Compensation Commission Acts*.

> **which to conclude that an Australian court is a clearly inappropriate forum**."[63] (emphasis added)

[83] Two further observations may be made about this passage. First, in referring to the legislative provisions made for determination of trans-Tasman proceedings as a factor, in my view, the High Court's reasons also require me to consider the legislative provisions that will apply to this trans-Tasman proceeding, notwithstanding that the NSWCA did not do so in their reasons in *Robinson v Studorp Ltd*. Secondly, the legislative provisions referred to by the High Court at that time did not include the Act or the New Zealand Act or the Trans-Tasman Mutual Recognition Acts, which in my view significantly strengthen the force of that factor.

[84] Notwithstanding what was said by the High Court in *Puttick*, the Judges of the NSWCA reasoned that the DDT was most likely a clearly inappropriate forum for Mr Robinson's claim.

[85] I start with the reasons of Hoeben JA, since the other members of the Court agreed with those reasons. His Honour identified some of the points I have considered above, as questions which would fall to be considered under New Zealand law: namely, the claim for damages for gratuitous care and the question of whether the Fairchild principle will arise. Although he expressed the view that the latter point "should not arise", his Honour continued: "Given the unpredictability of litigation, it is not clear whether other liability issues might arise. What is clear from the report of Mr Hodder SC is that there are real differences between the law of New Zealand and that of New South Wales in relation to claims in negligence and damages for personal injury."[64]

[86] Whilst I accept there are some differences (I also think there are some differences not identified in the reports of the experts and that some of the expert's observations about the common law of Australia are erroneous) I am unable to accept this line of reasoning as a matter of generality, once the specific points are dealt with. Any general conclusion about the law of New Zealand must take into account the High Court's statement in this same general context in *Puttick* as to "the essential similarities between legal systems."

[87] A specific point made by his Honour about the DDT was that a finding in that tribunal as to a matter of New Zealand law would be a finding of fact "immune from appeal" because of the restrictions upon appeals from that tribunal to the NSWCA on a question of fact. That point was held by his Honour "to be an important consideration distinguishing this case from *Puttick*."[65] For the purposes of this application, the restricted nature of an appeal from the DDT to the NSWCA is not relevant to any judgment upon Mr Robinson's claim in this Court and may be put to one side.

[88] As to the other Judges, Allsop P was of the opinion that "there will be important questions as to the existence and content of duty and the principles to govern the recovery of damages which… will necessarily be treated as factual questions to prove and be decided upon as, or substantially as, questions of fact." His Honour

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63 At [31].
64 At [83].
65 At [87].

continued: "This is an important consideration distinguishing this case from *Puttick*…".[66]

[89] Again, with all respect, I am also unable to agree with that observation in generality. Later, his Honour specifically reasoned that in *Puttick* "all 'legal' questions of fact would have been open to appellate scrutiny" and that would not apply in the DDT.[67] If his Honour's reasons are to be understood as particularly directed to the consequence of the restriction upon the scope of an appeal to the NSWCA from the DDT on a question of fact, there is no difficulty, because that factor is irrelevant upon any judgment in this proceeding. But if the proposition is expressed on the footing that there are significant differences likely to arise as to the law of New Zealand upon the content of a duty of care or the law of damages,[68] I do not consider that Mr Robinson's claim is apparently distinguishable from the reasoning of the plurality in *Puttick* at all. And my own analysis, as set out above, is consistent with that reasoning, on the facts of this case.

[90] Finally, although Meagher JA expressed similar reasons, his Honour raised one further matter which should be acknowledged. He said of the claim for damages for gratuitous care: "It may be suggested that a New Zealand Court is better placed to deal with that question than the Tribunal being a question that involves considerations of legal policy in the development of the law. On the other hand, it may be said that the essential similarities between the Australian and New Zealand legal systems lessen the significance of this: see *Puttick*… at [31]."[69]

[91] In my respectful view, Meagher JA asked the right question. But it is unnecessary to answer that specific question for the purposes of this application because that claim for damages is no longer made.

[92] In the result, in my view the NSWCA's reasons in *Studorp Ltd v Robinson* do not support the conclusion that I should grant a stay of Mr Robinson's claim on the ground that this court is a clearly inappropriate forum, because of the significance of the factor that New Zealand law is the lex causae.

Remaining issues

[93] Three matters remain to be mentioned. First, Mr Robinson relies upon the facts that he is represented in this proceeding on a no-win no-fee basis and has been unable to ascertain that he could find similar representation or litigation funding in New Zealand. The defendant submits that is irrelevant on a stay application. Whether or not it is irrelevant, and in my view it is relevant, I do not consider that it is necessarily of great significance in this case. Given the operation of the New Zealand Act from mid-October, Mr Robinson it might be that he could be represented or appear by his present lawyers and, if appropriate leave were granted, do so remotely.

[94] Secondly, in my view, something remains to be said for the views that "it may be suggested that a New Zealand Court is better placed to deal with that question than [this court] being a question that involves considerations of legal policy in the

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66 At [14].

67 At [14] and [15].

68 Putting to one side the points as to damages which will not arise as previously discussed.

69 At [29].

development of the law" and the similar statement that there is "general undesirability of [this Court] making a pronouncement upon a foreign legislative regime". As previously noted, the second statement does not appear to apply to this proceeding, so far as the parties have proved New Zealand law up to the present time, except for the potential operation of any limitation period. These statements stem from considerations of comity, which also inform the *Voth* principles. They are also reflected in the express recognition in s 19(2)(e) of the Act, as a factor on a stay application, of the law that it would be most appropriate to apply, from when that section comes into effect in mid-October 2013.

[95] However, it seems to me that at this point in time I am not permitted to further engage that factor in the operation of the *Voth* principles, in relation to the circumstances of this case, for the decision on this application

[96] That conclusion is reinforced by an important difference in the way in which a stay operates at common law and the way in which a stay will operate under the Act after Pt 3 comes into effect. If a stay of an Australian proceeding like this one is ordered under s 19 of the Act and the claim is made again in a civil proceeding in a New Zealand court after the stay of the Australian proceeding, for the purpose of every applicable limitation period or defence under New Zealand law, the New Zealand proceeding is to be treated as commencing at the time the Australian proceeding commenced.[70]

[97] However, if a stay is ordered on an application at common law, that protection under the Act will not apply. A plaintiff will be exposed to time running under s 4(7) of the *Limitation Act* 1950 (NZ),[71] from the time when the injury was reasonably discoverable[72] until the proceeding in New Zealand is commenced.

[98] Lastly, the defendant applied for a stay on the alternative ground that Mr Robinson had not yet paid the costs he was ordered to pay by the NSWCA or which he is liable to pay upon discontinuing the NSWSC proceedings.

[99] There are two reasons to refuse to stay this proceeding on that ground. First, there was no evidence that any costs are payable but unpaid either by agreement or upon assessment under Division 11 of Part 3.2 of the *Legal Profession Act* 2004 (NSW). Secondly, the defendant's reliance on *UCPR* 312 as the basis for granting a stay was misplaced. That rule applies where a proceeding has been discontinued or withdrawn under Pt 3 of Ch 9 of the *UCPR*. Mr Robinson has discontinued proceedings in the NSWSC not in this court under the *UCPR*. However, the defendant relies on *Byrnes v John Fairfax Publications Pty Ltd*[73] as establishing the power of the court, in its inherent jurisdiction, to stay this proceeding until the NSW costs are paid.[74] That question does not arise, because the defendant has not established that costs are payable and remain unpaid.

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70 Section 23(2) of the *Trans-Tasman Proceedings Act* 2010 (NZ).

71 That repealed Act applies to this claim – s 59 *Limitation Act* 2010 (NZ), and provides for a 2 year limitation period from the date on which the cause of action accrued, subject to leave being granted on application and made after notice to the defendant to bring such an action, at any time within 6 years from the date of accrual.

72 *G D Searle & Co v Gunn* [1996] 2 NZLR 129.

73 [2006] NSWSC 251.

74 At [35].

Conclusion on stay application

[100] For those reasons, in my view, the applicant has not demonstrated that this Court is a clearly inappropriate forum, applying the *Voth* principles. It follows from that conclusion and the reasons set out above that the application must be dismissed.