FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 57
PD2099/14

Lord President
Lord Menzies
Lord Brodie

OPINION OF LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

JAMES DOCHERTY'S EXECUTORS AND OTHERS

Pursuers and Reclaimers

against

SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS

Defender and Respondent

Pursuers and Reclaimers: O'Neill QC, T Marshall (sol adv); Thompsons
Defender and Respondent: O'Brien QC, Charteris; Clyde & Co

22 August 2018

Introduction

[1] The pursuers sue the defender in respect of the death of the late James Docherty. If the claim were to be determined under Scots law, it is probable that the damages available would be greater than those under English law, because of the competency of claims by relatives in terms of section 4(3)(b) of the Damages (Scotland) Act 2011. It is not disputed that the question to be determined is: what is the *lex loci delicti?* Put simply, the pursuers say it is Scots law, because it was in Scotland that the exposure to asbestos in the employment of

the defender occurred. The defender says it is English law, because it was in England that the disease developed and where the deceased died.

[2] It is immediately clear that the defender's proposition, which was accepted by the Lord Ordinary, would have surprising consequences. First, a defender operating exclusively in Scotland, could find himself subject to the law of a country with which he had no prior connection. Secondly, a pursuer, who had worked in Scotland and sought to sue his employer, could deprive himself of a claim for damages by the act of going to a foreign country where the law differed.

Background facts and procedure

[3] The first pursuers are the executors nominate of the late widow of the deceased and, as such, executors of the deceased by virtue of section 7 of the (English) Administration of Estates Act 1925. The remaining twenty three pursuers are relatives of the deceased. They are members of his immediate family (or in one case the executor of such a relative) and thus persons having title to sue in respect of the death of the deceased in terms of sections 3 and 4 of the 2011 Act. The deceased was employed by Scotts Shipbuilding & Engineering Co, at Greenock, from 1941 to 1947. The defender has assumed the liabilities of that, now defunct, company. Originally the pursuers also sued Imperial Chemical Industries Ltd, as second defenders, in respect of the deceased's later exposure to asbestos, during the years 1954 to 1979, in Teeside, England. From in or about 2003, when the deceased was still living in England, he began suffering from respiratory problems which continued until his death, again in England, on 30 September 2011. Most of the relatives who sue are resident in England.

[4] The case against both defenders came before the Lord Ordinary on the second defenders' contention that the averments against them were irrelevant. It was accepted, as it is now, that the provisions of the Private International Law (Miscellaneous Provisions) Act 1995, which abolished the requirement of dual actionability, did not apply; given the date of exposure. The same applied to EU Regulation 864/2007, known as the Rome II Regulation, as applied in the Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008. This left, as the only issue, the location of the *lex loci delicti*. In respect of the second defenders, this was clearly England. Since it was accepted that English law would apply to the claim against the second defenders, and the only claim that could have been pled (but was not) was one by the widow under the Fatal Accidents Act 1976, the action against the second defenders was dismissed. This was a consequence not only of the interlocutor of the Lord Ordinary, dated 18 November 2015, but also that of a different Lord Ordinary, dated 29 March 2017, which refused to allow the introduction, by minute of amendment, of a case in respect of the widow based on the 1976 Act.

[5] The case against the first defender remained as it was originally pled in terms of Scots law (ie the 2011 Act). Amendment was subsequently allowed to permit a case based on English law. The issue of which law applied to the claim against the first defender, being the *lex loci delicti,* was determined by the Lord Ordinary as English law by interlocutor dated 21 March 2018.

The Lord Ordinary's reasoning

[6] The Lord Ordinary concluded that authoritative guidance was provided by *dicta* in *Brown* v *North British Steel Foundry* 1968 SC 51, as cited in *Rothwell* v *Chemical & Insulating Co* [2008] 1 AC 281. In *Brown*, it was said (LP (Clyde) at pp 64-5) that for there to be a cause of

action there had to be a concurrence of *injuria* and *damnum*. In *Rothwell* it was determined that the development of pleural plaques as a consequence of asbestos exposure did not create a cause of action (albeit that that was reversed by statute in due course). A cause of action in delict did not arise unless and until there had been both a wrongful act and a resultant injury. The presence of asbestos dust in a person's lungs did not itself constitute injury. The Lord Ordinary concluded, as follows:

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

[7] The Lord Ordinary regarded his conclusion as consistent with *Evans and Sons* v *Stein & Co* (1904) 7 F 65, which he interpreted as meaning that the *locus delicti* was the place of the occurrence of injury and not that of the event giving rise to the injury. He rejected a submission to the contrary based upon *Distillers Co (Biochemicals)* v *Thompson* [1971] AC 458 and *Durham* v *T&N*, 1 May 1996, Court of Appeal, unreported. On this basis the pursuers' claims fell to be determined by English law. This resulted in dismissal of the action in so far as it proceeded at the instance of the second to twenty fourth pursuers (ie all claims, other than that of the late widow).

Submissions

Pursuers

[8] The pursuers observed *in limine* that, hitherto, the view widely held in the legal profession had been that Scots law applied in cases where asbestos exposure had occurred in Scotland; even if asbestosis had not developed or been diagnosed until the pursuer was resident elsewhere (eg *Manson* v *Henry Robb* 2017 SLT 1173). The decision of the Lord

Ordinary would mean that, in future, medical evidence would require to be led about the country in which the disease had developed; a matter previously regarded as irrelevant.

[9] The Lord Ordinary had made two errors in law. The first was holding that the *lex loci delicti* referred to the place where the "harmful event" occurred or the injury was sustained, rather than the place where the wrongful act (ie, in this case, the exposure) had occurred. The Lord Ordinary had confused the question of breach of duty (the delict) with whether a cause of action arose. *Bavaird* v *Sir Robert McAlpine* 2014 SC 322 (citing *Walters* v *Babergh District Council* (1983) 82 LGR 235 at 242-243) showed that the existence of a liability was recognised before actionable harm occurred. This was fortified by *Durham* v *BAI (Run Off)* [2012] ICR 574, in which the use of a phrase involving the place where an injury or disease was "sustained" or "contracted" was interpreted as one looking to the initiation or causation of the disease which injured the employee. The wrong constituted by the asbestos exposure could have been interdicted in Scotland irrespective of whether a disease had actually developed.

[10] Secondly, English law would identify Scots law as the relevant one. In *Durham* v *T&N* (*supra*), Canadian law was regarded as applicable where the exposure had been in Montreal. The plaintiff's argument, in seeking to have the law of England applied, that he was probably resident in England when the changes to his lungs had developed and his condition had been diagnosed, was "highly artificial and unpersuasive". The Lord Ordinary's reference to, and reliance upon, a place where the harmful event had occurred had been drawn from the terms of the Brussels Convention on Jurisdiction and the enforcement of judgments in civil and commercial matters 1968 (Article 5(3)). However, this meant both the place where the damage had occurred and the place of the event which gave rise to it (Case 21/76 *Handelswekerij GJ Bier* v *Mines de Potasse d'Alsace* [1978] QB 708). An

application of English law would result in a renvoi to Scots law on the application by the Scottish courts of the applicable English choice of law rules (see *Neilson* v *Overseas Projects Corp* (2005) 223 CLR 331). If the pursuers' approach were not followed, there would be an absurd consequence of the pursuers' claims falling into a legal black hole in which neither Scots law, nor English law, applied.

Defender

[11] The defender submitted that the pursuers were confusing the *lex loci delicti* with the *lex loci delicti commissi*; the latter place being where the negligence occurred, rather than where the harm was sustained. No injury had occurred to the pursuer before he had become negligently exposed to asbestos in Teeside. The court had to make a choice of law because the exposure had occurred in two countries. If a person had died in England and his relatives were all in England, it was obvious that the English law scheme should apply to their claims. This was common sense. Although it was initially said that the harm was the death, it was later said to be the place where the person first experienced symptoms which were attributable to the exposure. Death did not alter the choice of law. The Lord Ordinary had correctly followed the observations in *Rothwell* (*supra* at paras 33, 38-39, 47, 80, 83 and 86), which distinguished between a wrongful act, where the results were negligible, and one which caused demonstrable physical injury, however slight. No completed delict had occurred unless there was harm caused. *Manson* v *Henry Robb* (*supra*) was distinguishable because the exposure in this case was caused by two defenders and occurred both in England and Scotland. The fact that there had been exposure in England was relevant to quantification of damage. *Durham* v *BAI (Run Off)* (*supra*) concerned the wording of an employer's liability insurance policy and was not relevant. *Brown* v *North British Steel*

Foundry (*supra*) concerned the concurrence of *injuria* and *damnum* in the context of time bar and was of limited relevance. *Bavaird* v *Sir Robert McAlpine* (*supra*) was not authority for the proposition advanced.

[12] Delict was shorthand for cause of action (*McElroy* v *McAllister* 1949 SC 110 at 135 and 138; *Cartledge* v *E Jopling & Sons* [1963] AC 758 at 773; Scottish Law Commission Consultative Memorandum No. 62: *Private International Law Choice of Law in Tort and Delict* at para 4.65; Anton: *Private International Law* (2nd ed) 415).

[13] The nature of English law prior to 1995 was irrelevant. The question was what Scots common law made of the issue. *Durham* v *T&N* (*supra*) turned on anomalous facts. Whatever the rules of English law might be, the English courts would not have sent the current claims back to Scotland had it started in England (see *Cox* v *Ergo Versicherung* [2014] AC 1379). An English court would have found that the most significant relationship with the occurrence and the parties lay in England. The Lord Ordinary had not applied any test deriving from European jurisprudence. Identification of the place where there was a concurrence of *injuria* and *damnum* was the only way in which there could be certainty in the selection of an applicable law.

Decision

[14] A *delictum* in Latin, and Roman law, is a fault or omission or, generally, an offence (crime) (see eg Smith's Latin Dictionary). The *lex loci delicti* is the law of the place where the fault, omission, or offence takes place (see eg Traynor's Latin Maxims at 338: *locus delicti*). It is the place of the act of the defender which constitutes the wrong (see headings in Walker: *Delict* (2nd ed) 57; Anton: *Private International Law* (2nd ed) 412). It sets the law to be applied to a person's actings as the place where those actings occurred and not where any resultant

harm chances to emerge. That is not to say that the place where harm occurred, rather than that of an initiating act, will not be the *locus* of the delict depending on the circumstances. These can, in certain cases, be complex and involve, for example, a single act in one country causing harm only in a different country or countries. That is not the position here. The delict (or quasi delict) is the act of the defender in exposing the deceased to asbestos. So far as this action is now concerned, this occurred in Scotland, which is thus the *locus delicti*. Scots law therefore, not surprisingly, governs the defender's operations in Greenock relative to their workforce.

[15] Although, in earlier times, it may have been that, once jurisdiction in Scotland had been established, choice of law followed (see eg *Callendar* v *Milligan* (1849) 11 D 1174, Lord Jeffrey at 1175, quoted in Thomson: *Delictual Liability in Scottish Private International Law* (1976) 25 ICLQ 873 at 874), the idea, that the law of the country where the allegedly wrongful act occurred should play a part, quickly took hold (*ibid*, Lord Mackenzie at 1176). Although this developed into the double actionability rule, the fundamental principle, which is entirely sensible, is that, as a generality, acts committed at a particular place ought to be governed by the law of that place and not that of a country which chances to afford jurisdiction over the defender (*Goodman* v *L & NW Ry Co* (1877) 14 SLR 449, Lord Shand at 451). The mischief, which double actionability presented, was not the application of the *lex loci delicti*, but the additional requirement of actionability under the *lex fori* (see *McElroy* v *McAllister* 1949 SC 110, LJC (Thomson) at 117 and generally Black: *Delict and the Conflict of Laws* 1968 JR 40).

[16] The development of the law in England was different, but it was accepted that there was an exception to the rule, that English law applied in cases before the English courts, where the law of the place where an act was committed positively excused the act (*Phillips* v

Eyre (1870) LR 6 QB 1, Willes J at 28, explained in *Boys* v *Chaplin* [1971] AC 356, Lord Pearson at 398). The English courts did ultimately apply a "substance" of the delict test in determining the place of the tort, thus avoiding arguments such as that in the present case (*Durham* v *T&N*, 1 May 1996, Court of Appeal, unreported, Bingham MR p 10). They nevertheless rejected, as highly artificial and unpersuasive, submissions which attempted to move that place away from that of asbestos exposure (*ibid*). On this basis, were this case to be tried in England, the choice of law would be Scots. Unsuccessful attempts in Australia to shift the *locus* away from China, where an injury had been sustained in an apartment in Wuhan (*Neilson* v *Overseas Projects Corp* (2005) 223 CLR 331), are also instructive. This is all consistent with the principle that "if a person suffers a wrong in a foreign country, the primary Court from which to seek redress is the Court of that county, which will presumably provide a remedy which the *lex loci delicti* affords and which knows how to do so" (*McElroy* v *McAllister* (*supra*), LP (Cooper) at 139).

[17] In establishing the *lex loci delicti*, the emphasis is on the place of the defender's actings, and not the place where an injury emerges. *Joseph Evans & Sons* v *John G Stein & Co* (1904) 7 F 65 does not contradict this. Although the letters and telegram were sent from Scotland, the act of defamation was to take place (at least under Scots law) at the place where they were intended to be read. The act of defaming (the publication and hence the delict) was in Wolverhampton. Applying the *ratio* of *Joseph Evans & Sons* more generally, publication of defamatory material in newspapers will be actionable under the law of each place where publication occurs (eg *Longworth* v *Hope* (1865) 3 M 1049, LP (McNeill) at 1054, Lord Deas at 1057). The seduction cases are to the same general effect. If the acts of deception occur in Scotland, Scots law will apply even if the sexual intercourse ("the last favour"; not actionable *per se*), which was necessary for the case to be actionable, eventually

occur elsewhere (*Soutar* v *Peters* (1912) 1 SLT 111, Lord Ormidale at 112). Acts in Scotland calculated to result in a passing off elsewhere are governed by Scots law despite the finishing point of the end product (*John Walker & Sons* v *Douglas McGibbon & Co* 1972 SLT 128). In short, the focus is on the *locus* of the defender's actions and not that where *injuria* meet *damnum*, thus giving rise to an action of damages (*Rothwell* v *Chemical and Insulating Co* [2008] 1 AC 281). Exposure to asbestos is, in the circumstances averred, a delict and quasi delict which is completed, and incidentally actionable by interdict, whether or not an injury is proved to have been sustained.

[18] There are cases in which an initiating act in one country results in damage in another. *Case 21/76 Handelskwekerij GJ Bier* v *Mines de Potasse D'Alsace* [1978] QB 708 is an example. It was, however, concerned specifically with jurisdiction and the meaning of "the place where the harmful event occurred" in the 1968 Brussels Convention. It is of limited value in the present case, in so far as it allows a choice of jurisdictional seats. Academics have postulated other scenarios, such as a person shooting another across a border (Black (*supra*) at 45). It is not necessary to enter into a debate on such niceties. Each case will depend upon its own facts. Suffice it to say, at the risk of unnecessary repetition, wrongful exposure to asbestos in Scotland is, in an action in this jurisdiction, governed by Scots law.

[19] In relation to the pursuers' submission based on renvoi, I agree with Lord Brodie's analysis. The defender referred to the significance of the later, and greater, exposure to asbestos in the employment of the former second defenders in England in the calculation of damages. This does not arise for decision at this stage. Whether there requires to be an apportionment, where only one defender is sued (see *Heneghan* v *Manchester Dry Docks* [2016] 1 WLR 2036), or not (see eg the Compensation Act 2006, section 3), and the effect of

any recovery by the late widow's estate against the former second defenders in proceedings in England will require to be argued, if necessary, in due course.

[20] For these reasons, and those of Lord Brodie, with which in substance I agree, the reclaiming motion must be allowed; the interlocutor of the Lord Ordinary dated 21 March 2018 recalled; and the claims of all of the pursuers allowed to proceed to proof on the basis of Scots law.

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Lord President
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OPINION OF LORD MENZIES

in the Reclaiming Motion by

JAMES DOCHERTY'S EXECUTORS AND OTHERS

Pursuers and Reclaimers

against

SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS

Defender and Respondent

Pursuers and Reclaimers: O'Neill QC, T Marshall (sol adv); Thompsons
Defender and Respondent: O'Brien QC, Charteris; Clyde & Co

22 August 2018

[21] For the reasons given by your Lordship in the chair and by Lord Brodie, I agree that this reclaiming motion should be allowed. I am in complete agreement with the views expressed by each of your Lordships, and have nothing further to add.

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OPINION OF LORD BRODIE

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Introduction

[22] I agree with your Lordship in the chair that the reclaiming motion should be allowed.

[23] As your Lordship has explained, this action was originally brought against two defenders: the first defender, the Secretary of State for Business, Innovation and Skills as successor to the liabilities of the former Scott's Shipbuilding & Engineering Company Limited ("Scott's"); and the second defender, Imperial Chemical Industries Limited. The action in so far as directed against the first defender was founded on alleged negligence and

breach of statutory duty on the part of Scott's in exposing the deceased to asbestos dust which he inhaled while working in the course of his employment in Scott's shipyard in Greenock in Scotland between 1941 and 1947. The action in so far as directed against the second defender was founded on alleged negligence and breach of statutory duty on the part of the second defender in exposing the deceased to asbestos dust which he inhaled while working in the course of his employment at the second defender's plant in Wilton on Teeside in England between 1954 and 1979.

[24] The case against the second defender, at the instance of all of the pursuers, has now been dismissed. It follows that all the averments in support of that case, including the averments of exposure to asbestos dust in England, can, at least for present purposes, be laid aside. What is left for consideration is a claim for damages in reparation brought in a Scottish court of competent jurisdiction in respect of alleged breaches of duty owed by a single Scottish employer to its then Scottish resident employee while he was working in his employer's shipyard in Scotland. The acts and omissions founded on as constituting these alleged breaches of duty (failure to minimise exposure to asbestos dust, failure to warn about the dangers of asbestos, failure to provide adequate protective equipment; and, under reference to sections 4, 43 and 47 of the Factories Act 1937, failure to provide adequate ventilation, failure to provide adequate accommodation for clothing, and failure to take all practicable measures to protect against inhalation of asbestos dust) were all committed or omitted exclusively in Scotland.

[25] It might therefore not be thought to be remarkable that the pursuers present their claims under reference to Scots law. They make clear averments that the deceased suffered from symptoms and exhibited signs of asbestosis between about 2003 and his death on 30 September 2011. They make somewhat less clear averments from which it can be taken that

it is their contention that asbestosis materially contributed to (in the sense of hastening) the deceased's death. The first pursuers sue in respect of the heads of damage which would have been available to the deceased in terms of section 8 of the Administration of Justice Act 1982 and sections 1 and 2 of the Damages (Scotland) Act 2011 and the claim which would have been available to the deceased's widow under section 4(3)(b) of the 2011 Act. The remaining pursuers sue in respect of claims under section 4(3)(b). As appears from paragraph 2.5 of their note of arguments, the pursuers' case is that in order to establish liability against the first defender they need only prove that the deceased's wrongful exposure in the course of his employment with Scott's between 1941 and 1947 contributed a non-negligible quantity of the total amount of asbestos dust inhaled by the deceased which quantity can therefore be taken to have materially contributed to his disease: *Wardlaw* v *Bonnington Castings Limited* 1956 SC (HL) 26 at 31 to 32, *Williams* v *Bermuda Hospitals Board* [2016] AC 888 at paras 30 to 42.

The suggested foreign element requiring a choice of law

[26] Scottish courts generally apply Scots law (the *lex fori*) to the resolution of the issues before them but they do not always do so. Where the case has a "foreign element" (the expression used both in Anton *Private International Law* (3rd edit) at para 1.01 and Dicey, Morris and Collins *The Conflict of Laws* (14th edit) at para 1-001) there is the recognition, expressed through the body of Scots private international law, that it may be more appropriate and more likely to produce a just outcome that a Scottish court should apply the rules of the foreign system. Whether the circumstances so require is determined by the relevant Scots choice of law rule. Anton (3rd edit at paras 1.16 and 1.17) describes the paradigm. Where there is a foreign element in the case which suggests an alternative to the

simple application of Scots law as the *lex fori*, resort should be had to the relevant choice of law rule which will point to the legal system where the rule to be applied to determine the issue is to be found. The mechanism which the choice of law rule employs to connect the facts of the case with a particular system of law is the "connecting factor". The connecting factor will vary depending on the proper characterisation of the issue which the Scottish court has to resolve.

[27] The analysis of the present case as including a material foreign element depends upon the pathology of asbestosis, as that pathology is understood by lawyers. Asbestosis is a variant of pneumoconiosis. It is a "long-tailed" disease; it is caused by the inhalation of asbestos dust but the presence of dust within the respiratory system produces no immediate pathological changes to tissue, let alone symptoms of ill health, rather, these only emerge, or may only emerge, after a long period of years. The point is made in two of the authorities to which we were referred: *Brown* v *North British Steel Foundry* 1968 SC 51 and *Durham* v *BAI (Run off) Ltd* [2012] ICR 574. In *Brown* the pursuer had inhaled silica dust when employed in the dressing shop of a foundry between 1941 and 1949. In 1958 he was found to be suffering from pneumoconiosis. While it was accepted that this was due to his exposure to dust between 1941 and 1949, it was impossible to establish a diagnosis of pneumoconiosis earlier than the beginning of 1955. The Lord President (Clyde) said this of the evidence (at 63 to 64):

> "The pursuer went to proof seeking to establish that, while he was working in the dressing shop, or at any rate by the time he left it in 1949, he was suffering from pneumoconiosis. But he has completely failed to establish this in evidence. He no doubt inhaled siliceous dust during the time he was in the dressing shop, but it is nowhere suggested in the evidence that by 1949 he was in any way then suffering from pneumoconiosis. All the men working in dressing shops inhale such dust, but few are infected with pneumoconiosis, which involves the scarring and inflammation of the tissues in the lungs. …the Lord Ordinary was well entitled on the evidence to hold, as he did, that the pneumoconiosis first manifested itself on 1st

> January 1955. There is no evidence at all of its existence prior to that date. … The pursuer sought to … [argue] that the injury was done to the workman's lungs by 1949, because he had been inhaling dangerous dust for some years before that and, as subsequent events show, he was susceptible to pneumoconiosis in 1949. But …there is no medical evidence at all to support it. …there is no evidence of any injuries to the workman's lungs in 1949. He had then merely a deposit of dust in his lungs, which might or might not subsequently create an injury."

[28] This temporal dislocation between the potentially harmful event (inhalation of mineral dust) and the ensuing harm (a pathological change in the respiratory tissues with consequent symptoms) which is described by Lord President Clyde under reference to the evidence in *Brown* was noted by Lord Mance, specifically in relation to asbestos exposure, in *Durham* at para 52:

> "It may be that, in the case of some long-tail diseases, the victim can be said to have incurred or caught them at the same time as the initial ingestion or scratch giving rise to them. But it is clear that this is not the position with inhalation of asbestos in relation to either asbestosis or mesothelioma. No cause of action arises from exposure or inhalation alone: *Rothwell* v *Chemical & Insulating Co Ltd* [2008] AC 281."

[29] In the present case, whereas on the pursuers' case there should be taken to have been asbestos in the deceased's lungs by reason of exposure in Scotland between 1941 and 1947, it was only in 2003 that he can be said to have suffered injury and damage. By that time he was resident in England (as he had been for many years). This, the defender contends and the Lord Ordinary accepted, introduces a foreign (ie English) element into the case which requires a Scottish court, notwithstanding that it is seised with jurisdiction, to make a choice as to which system of law should be applied to determine the substantive issues.

The choice of law rule

[30] Before this court parties were agreed that given the date of the deceased's exposure to asbestos, choice of law fell to be determined at common law. They were further agreed that in personal injury claims, Scotland, as was the case with other Commonwealth

jurisdictions including England, and states of the United States of America (see eg Webb and North, *Thoughts on the Place of Commission of a Non-Statutory Tort* (1965) 14 ICLQ 1314, cited by Walker *Delict* (2nd edit) at p57) had adopted the *locus delicti* as a connecting factor for its choice of law rule; the law had been authoritatively determined for Scotland by a Seven Judge court in *McElroy* v *McAllister* 1949 SC 110.

[31] *McElroy* was a claim at the instance of a widow whose husband had been killed in a road accident in England; as Lord President Cooper described it at 135, "a claim *ex delicto* by a pursuer in respect of a wrongful act committed abroad". He went on:

> "The principle which I am content to extract from [*Naftalin* v *London Midland and Scottish Railway Co* 1933 SC 259] and to reaffirm is the negative one that the Scottish Courts will not recognise in such a pursuer any specific *jus actionis* which is denied to him by the *lex loci delicti*."

Implicit in the Lord President's statement of principle is that the *jus actionis* must also be available under Scots law as the *lex fori*. This requirement for "double actionability" is made explicit in the formulation of the rule which had originally appeared in the first edition of Anton and was later adopted by Lord Coulsfield in *James Burrough Distillers plc* v *Speymalt Whisky Distributors Ltd* 1989 SLT 561 at 564:

> "The Scots law on this topic may be summed up by saying that an action for reparation based on a delict committed outside Scotland will fail unless the pursuer can show that the specific *jus actionis* which he evokes is available and available to him both by Scots law and by the *lex loci delicti".*

The *locus delicti*

[32] What then is meant by the *locus delicti*?

[33] In the present case parties relied, for their respective purposes, on linguistic analysis of the Latin word *delictum*. The pursuers pointed to its meaning as fault, offence, crime or wrong, in contrast to the expression "cause of action" which is what Lord Mance referred to

in *Durham* and Lord Rodger was discussing in *Rothwell*. The defender contrasted *locus delicti* with *locus commissi delicti*, that is the place of the delict, as opposed to the place of commission of the delict. I am not persuaded that any of this takes one anywhere. *Locus delicti* can properly be translated as the "place of the wrong" but that is simply to replace an elastic Latin expression with an elastic English expression.

[34] The *locus delicti* is a concept rather than a matter of pure objective fact. Identifying it involves a mixed question of fact and law. As can be demonstrated by reference to the American, Canadian, Australian, English and few Scottish cases, there are at least three possible approaches to that question: identifying the *locus* by reference to the place of the relevant wrongful act, identifying the *locus* by reference to the place of the relevant harm, and identifying the *locus* by reference to the place of the substance of the delict. Whereas a legal system might adopt one of these approaches to the exclusion of others I do not understand Scots law to have done so prior to the supersession of the common law, first by the Private International Law (Miscellaneous Provisions) Act 1995 sections 9(1) and 14(1) and then by the Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008 (see Anton (2nd edit) at pp 412 to 413). I take the position to have been accurately set out at para 2.44 of the joint Law Commission Working Paper No 87 and Scottish Law Commission Consultative Memorandum No 62 of 1984:

> "The Scottish courts have rarely been called upon to consider which is the *locus delicti* in cases where different elements of the delict have occurred in different countries. The question does not appear to have arisen for decision in cases specifically involving the double actionability rule. What authority there is concerns delicts allegedly committed in Scotland and it is clear that the definition of the *locus delicti* can vary according to the nature of the delict in question."

The approach taken by the Lord Ordinary

[35] The approach adopted by the Lord Ordinary was to fix the *locus delicti* by reference to what he saw as being the place of the relevant harm or, as it is sometimes referred to in the literature, the place of "the final event" which completes the delict or tort. The starting point for his course of reasoning was the opinion of the Lord President in *Brown* at 64 to 65 (see *Docherty* v *Secretary of State for Business, Innovation and Skills* 2018 SLT 349 at para [22]) from which he quotes the following passage:

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

As the Lord Ordinary goes on to note (*supra* at para [23]), this passage was cited by Lord Rodger in *Rothwell* before continuing as follows (*Rothwell* paragraphs 87 and 88):

> "87 In summary, three elements must combine before there is a cause of action for damages for personal injuries caused by a defendant's negligence or breach of statutory duty. There must be (1) a negligent act or breach of statutory duty by the defendant, which (2) causes an injury to the claimant's body and (3) the claimant must suffer material damage as a result.
>
> 88 In these cases the claimants do not suggest that the presence of the asbestos fibres in their lungs constitutes an injury…"

In *Rothwell* Lord Hope had been to similar effect. Thus, as the Lord Ordinary observes (*supra* at para [24]), a cause of action does not arise unless and until there has been a wrongful act and resultant injury. Specifically, the presence of asbestos dust in the employee's lungs does not of itself constitute injury, and (subject to the Scottish statutory provisions regarding pleural plaques) no cause of action based on negligent exposure arises

until it does. Accordingly, on the Lord Ordinary's analysis, the present case was an action in respect of a harmful event which had occurred in England, because (*supra* at para [25]):

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

The pursuers' primary argument: error in the identification of the *locus delicti*

[36] Agreeing with the pursuers' and reclaimers' primary argument, in my opinion, while the Lord Ordinary was correct in finding that in all the circumstances of the case there was no cause of action in respect of any of the claims now advanced by the pursuers until the deceased first developed the signs and symptoms of asbestosis in 2003, he erred in concluding that the fact that the deceased happened to be in England when this "final event" occurred meant that the relevant *locus delicti* was England.

[36] There is no Scottish authority stating, as a matter of principle, how the *locus delicti* should be identified for the purpose of choice of law. The second edition of Anton at pp 412 to 413 considered the matter not to be clear. The authors refer to *John Walker & Sons* v *Douglas McGibbon & Co* 1972 SLT 128 as the only Scottish case that lends any support to the place of acting approach. As your Lordship in the chair has observed, that is to ignore *Soutar* v *Peters* 1912 1 SLT 111. Equally, only *Evans & Sons* v *John G Stein & Co* (1904) 7 F 65 was cited by Anton in support of the place of harm or result approach. No authority is cited in support of the substance of the wrongdoing approach although, in a footnote at p414, Anton draws attention to the decision in *Russell* v *F W Woolworth & Co Ltd and Anor* 1982 SC 20, a case concerning jurisdiction. As it appears to me, in the absence of any firm common law rule, courts felt able to come to conclusions on the basis of their impression of the facts. As Walker has it at p58, expressing a view which was to be repeated in the Scottish Law

Commission Consultative Memorandum No 62, the basis on which the place of a wrong is determined may vary from one wrong to another.

[38] In the fatal personal injury cases to which we have been referred or which have been discussed in the cases to which we have been referred (*Goodman* v *The London and North-Western Railway Co* (1877) 14 SLR 449, *Convery* v *Lanarkshire Tramways Co* (1905) 8 R 117, *Naftalin* v *London, Midland and Scottish Railway Co* and *McElroy* v *McAllister*) the *locus delicti* has been taken to have been the place where the act of negligence in the conduct of the relevant vehicle occurred. Admittedly, these were all cases where the relevant breach of duty coincided in time and place with the relevant harmful event (the death of a family member of the pursuer), but in accepting that the *locus delicti* was the place of the breach of duty, the courts did not see a need to take into account the place where the hurt to feelings for which a claim for *solatium* was being made had its impact. As is noted by Walker at p58, in *Convery* v *Lanarkshire Tramways Co* where the pursuer, an Irishman, sued for *solatium* in respect of the death of his son in a tramcar accident in Scotland, it was argued that the *locus delicti* was really Ireland, for the claim being only for the pursuer's wounded feelings, the *locus delicti* was where the pursuer resided. The only opinion is that of the Lord President (Dunedin). The Lord President does not discuss this point directly but by implication he must be taken to have rejected it. As Walker puts it:

> "The argument, in a claim for injured feelings, that the *locus delicti* was where the feelings were injured rather than where the death took place, received no support."

Walker considers the hypothetical case of A injuring B, a Scot, in England as a result of which B later dies at home in Scotland or, alternatively, in France where he has been taken for medical treatment. He submits that in such a case the wrong takes place in the country where the injury which caused the death took place, that is England, even if the actual death

took place elsewhere. That would seem to be sound; why should it matter where the deceased happened to be when he succumbed to what was to prove a fatal injury?

[39] Thus, it does not necessarily follow, even if a final event must occur in order to complete a cause of action (the pursuer learning of the death of his son in *Convery* or the death of B in Walker's hypothetical case), that the place where that final event occurs is the *locus delicti*.

[40] On the facts in the present case, I can only conclude that the *locus delicti* is Scotland. That is where Scott's shipyard was located. That is where the deceased was employed. That is where he was exposed to and inhaled asbestos dust. A consequence of these facts was that Scott's, as the deceased's employer, were bound, but also entitled, to conduct their operations by reference to the requirements of Scots law. Accordingly, they could hardly complain, in the event of their failure properly to do so, if they were held responsible for that failure by reference to the then applicable rules of that system. On the contrary, they would have cause for complaint if they were held responsible by reference to the rules of some other system, the application of which would not have been foreseeable to them at the relevant time. That, as I understand it, is the justification for requiring actionability under the *lex loci delict*; it is only fair and indeed it is only rational to hold a party accountable for a particular breach of duty if, at the relevant time, that party was on actual or constructive notice that he was subject to that duty. Lord Russell puts the point this way in *McElroy v McAllister* at 127:

> "It was to the *lex loci delicti* that the defender was subject at the moment of his negligent act, and it would seem just and equitable that his liability, if any, should by that law be regulated, measured and adjudged. On principle, therefore, I would be unwilling to apply private international law so as to produce a result which I would deprecate as being difficult to reconcile with natural justice unless there is authority binding on this Court which compels me to do so. In my opinion, no such authority has been produced."

Similarly, in the present case, the deceased was entitled to look to Scots law for the protection of his interests, including his interest in bodily integrity, and therefore, it might be thought, he was entitled to the benefit of such remedies as Scots law affords in the event of these interests not being properly protected.

[41] I am reinforced in my conclusion that the *locus delicti* in the present case was Scotland by consideration of just how peripheral to the delict in question was the place where the deceased happened to be when the relevant changes began to develop within his body. In a sense these purely internal changes have no relationship whatsoever with England as a geographical location. On the pursuers' case, the pathology of the deceased's condition was entirely independent of any external event or occurrence that had anything to do with England. I have used the expression temporal dislocation to describe the separation in time as between the breach of duty in the present case and the consequent harm. Given the decisions in *Brown* and *Rothwell*, the separation in time as between breach and harm must be accepted, but what I have more difficulty in accepting is that there was any relevant separation in place. As matters have turned out, what was necessary to give rise to the pursuers' causes of action was the presence of the deceased in Scott's shipyard in Greenock in circumstances in which he inhaled asbestos dust. That is all that the pursuers have to prove in relation to a specific place. That the deceased was in England when he developed asbestosis is of importance to the pursuers' cause of action only to the extent of the fact that the pursuers must prove that the deceased developed asbestosis. They need not prove where he was when that occurred. Indeed, one might even go the distance of questioning whether there is truly any foreign element in this case at all.

[42] *Evans and Sons* v *Stein & Co* (1904) 7 F 65 was a case of alleged defamation by the sending of two letters and a telegram from Bonnybridge in Scotland to Wolverhampton in England. The facts were therefore very different from those in the present case. However, I do not find the approach of the court in *Evans* to have been inconsistent with the approach that I would see as appropriate here. In *Evans* an issue over identifying the *locus delicti* arose because, as Lord McLaren explained, it had been agreed by counsel (and therefore did not need to be proved) that while the law of Scotland awards reparation for defamatory statements made on the ground of injury to feelings, the law of England, which does not take account of injury to feelings, gives no action for statements simply addressed to the party himself. For there to be any question of hurt to feelings the letters and telegram had of course to arrive and be read in Wolverhampton. It was therefore of the essence of the alleged defamation that the communications should arrive at their destination; while in transit in Scotland the letters were entirely innocuous. Thus, as Lord McLaren put it, "the case is exactly the same as if the defender had taken the letters to Carlisle and posted them there, because in their transit through Scotland they could do no harm." For Lord Kinnear there was no injury until the pursuer opened and read the letter. The question was not where was the *locus delicti* but whether there was a *delictum* or not and "the whole of the somewhat metaphysical discussion as to whether the wrongful act, of which the pursuer says he is entitled to complain, was done in Glasgow or Wolverhampton" seemed to Lord Kinnear "altogether beside the question." Thus, the emphasis was not on whether a delict should be localised at the place of the ensuing harm rather than the place of the wrongful act, but rather whether there had been a wrongful act at all, as opposed to an unactionable "mere insult".

The pursuers' alternative argument: *renvoi*

[43] Because I am with the pursuers on their primary argument it is unnecessary for me to consider their alternative argument. This was to the effect that if on an application of the Scots choice of law rule the applicable law was identified as English (because England was the *locus delicti*) then the whole of English law would fall to be applied, including its private international law and therefore its choice of law rules. Application of the English choice of law rules would, the pursuers asserted on the (rather fragile) authority of *Durham* v *T&N plc* (Court of Appeal, 1 May 1996, unreported), consider Scots law to be appropriate to govern the claim. There would thus, as the pursuers put it in para 3.20 of their note of arguments, "be a *renvoi* back to Scots law on the application by the Scottish court of the applicable English choice of law rules". Support for this approach, the pursuers claim at para 3.21 of their note of arguments, can be found in the decision of the High Court of Australia *in Neilson* v *Overseas Projects Corporation of Victoria Ltd* (2005) 221 ALR 213.

[44] As I have indicated, it is unnecessary for me to consider this argument. This is perhaps just as well. It appears to me to be highly problematic at a number of its steps. The third edition of Anton, at para 4.44, notes what the authors describe as Scots law's hostility to the admission of *renvoi* in certain areas. These areas include the law of delict. This appears from what was said by Lord Russell in *McElroy* v *McAllister* at 126:

> "It is desirable to note that in referring to the *lex loci delicti* to ascertain by what rules the rights and liabilities of the parties to this action are there regulated this court refers to the internal domestic law of that locus and not to *its* private international law."

The pursuers' argument involves the curious exercise of a Scots court determining that on particular facts the *locus delicti* is England but then abandoning that conclusion in deference to the hypothetical judgment of an English court on the same facts that the *locus delicti* is

Scotland. The argument does not address whether an English court, if seised with jurisdiction, would impose a requirement for double actionability and therefore actionability under English law as the *lex fori*. Critically, and fatally, the argument is entirely unsupported by averment; in Scottish proceedings foreign law is a matter of fact and therefore must be pled if it is to be founded on.