SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Bailey-Brown v Southern New South Wales Local Health District**
Citation:	**[2019] ACTSC 78**
Hearing Date:	22 March 2019
Decision Date:	28 March 2019
Before:	McWilliam AsJ
Decision:	(1) The applications are dismissed. (2) The defendant is to pay the costs of the applications, with such costs not to be recovered until the resolution of the substantive proceedings.
Catchwords:	**PRACTICE AND PROCEDURE** – Cross vesting legislation – application to transfer under *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT) s 5(2)(b) – where there are a preponderance of connecting factors with New South Wales – where personal convenience of the plaintiffs strongly favours the Territory – whether transfer in the interests of justice
Legislation Cited:	*Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT) s 5(2)(b)
Cases Cited:	*Bateman v Fairfax Media Publications Pty Ltd* [2013] ACTSC 72; 8 ACTLR 13 *BHP Billiton Ltd v Schultz* [2004] HCA 61; 221 CLR 400 *Langton v Western Sydney Local Health District* [2017] ACTSC 352
Parties:	Alice Caitlin Bailey-Brown By her Litigation Guardian Rebecca Catherine Bailey-Brown (Plaintiff in SC 167 of 2018) Rhys Bailey-Brown (Plaintiff in SC 259 of 2018) Rebecca Catherine Bailey-Brown (Plaintiff in SC 260 of 2018) Southern New South Wales Local Health District (Defendant)
Representation:	**Counsel** J Ronald (Plaintiffs) H Chiu (Defendant) **Solicitors** Commins Hendriks (Plaintiffs) Hicksons Lawyers (Defendant)
File Number(s):	SC 167 of 2018; SC 259 of 2018; SC 260 of 2018

McWilliam ASJ

1. Before the Court are three applications in proceedings brought by the defendant, the Southern New South Wales Local Health District (Health Service), seeking to transfer three related proceedings to the Supreme Court of New South Wales that have been commenced and are currently being litigated in the Australian Capital Territory (the Territory).

2. The three substantive proceedings arise out of the alleged intrapartum mismanagement of the infant plaintiff, Alice Bailey-Brown, at Moruya Hospital in NSW when she was born on 20 October 2011. The first claim alleges that as a consequence of medical negligence, Ms Bailey-Brown suffered hypoxic ischaemic encephalopathy, resulting in cerebral palsy. The other two claims are related, with Ms Bailey-Brown's parents each claiming for psychiatric injury arising out of the same incident, including nervous shock, anxiety and depression.

The Court's power to transfer proceedings

3. The Court's power to make an order transferring these proceedings arises under s 5(2)(b)(ii) and (iii) of the *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT). These provisions permit proceedings pending in this Court to be transferred to the Supreme Court of another state or territory if:

   (a) Having regard to the interests of justice, it is more appropriate that the other court determine the proceeding (s 5(2)(b)(ii)); or

   (b) It is otherwise in the interests of justice that the proceeding be determined by the Supreme Court of another state or territory (s 5(2)(b)(iii)).

Applicable legal principles

4. In *Langton v Western Sydney Local Health District* [2017] ACTSC 352, a case bearing certain similarities to the present circumstances under consideration, I set out the relevant principles at [5]-[8]:

> 5. The principles to be applied in determining an application for transfer under the cross-vesting legislation were expounded by the High Court of Australia in *BHP Billiton Ltd v Schultz* [2004] HCA 61; 221 CLR 400 (***BHP v Schultz***). They have been followed in this Court in cases such as *Barker v Robert Barker Nominees Pty Ltd* [2011] ACTSC 73 per Master Harper at [21] and in *Bateman v Fairfax Media Publications Pty Ltd & ors* [2013] ACTSC 72; 8 ACTLR 13 (***Bateman***), where Refshauge J set out in detail the applicable principles at [68]-[70], to which I have had regard in the determination of this application. It is not necessary to repeat them in totality here. The factors which I consider to be relevant to the circumstances of the proceedings before me are addressed below.
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> 6. As a starting point, the legislation does not confer a discretion on the Court. If satisfied that it is in the interests of justice that the action be determined by another Supreme Court, this Court must order a transfer.
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> 7. The interests of justice are not limited to the interests of the parties, although these must be considered: *BHP v Schultz* at [15]; *Bateman* at [68].
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> 8. It is not necessary that the first court is clearly an inappropriate forum. Rather, it is both necessary and sufficient that, in the interests of justice, the second court is more appropriate: *BHP v Schultz* at [15].

5. In addition, the Health Service relies on (among others) the following further principles to be drawn from *BHP v Schultz*, which it says are of relevance to the present circumstances:

   (a) The plaintiffs' choice of forum, indicated by the commencement of proceedings there, does not require any specific emphasis of weight to be given to it: *BHP v Schultz* at [25], [77], [170], [258].

   (b) Rather, the court is required to decide which is the more appropriate court by fairly balancing all the factors defining the relevant interests of justice: *BHP v Schultz at* [22].

   (c) The interests of justice are not the same as the interests of one party and there may be interests wider than those of either party to be considered: *BHP v Schultz* at [15].

   (d) The more appropriate court will be the court that is the natural forum as determined by connecting factors to that forum: *BHP v Schultz* at [10].

   (e) Relevant connecting factors include matters of convenience and expense such as the availability of witnesses, the places where the parties respectively live or carry on their business, especially if relevant to the issues, and the law regulating the relevant facts in issue: *BHP v Schultz* at [18]-[19].

   (f) In many cases, there will be a preponderance of connecting factors with one forum so that the answer to the question of which is the more appropriate forum is clear; *BHP Schultz* at [19].

How the principles operate with regard to the present case

6. The Health Service relied upon the affidavit of the solicitor with carriage of the matter, Ms Emily Bluett, affirmed 12 February 2019. The plaintiffs relied upon the affidavit of their solicitor, Mr Geoffrey John Potter, sworn 20 March 2019.

7. The Health Service seeks to transfer the proceedings to NSW for the following reasons:

   (a) All three plaintiffs reside in Wagga Wagga, NSW.

   (b) The Health Service is a statutory corporation formed under NSW legislation, and is based in NSW with no presence in the ACT.

   (c) The alleged negligence occurred in Moruya Hospital in NSW.

   (d) The law of the place of the tort is the law of NSW, because the injury was suffered, and the damages crystallised upon the infant plaintiff's birth at Moruya Hospital.

   (e) The defendant's potential witnesses in the proceedings include medical and nursing staff at Moruya Hospital who attended the infant plaintiff in the hours leading up to her delivery, during which time the alleged negligence occurred. These witnesses live or are based in Moruya in NSW.

   (f) A number of the plaintiffs' expert witnesses reside in NSW, and other expert witnesses who are not based in NSW are also not based in the ACT.

(g) The infant plaintiff's treating GP is based in Wagga Wagga in NSW, and some of the infant plaintiff's ongoing paediatric review has been conducted at the Sydney Children's Hospital in Randwick, NSW.

8. Having stated those facts, all of which establish a connection to NSW, it might be thought that there was such a preponderance of connecting factors that the Court would readily transfer the matter to the Supreme Court of NSW. In the present case, the residence of the plaintiffs and defendant and the place of the tort are all in the State of NSW. Those connecting factors may in other cases warrant a finding that the 'natural forum' is NSW: see *BHP v Schultz* per Callinan J at [259]. Ordinarily, I would have had no hesitation in making such a finding.

9. However, they are not the only connecting factors before me and the test is not merely ticking boxes of legal principle. It is about balancing the various competing considerations to ascertain what is in the interests of justice; and matters of convenience and expense are also established connecting factors.

10. Having read the plaintiffs' affidavit evidence, which was unchallenged on this application, I have been persuaded that in fact, the interests of justice in this case lie with the proceedings remaining in the Territory.

11. The fact of the proceedings having been commenced in the Territory does not attract specific emphasis, but the Court nevertheless distinguishes that from the reasons why a plaintiff commenced proceedings in a particular forum, which may be relevant to where the interests of justice lie: see *BHP v Schultz* at [15]; *Bateman* at [68(d)].

12. In this case, I consider the underlying reasons to be critical and overwhelming, but I will deal with the totality of the plaintiffs' three main arguments as they all contribute to the balancing task required to determine what is, in the interests of justice, the more appropriate forum.

Convenience to the plaintiffs

13. The first is of course that this is the preferred forum for the plaintiffs for geographic reasons. It is the most convenient forum for them as they live in Wagga Wagga, which is much closer to Canberra than to Sydney, and their solicitors are based here.

14. The geographic proximity of the Territory to the plaintiffs' home has further significance. On the unchallenged evidence on this application, the infant plaintiff's disabilities are severely debilitating. At six years of age, she is unable to sit or rollover. Medication is required to manage seizures, gastric reflux and constipation. She is fed by a PEG feeding tube, is not toilet trained and has regular treatment from visiting therapists to her home each week. The infant plaintiff cannot be left alone at any time.

15. This has consequences both for the preparation of the case and for the substantive hearing if the matter proceeds to that point. The solicitors for the plaintiffs consider the case may be up to three weeks' duration. Given the number of medical, lay and expert witnesses potentially involved and the catastrophic nature of the injuries, I accept this to be a reasonable estimate if the parties are unable to agree on every issue.

16. The infant plaintiff's parents, being the two adult plaintiffs, will be able to manage the care of the infant plaintiff throughout the hearing and the preparation for it (including

any distress she might suffer by being apart from her parents) much better if they are able to drive to and from Canberra, and stay in appropriate accommodation close to the Court and by relying on their family support network on a daily basis. They also have two other children living at home requiring care. The infant plaintiff's parents could return to Wagga Wagga overnight from Canberra and return in the morning if required. The drive from Wagga Wagga to Canberra is 2 hours and 45 minutes.

17. All of that is a much more difficult, expensive, and exhausting proposition if the trial is run out of Sydney. Counsel for the defendant submitted that there was a possibility that some of the evidence could be taken in Wagga Wagga or in Moruya. However, he could put it no higher than a possibility, and the two adult plaintiffs are plainly entitled to be at the remainder of the hearing, including to give instructions and assess the medical evidence as it unfolds.

Witnesses residing in the Territory

18. The second argument raised by the plaintiffs is that there are a number of witnesses whom the plaintiffs presently intend to call and who are based in the ACT, as the infant plaintiff was transferred to Canberra Hospital following her birth. Counsel for the defendants argued that the critical aspect of the conduct occurred at Moruya Hospital and it is likely that the medical notes describing what occurred at Canberra Hospital could be relied upon, rather than calling witnesses. This amounts to a submission that it is not yet known who is required for hearing.

19. The same argument must also apply to the expert witnesses who are based in NSW, a connecting factor relied upon by the defendant. The expert evidence for the defendant is yet to be completed and it may be that some experts who are based in NSW also reach agreement so that they are not required for a substantive hearing.

20. Convenience to a majority of witnesses can be a factor: *Bateman* at [70(l)]). Here, I do not accept that it will be more convenient for a majority of witnesses to travel to the Supreme Court in NSW for a hearing, given that most are located either in the ACT or in Moruya. Canberra is geographically closer to Moruya when compared with Sydney. Having said that, the location of the experts carries less weight in the circumstances of this case, for the following reasons:

    (a) First, there is no suggestion that a medical witness in NSW could not travel to ACT or vice versa.

    (b) Second, evidence may now be taken by audio-visual link with relative ease: see *Bateman* at [70(o)(iii)] and the cases there-cited, particularly for non-critical witnesses whose credit is not in question.

    (c) Third, as alluded to above, the proceedings are not at a stage where all the witnesses are even known, let alone whether they will be required for cross-examination.

Stage of readiness and any delay in obtaining a hearing date

21. The third argument raised by the plaintiffs was the stage the proceedings are at in the Territory. Counsel appearing for the plaintiffs argued that the case will be ready to take a hearing date from May 2019. If the proceedings are transferred, he asserted there would inevitably be a delay through the administrative processes necessary to transfer the proceeding and list the matter for directions. There was also some

suggestion that the queue of matters awaiting a date to be set for trial in NSW was longer than that which presently exists in the Territory. These were matters about which no evidence was led and I have given them little weight.

Balancing the considerations

22. The defendant argued that to allow personal convenience to outweigh other factors which clearly connect the proceedings to NSW would set a dangerous precedent, as every accident in southern NSW would be likely to be litigated in the Territory. I disagree. In my view, this is an exceptional case due to its facts. The preponderance of factors connecting the matter to NSW may be overtaken by convenience to some witnesses and, more importantly, personal convenience to the plaintiffs because of the particular circumstances in which they find themselves.

23. Once all the competing factors are considered, those connecting the matters to NSW become less important. For example, the fact that the applicable law is that of NSW is in truth a neutral factor because the law of NSW can be applied by the ACT Supreme Court just as it would in NSW.

24. The location of the defendant is also not a separate or particularly significant connecting factor in the context of this case, once the convenience to the individual witnesses has also been taken into account.

25. The residence of the plaintiffs in NSW also carries less importance when it is appreciated that Wagga Wagga is in southern NSW, which is much closer to Canberra than Sydney. More importantly, however, it takes but a moment's thought about the reality for these parents and their severely disabled child in litigating this matter from Sydney as opposed to Canberra to reach the conclusion that NSW is not the more appropriate forum for this matter. Whatever the merit of the case in medical negligence, I am not minded to make their lives any harder than they already are, by forcing them to litigate in a forum that makes it considerably more difficult for them to attend to the needs of their infant plaintiff.

Conclusion

26. Accordingly, I am satisfied that, having regard to the interests of justice, the Supreme Court of the ACT is the more appropriate court to hear and determine the present action.

27. The Orders of the Court are:

    (1) The applications are dismissed.

    (2) The defendant is to pay the costs of the applications, with such costs not to be recovered until the resolution of the substantive proceedings.\

I certify that the preceding twenty-seven [27] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Associate Justice McWilliam

Associate:

Date: