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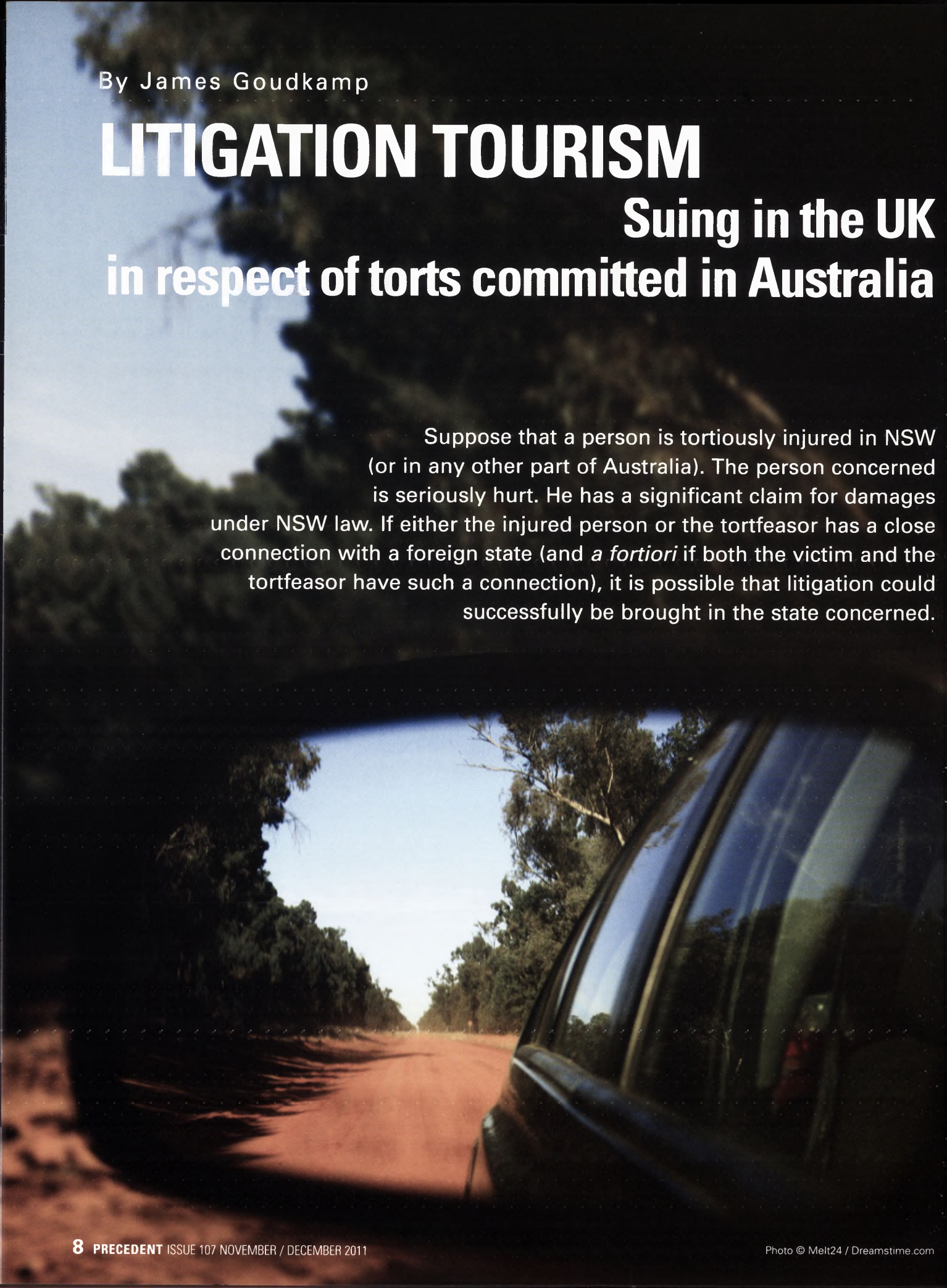
LITIGATION TOURISM

Suing in the UK in respect of torts committed in Australia

Suppose that a person is tortiously injured in NSW (or in any other part of Australia). The person concerned is seriously hurt. He has a significant claim for damages under NSW law. If either the injured person or the tortfeasor has a close connection with a foreign state (and *a fortiori* if both the victim and the tortfeasor have such a connection), it is possible that litigation could successfully be brought in the state concerned.



Suing outside Australia potentially has significant advantages. This article provides an outline of the relevant law, with the focus being on suing in the UK. It begins, however, by delineating some key respects in which the law governing the assessment of damages for personal injuries in the UK differs from that in Australia. This outline will make it clear why suing in the UK may be in the plaintiff's interests.

A VERY BRIEF OUTLINE OF THE LAW OF DAMAGES IN PERSONAL INJURY CASES IN THE UK[1]

In the UK, tort law, including the law regarding the assessment of damages, is found nearly exclusively in the law reports rather than in the statute books. Statutory modification of it has been minimal relative to the Australian experience on this score. Thus, there are no caps on damages. For example, there is no ceiling on the damages that can be awarded in respect of a loss of earning capacity.[2] Nor are there any thresholds that need to be satisfied before a plaintiff is eligible for damages under certain heads. Damages arising from a need for care can, for instance, be recovered irrespective of how small that need is and regardless of how short the period over which the need exists.[3] Awards of general damages for non-pecuniary loss tend to be significantly higher in the UK than in Australia.[4] Under English law, catastrophically injured persons may receive up to £265,000 (roughly AUD$403,000) in general damages for pain and suffering and loss of amenity. Awards of interest in personal injury cases are compulsory[5] and are in principle available in respect of damages under all heads. Perhaps most significantly, the discount rate in the UK is only 2.5 per cent,[6] in contrast with the 5 per cent rate that prevails in most contexts in the majority of Australian jurisdictions.[7] In high-value cases, the difference between these discount rates may equate to hundreds of thousands of dollars.

These very brief observations show that Australian lawyers acting for clients who have a connection with the UK should seriously consider whether their clients can sue in the UK.

THE SERVICE ISSUE

The first question to consider is whether the defendant can be served with an English claim form. The rules of service are contained primarily in Part 6 of the *Civil Procedure Rules* 1998 (UK) (CPR).[8] The applicable procedure depends, among other things, on where the defendant is located. If the defendant is in England, the process is relatively straightforward. Matters are more complicated where the defendant is located outside England. In this situation, it may be necessary to seek the court's permission to serve the claim form. If permission is required, the plaintiff must show that England is the most appropriate forum in which to entertain the proceedings and that there is a serious issue (that is to say, a non-frivolous issue) to be tried.

THE JURISDICTION ISSUE

The defendant may want to dispute the court's jurisdiction. To do so, he or she must first acknowledge service[9] and then, within the period for filing a defence, bring an application objecting to the court's jurisdiction.[10] A defendant can make such an application whether or not service occurred inside or outside England, although most jurisdictional objections arise where the claim form is served outside England. The relevant law in this regard is complex and cannot be discussed in detail here. For present purposes, it suffices to say that the overarching principle is that an English court will stay the proceedings if it decides that it is in the interests of justice for the proceedings to be tried in another jurisdiction.[11] The mere fact that damages >>

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awards are generally lower in personal injury cases in Australia than in England will not be sufficient to show that the UK rather than Australia is the more convenient forum.[12]

THE CHOICE OF LAW ISSUE

The next relevant issue concerns the circumstances in which English law applies to torts committed in Australia. Consideration of this question must begin with a discussion of the decision of the House of Lords in *Harding v Wealands*.[13]

The decision of the House of Lords in *Harding v Wealands*

Mr Harding and Ms Wealands were a couple living in England. While holidaying in Australia in 2002, Mr Harding was catastrophically injured in a motor vehicle accident in NSW owing to the negligent driving of Ms Wealands. Following their return to the UK, Mr Harding brought proceedings in England against Ms Wealands. The parties agreed that the law on liability in NSW applied. They were in dispute, however, as to whether damages should be assessed under the law of the UK or that of NSW. The resolution of this issue depended on whether the law on damages is 'substantive' or 'procedural', as English legislation provided that questions of 'procedure' were to be decided according to the law of the forum.[14] The House held that the assessment of damages is a procedural matter. Thus, Mr Harding's damages were assessed under English law.

The *Rome II* Regulation[15]

The decision in *Harding v Wealands* was superseded by *European Community Regulation No 864/2007*.This regulation, which all Member States of the European Community are bound to apply,[16] is known as '*Rome II*'. Its operation in so far as is relevant for the purposes of this article will shortly be described. It is convenient to first say a few words about what European Regulations are and what their status is. European Regulations are created by the European Council (which consists of Heads of State of Member States of the European Union) and the European Parliament (whose members are elected directly from within Member States).[17] They are a type of legislation and automatically form part of the domestic law of Member States. In other words, Member States do not have to take any steps to incorporate regulations into local law.

Rome II applies to 'non-contractual obligations', which includes duties arising in tort. The choice of law regime that it erects applies in the UK (and elsewhere in the European Community) irrespective of whether the tort occurred within or outside the European Union.[18] Accordingly, *Rome II* is relevant to Australian lawyers who are considering whether their client should bring proceedings in the UK.

The central provision in *Rome II* is Article 4. It provides:

'(1) Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

(2) However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

(3) Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort or delict in question.'

Article 4(1) states the general rule.[19] Under this rule, the applicable law, both substantive and procedural, is the law of the jurisdiction in which the tort occurred. Accordingly, it reverses the effect of the decision in *Harding v Wealands*.[20]

Article 4(2) provides for a narrow exception to the general rule. It applies where the parties both reside in a country other than that in which the tort was committed at the time the damage was incurred. It states that the law of that country is applicable in such circumstances. Accordingly, if both parties live in the UK, the law of the UK will apply to litigation arising out of a tort committed in Australia.

A second and more open-textured exception is created by Article 4(3).[21] It provides that the law of a country other than that in which the tort occurred will apply if that country is 'manifestly more closely connected' with the tort. It is notable that the word 'manifestly' is used rather than, say, the term 'significantly'. For Article 4(3) to be enlivened, it merely needs to be shown that it is *clear* that the tort is more closely connected with another jurisdiction than that in which it occurred. It does not need to be demonstrated that it is *much* more closely connected.

From the perspective of persons injured in Australia who are hoping to obtain the benefit of the more generous damages law of England, *Rome II* is an adverse development. However, Article 4(2) and 4(3) leave open the possibility that a person injured in Australia can recover damages assessed under English law. The plaintiff in *Harding v Wealands*, for example, would have been able to obtain English damages under Article 4(2) and, probably, under Article 4(3) too.

Recital 33: 'Road Traffic Accidents'

There is a 'recital' in the preamble to *Rome II* that is relevant to proceedings for damages in respect of 'road traffic accidents'. This recital will be discussed momentarily. First, it is necessary to explain what recitals are and what their legal effect is. All European Community Regulations contain recitals.[22] They appear before the Articles (or 'enacting terms'). Their purpose is to give a succinct statement of the reasons for the enacting terms. Their status is a matter of debate. However, they probably lack any direct legal effect but may guide the interpretation of the enacting terms.

The relevant recital is Recital 33. It provides:

> 'According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for person injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all of the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.'

Recital 33 may be significant where a plaintiff is injured in a motor vehicle accident in Australia and lives in the UK but is not entitled to English damages because he or she is unable to escape the effect of Article 4(1). In such circumstances, the court should take account of any difference in the cost of obtaining medical treatment and care between Australia and England (to the extent that there is any difference) in quantifying the plaintiff's damages. This will not result in the outcome being the same as if the plaintiff could recover damages assessed under English law. But it may go some way toward achieving that result.

The temporal scope of *Rome II*

A distinction, alien to lawyers from common law jurisdictions, is drawn in European Community Regulations between the 'entry into force' of a Regulation and the date of a Regulation's 'application'. Article 32 of *Rome II* states that *Rome II* applies from 11 January 2009. However, *Rome II* is silent as to its entry into force. Accordingly, the date of its entry into force is determined by Article 297 of the *Treaty on the Functioning of the European Union*. This Article states that a European Regulation that does not provide for its entry into force will enter into force on the 20th day following its publication in the *Official Journal of the European Communities*. *Rome II* was published in the *Official Journal* on 31 July 2007. Consequently, it entered into force on 20 August 2007. The upshot of the foregoing is that *Rome II* had no effect on litigation until 11 January 2009. But from this date, it applied to all actions in respect of torts committed on or after 20 August 2007. In relation to actions arising from torts committed prior to 20 August 2007, the law as enunciated in *Harding v Wealands* governs. >>

Australian insurers were alarmed by the decision in *Harding v Wealands*.

Relevant Australian legislation

Australian insurers were alarmed by the decision in *Harding v Wealands*. It exposed them to liability to pay damages at higher English levels. Governments in some Australian jurisdictions enacted legislation, doubtlessly at the behest of insurers, in an attempt to limit insurers' exposure in this connection in certain contexts. For example, s123(2) of the *Motor Accidents Compensation Act* 1999 (NSW) provides that if the 'substantive law' of NSW applies to the resolution of a claim, the restrictions on damages set out in that Act are deemed to be part of the 'substantive law' too.

A second layer of protection is created by s123(3)(a). This paragraph provides that if a court, including a court in another jurisdiction, awards damages in respect of a motor vehicle accident without regard to the damages limitations imposed by the Act, the defendant is not liable to pay damages to the extent that they are higher than is permitted by the Act.

A final line of defence is established by s123(b). Pursuant to this paragraph, any damages awarded by a court, including a court in another jurisdiction, in excess of the amount of damages that may be awarded under the Act, may be recovered by the defendant as a debt from the plaintiff.

Similar provisions exist in other Australian jurisdictions and in other contexts.

It is doubtful whether s123 (and equivalent provisions) has any impact on defendants in England. It would not seem to have extra-territorial effect and would probably be ignored by English courts. Where the defendant is in Australia, the situation is more complicated. Once judgment is given against the defendant, the defendant might be able to rely on the second and third barriers in Australian proceedings. These are matters on which it is only possible to speculate. Section 123 (and equivalent provisions) is in need of judicial elaboration.

THE ENFORCEMENT OF JUDGMENT ISSUE

Once judgment is obtained, it is necessary to consider its enforcement.[25] The general rules applicable where judgment is sought to be enforced in the UK are contained in CPR 70. Enforcement outside the UK is governed by CPR 74. Enforcement is typically unproblematic where the defendant is insured. Partly for this reason, but also because the relevant law is convoluted, enforcement will not be further discussed. Practitioners should be aware, however, that it is a potential problem.

PRESERVING RIGHTS IN AUSTRALIAN LAW

If proceedings are commenced in the UK in respect of the commission of a tort in Australia, it would be prudent to take steps to preserve the rights of the injured person in Australian law in case problems arise in relation to the English proceedings. However, one step that probably should not be taken, at least not without giving the matter careful consideration, is to bring proceedings in Australia. This is because the fact that proceedings have been commenced in Australia may lead an English court to conclude that England is not the most convenient jurisdiction in which to try the action. English courts are understandably reluctant to entertain proceedings where doing so would mean that parallel proceedings would be afoot.[26]

CONCLUSION

Suing in the UK in respect of torts committed in Australia is fraught with difficulty. The relevant law (which has only been outlined in the briefest of terms in this article) is extremely intricate and much of it, such as *Rome II*, is in need of judicial elaboration. Consequently, it is often impossible to state with confidence what the legal position

is on some issues. However, because the law of damages in personal injury cases is significantly more generous in the UK than in Australia, it is necessary for Australian practitioners to give serious consideration to suing in the UK where a case has a close connection with that country, especially where the plaintiff is catastrophically injured. ■

Subject to the usual caveat, the author is grateful to Mr Carmine Conte for discussing the issues raised in this article with him.

Notes: **1** The leading treatise on damages in England is Harvey McGregor, *McGregor on Damages* (18th edn, 2010). **2** Cf *Civil Liability Act* 2002 (NSW), s12; *Motor Accidents Compensation Act* 1999 (NSW), s125. **3** Cf *Civil Liability Act* 2002 (NSW), s15; *Motor Accidents Compensation Act* 1999 (NSW), s128. **4** In England, general damages in personal injury cases are assessed by reference to guidelines issued by the Judicial Studies Board, an independent judicial body concerned with training judges. The guidelines are now in their tenth edition: Judicial Studies Board, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (10th ed, 2010). **5** *Senior Courts Act* 1981 (UK), s35A(2). **6** Set by the Lord Chancellor in 2001: *Damages (Personal Injury) Order* 2001 (SI 2001/2301) (UK). **7** See, for example, *Civil Liability Act* 2002 (NSW), s14; *Motor Accidents Compensation Act* 1999 (NSW), s127. **8** SI 1998/3132. An accessible discussion of the law in this regard may be found in Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (2nd edn, 2006) at Ch 4. **9** CPR 11(2). Service must be acknowledged under CPR 10. **10** CPR 11. **11** *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL). **12** Zuckerman, above n8 at 227. **13** [2006] UKHL 32; [2007] 2 AC 1, noted in Janeen M Carruthers, 'Damages in the Conflict of Laws – The Substance and Procedure Spectrum: *Harding v Wealands*' (2005) 1 *Journal of Private International Law* 323; Peter McEleavy, Charles Dougherty and Lucy Wyles, '*Harding v Wealands*' (2007) 56 *International and Comparative Law Quarterly* 443. **14** *Private International Law (Miscellaneous Provisions) Act* 1995 (UK), s14(3)(b). **15** See, generally, John Ahern and William Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (2009). **16** The only exception is Denmark: see Article 1(4). **17** The power to make regulations is found in Article 288 of the *Treaty on the Functioning of the European Union*. **18** Consider Article 3. **19** This general rule is restated in Recitals 14 and 17. **20** Article 4(1) needs to be read alongside Article 15. Article 15 makes it clear that the term 'law' in Article 4(1) means the law generally. **21** It is described in Recital 18 as an 'escape clause'. **22** A comprehensive analysis of the role of recitals is provided in Tadas Klimas and J rat Vai iukait , 'The Law of Recitals in European Community Legislation' (2008) 15 *ILSA Journal of International & Comparative Law* 1. **23** *Bacon v Nacional Suiza CIA Seguros Y Reseguros* [2010] EWHC 2017 (QB); cf *Homawoo v GMF Assurance SA* [2010] EWHC 1941 (QB). **24** See, for example, *Accident Compensation Act* 1985 (Vic), s138A; *Wrongs Act* 1958 (Vic), s28LD. **25** See Zuckerman, above n8 at 817ff. **26** See further Zuckerman, above n8 at 224-5.

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