CITATION:	*Matute v Cramer* [2018] NTSC 8
PARTIES:	MATUTE, Susana Gabriela v CRAMER, Christie
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	No 109 of 2016 (21651187)
DELIVERED ON:	15 February 2018
DELIVERED AT:	Darwin
HEARING DATE:	24 May 2017 and 7 February 2018
JUDGMENT OF:	Grant CJ

CATCHWORDS:

PROCEDURE – SUPREME COURT PROCEDURE – COSTS

Application for order pursuant to cross-vesting legislation transferring proceedings to Supreme Court of South Australia – application for order that plaintiff pay costs of application for transfer – transfer in interests of justice given domicile of the parties, *lex loci delicti*, governing law, and that parties would likely incur additional costs in event the proceeding was conducted in the Northern Territory – plaintiff should not necessarily have anticipated the application for transfer – application not significant, exceptional or out of the usual run – application meritorious and reasonable – plaintiff's resistance to application not unreasonable – no call for costs of application to be decided immediately in defendant's favour – matter best left to court to which proceeding transferred.

Jurisdiction of Courts (Cross-Vesting) Act (NT) s 5, s 12
Motor Accidents (Compensation) Act (NT) s 6
Supreme Court Rules (NT) r 63.18

Australian Consolidated Investments Ltd v Westpac Banking Corporation (1991) 5 ACSR 233, *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400, *CH2M Hill Australia Pty Limited v ABB Australia Pty Ltd (No. 2)* [2016] NTSC 43, *Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru Spa (Italy)(No 2)* [2015] NTSC 51, *Greg Meyer Paving Pty Ltd v Can-Recycling (SA) Pty Ltd* [2013] NTSC 16, *James Hardie & Coy Pty Ltd v Barry* (2000) 50 NSWLR 357, *Halikos Hospitality Pty Ltd v Inpex Operations Australia Pty Ltd* [2017] NTSC 17, *Hodge v Kimber* [1995] NTSC 111, *Hopkins v QBE Insurance Ltd* (1992) 2 NTLR 147, *Johnson v Northern Territory of Australia* [2015] NTSC 15, *Lambert v Dean* (1989) 97 FLR 352, *Lexcray Pty Ltd v Northern Territory of Australia (No 3)* [2015] NTSC 83, *MacDonnell Shire Council v Miller* [2009] NTSC 46, *Otter Gold NL v Barcon (NT) Pty Ltd* (2000) 10 NTLR 189, *TTE Pty Ltd v Ken Day Pty Ltd* (1992) 2 NTLR 143, *Yow v Northern Territory Gymnastic Association Inc* (1991) 1 NTLR 180, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	Self-represented
Defendant:	T Liveris

Solicitors:

Plaintiff:	
Defendant:	Minter Ellison

Judgment category classification:	B
Judgment ID Number:	GRA1802
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Matute v Cramer [2018] NTSC 8
No 109 of 2016 (21651187)

BETWEEN:

SUSANA GABRIELA MATUTE
Plaintiff

AND:

CHRISTIE CRAMER
Defendant

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 15 February 2018)

[1] The defendant seeks the following orders:

(a) an order pursuant to s 5(2)(b)(iii) of the *Jurisdiction of Courts (Cross-Vesting) Act* (NT) transferring these proceedings to the Supreme Court of South Australia;

(b) an order that the plaintiff pay the costs of and incidental to the application for transfer; and

(c) an order for the taxation and payment of those costs forthwith.

History of the proceedings

[2] These proceedings were initiated by writ filed on 3 November 2016, by which the plaintiff sought common law damages for injuries received in a motor vehicle accident which occurred on 4 November 2013 in the suburb of Mawson Lakes in South Australia.

[3] At the first directions hearing conducted on 14 December 2016 the defendant foreshadowed an application pursuant to s 5(2)(b)(iii) of the *Jurisdiction of Courts (Cross-Vesting) Act* to transfer the proceedings to the Supreme Court of South Australia. That application was subsequently made by summons filed on 22 December 2016.

[4] On 10 February 2017, the defendant filed submissions in support of the application. It was and remains the defendant's contention that the courts in the State of South Australia are the natural and more appropriate forum for the conduct of the proceedings, and it is in the interests of justice that the proceeding be determined in that forum.

[5] On 14 February 2017, the plaintiff's solicitors advised the defendant's legal representatives that the plaintiff would consent to an order that the proceedings be transferred to the Supreme Court of South Australia. However, there was no consent to the order sought in paragraph 2 of the defendant's summons that the plaintiff pay the costs of and incidental to the application.

[6] On 15 February 2017, the Master ordered that the question of the costs of the application be referred to a judge for determination. On 28 February 2017, I made orders requiring the parties to file and serve written submissions and any material on which they intended to rely in the costs application.

[7] On 24 May 2017, the matter came before me for mention. The parties advised that they were involved in negotiations with a view to agreeing the question of costs. At that time it was agreed that the parties would advise the court whether the matter would proceed by way of consent order or whether a decision would be required. Those negotiations were ultimately unsuccessful.

[8] On 1 November 2017, the plaintiff's solicitors applied for leave to cease acting for her in the proceedings. That leave was granted. In a series of correspondence from the plaintiff to the court and to the defendant's solicitors since that time, the plaintiff has advised that she withdraws her consent to the transfer of the proceedings to South Australia.

[9] In the face of that withdrawal, the defendant applied to have the matter relisted for consideration. The matter was brought back before the court on 7 February 2018 for mention and any further submissions.

The application for transfer

[10] Section 5(2) of the *Jurisdiction of the Courts (Cross-Vesting) Act* provides relevantly:

> Where:
>
> (a) a proceeding (in this subsection referred to as the relevant proceeding) is pending in the Supreme Court (in this subsection referred to as the first court); and
>
> (b) it appears to the first court that:
>
> (iii) it is otherwise in the interests of justice that the relevant proceeding be determined by the Supreme Court of another State or of a Territory,
>
> the first court shall transfer the relevant proceeding to that other Supreme Court.

[11] The applicant for transfer carries the onus of persuading the court that the transfer of the proceedings to another jurisdiction would be in the interests of justice.[1] The relevant considerations include:[2]

(a) the place or places where the parties and/or witnesses reside or carry on business;

(b) the location of the subject matter of the dispute;

(c) the importance of local knowledge to the resolution of the issues;

(d) the law governing the relevant transaction;[3]

(e) the procedures available in the different courts;

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1 *James Hardie & Coy Pty Ltd v Barry* (2000) 50 NSWLR 357 at [100].

2 See generally *James Hardie & Coy Pty Ltd v Barry* (2000) 50 NSWLR 357; *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400.

3 *Australian Consolidated Investments Ltd v Westpac Banking Corporation* (1991) 5 ACSR 233.

(f) the likely hearing dates in the different courts; and

(g) whether it is sought to transfer the proceedings to a specialised court.[4]

[12] Conversely, the plaintiff's choice of forum, and the subjective reasons for that choice, is not necessarily a factor to which significant importance will be attached in assessing the interests of justice for this purpose. As Gleeson CJ, McHugh and Hayden JJ observed in *BHP Billiton Ltd v Schultz*:[5]

> The question is where the interests of justice lie. If, in a particular respect, the first respondent's assumed advantage and the appellant's assumed disadvantage are commensurate, the one simply being the converse of the other, then that does not advance the matter. The scales are inappropriately weighted in favour of a plaintiff if a possibility of what might ultimately turn out to be a higher total award of damages is treated as a consideration of justice which argues against transfer and if, in addition, the plaintiff's choice of venue is treated as a matter not lightly to be overridden … If it came to [the point of comparing the respective merits of legislative schemes in the two different jurisdictions], the appropriate course would be for the judge to draw back, and to consider the interests of justice by reference to more neutral factors.

[13] The following matters may be noted in the application of those considerations. The motor vehicle accident the subject of the proceedings occurred in South Australia. Both the plaintiff and the defendant were resident in South Australia at the time of the accident,

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4 *Lambert v Dean* (1989) 13 Fam LR 285; 97 FLR 352.

5 (2004) 221 CLR 400 at [26]. Their Honours were in dissent on the issue whether the interests of justice required the proceeding to be transferred to the Supreme Court of South Australia, but not on the significance of the plaintiff's choice of forum.

and remain so. The plaintiff has received medical treatment in South Australia in respect of the injuries sustained in the incident. The medical practitioners who provided that treatment were resident in South Australia. The plaintiff has undertaken employment in South Australia since the date of the accident. The defendant wishes to have the plaintiff assessed by medical experts resident in South Australia. The plaintiff's entitlement to damages at common law would be assessed pursuant to the laws of South Australia. The defendant has engaged solicitors resident in South Australia (although that firm has an office in Darwin). It is probable that at least some additional costs would be incurred if the trial was conducted in Darwin, although no attempt has been made to quantify that additional impost.

[14] Ranged against those factors which suggest South Australia as the appropriate forum, the nexus between the Northern Territory and the subject matter of the proceedings is that the defendant was driving a vehicle registered in the Northern Territory. Section 6 of the *Motor Accidents (Compensation) Act* (NT) has the consequence that the Northern Territory Motor Accidents (Compensation) Commission[6] must indemnify the defendant from any relevant liability incurred in respect of injury to a person arising from an accident involving that motor vehicle.

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6 Formerly, the Territory Insurance Office.

[15] It would appear that the plaintiff first made application under the compulsory third-party scheme in South Australia on 10 November 2013. She was advised by the manager of that scheme that the vehicle at fault was registered in the Northern Territory and she would be required to lodge a claim for her injuries with the Territory Insurance Office. As a consequence, the plaintiff made a claim to the Territory Insurance Office. By letter dated 22 November 2013, that office acknowledged receipt of the claim and advised that its policy was not to make interim payments until investigations into liability were completed and supporting medical reports had been obtained.

[16] By letter dated 4 March 2014, the Territory Insurance Office confirmed that it had accepted the plaintiff's claim for injuries sustained in the motor vehicle accident on 4 November 2013, and that it would meet all reasonable medical and rehabilitation costs for the treatment of injuries related to that accident. The office also made payments to the plaintiff for loss of income. That would appear to have been a policy determination directed to ensuring the plaintiff received appropriate medical and rehabilitation treatment, and to defray her loss of income, with a view to the fact that the office would ultimately be obliged to pay damages in a common law claim. As the office had previously advised the plaintiff by email dated 6 January 2014, the claim could not be resolved until her injuries had stabilised and an accurate assessment could be made of her future requirements.

[17] Management of the liability under s 6 of the *Motor Accidents (Compensation) Act* was subsequently transferred from the Territory Insurance Office to the Motor Accidents (Compensation) Commission with effect from January 2015. That transfer formed part of a statutory and organisational restructure necessitated by the sale of various arms of the office's business. On 19 May 2016, the manager of the plaintiff's claim advised the plaintiff that given the nature of the injuries, the length of time since the accident, and an assessment that physiotherapy would not deliver any long-term functional improvement, the Commission would no longer meet the costs of the plaintiff's ongoing physiotherapy treatment.

[18] As already described, the plaintiff commenced proceedings in the Supreme Court of the Northern Territory on 3 November 2016.[7] Quite apart from the limitation period, there would appear to have been an understanding, on the part of the plaintiff's then solicitors at least, that the matter was unlikely to be resolved without litigation.

[19] Against that background, and given the management of the claim by a Northern Territory entity, it cannot be said that it was inappropriate for the plaintiff to have commenced the proceedings in this forum; and nor does the defendant suggest that be so. The managing entity which provides instructions on the claim and is liable to pay the damages was,

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7 The relevant limitation period is three years.

and remains, resident in the Northern Territory. The plaintiff had been dealing with the office in Darwin prior to commencement, and had not been advised that the management of the matter had been transferred elsewhere.

[20] The fact that the law of South Australia governs the determination of the claim is perhaps not as significant a factor as might present in other circumstances. It would appear from the preliminary communications between the plaintiff and the claims manager that liability is not in issue, in the sense that it is accepted the defendant's negligence was the cause of the accident. That being so, the subject matter of the proceedings will be limited to an assessment of damages under the common law as modified by the South Australian legislation. The fact that the defendant has chosen to engage solicitors based in South Australia is understandable, but it is a matter of choice which, much like the plaintiff's choice to commence proceedings in the Northern Territory, does not significantly inform the assessment of the interests of justice.

[21] It was reasonable for the plaintiff to instruct solicitors resident in the Northern Territory and to commence proceedings in the courts of the Northern Territory. That fact notwithstanding, the domicile of the parties, the *lex loci delicti*, the governing law, that the plaintiff has received medical treatment in South Australia, and that the parties would likely incur additional costs in the event that the proceeding was

conducted in the Northern Territory, lead necessarily to the conclusion that the transfer of the proceedings to the Supreme Court of South Australia would be in the interests of justice. That conclusion is not altered by the fact that the matter will likely be remitted to the District Court of South Australia for determination.

Costs

[22] The application for transfer is interlocutory in nature. Rule 63.18 of the Supreme Court Rules provides:

> Each party shall bear his own costs of an interlocutory or other application in a proceeding, whether made on or without notice, unless the Court otherwise orders.

[23] The default position is that a successful party does not recover the costs of an interlocutory application unless particular circumstances exist causing the court to make a costs order otherwise.[8] The factors to be considered in determining whether an award of costs is warranted include:[9]

(a) whether a successful application would conclude the action;

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8 See *TTE Pty Ltd v Ken Day Pty Ltd* (1992) 2 NTLR 143; *Hodge v Kimber* [1995] NTSC 111 at [29]; *Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru Spa (Italy)(No 2)* [2015] NTSC 51 at [9]-[10]; *Yow v Northern Territory Gymnastic Association Inc* (1991) 1 NTLR 180 at 181; *Halikos Hospitality Pty Ltd v Inpex Operations Australia Pty Ltd* [2017] NTSC 17 at [7]; *Johnson v Northern Territory of Australia* [2015] NTSC 15 at [7]; *Hopkins v QBE Insurance Ltd* (1992) 2 NTLR 147; NTSC 7; *Lexcray Pty Ltd v Northern Territory of Australia (No 3)* [2015] NTSC 83 at [3]; *Otter Gold NL v Barcon (NT) Pty Ltd* (2000) 10 NTLR 189 at 192; *MacDonnell Shire Council v Miller* [2009] NTSC 46 at [21]; *CH2M Hill Australia Pty Limited v ABB Australia Pty Ltd (No. 2)* [2016] NTSC 43 at [12].

9 *Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru Spa (Italy)(No 2)* [2015] NTSC 51 at [13]; *Lexcray Pty Ltd v Northern Territory of Australia (No 3)* [2015] NTSC 83; *Greg Meyer Paving Pty Ltd v Can-Recycling (SA) Pty Ltd* [2013] NTSC 16 at [9]-[10].

(b) whether an application could have reasonably been anticipated;

(c) whether the general interests of a party were served by having a superior court decide a novel issue;

(d) whether an application is significant, exceptional, not "run-of-the-mill" or outside the "usual run of cases"; and

(e) the merit and reasonableness of an application, and the merit and reasonableness of a party's resistance to the application.

[24] In the particular context of this application, it is also material to note that s 12 of the uniform cross-vesting legislation provides:

> **Orders as to costs**
> Where a proceeding is transferred or removed to a court, that court may make an order as to costs that relate to the conduct of the proceeding before the transfer or removal if those costs have not already been dealt with by another court.

[25] The defendant's contentions in relation to costs may be summarised as follows. The plaintiff indicated its opposition to the application for transfer during the directions hearing conducted by the Master on 12 January 2017 following the filing of the application. That opposition led to the Master listing the matter for hearing on 15 February 2017 and making programming orders for that purpose. The plaintiff failed to comply with the order for the filing and service of written submissions in the matter, and on the day before the matter was due to come on for hearing the plaintiff's solicitors indicated they would consent to an order for transfer.

[26] The defendant contends that in the circumstances the application and the costs expended in its prosecution would have been unnecessary if the plaintiff had acted reasonably, and the defendant should not have to bear the costs consequences of that failure. At no stage did the plaintiff disclose any basis on which to resist the application for transfer, and the plaintiff's opposition to the application was without merit. The defendant contends further that the application fell outside the usual run of interlocutory applications in which each party might be expected to bear its own costs; that the application was an essential precursor to an order for the transfer of proceedings; and that all relevant facts and circumstances were disclosed in the affidavit material filed in support of the application.

[27] The defendant would also maintain that the unreasonableness of the plaintiff's conduct has been exacerbated and continued by her subsequent withdrawal of consent to the transfer.

[28] A number of observations may be made in relation to those contentions. As already observed, the defendant bore a persuasive onus in relation to transfer and the plaintiff was entitled to give consideration to the evidence and reasoning upon which the application was based. The timing of the plaintiff's consent to the application for transfer on the day before it was due to be argued, while not ideal, may be attributed to that consideration. Nor was it incumbent on the plaintiff to consent to pay the costs of the application for transfer

having regard to the usual position obtaining under rule 63.18 and the fact that the Northern Territory was not an inappropriate forum. The defendant's disinclination to take out a transfer order until it procured an order for costs, whether by consent or on determination, does not tell against the plaintiff in the application for costs.

[29] The plaintiff's subsequent withdrawal of consent to transfer is a less neutral factor in that assessment. That withdrawal would seem to be based on at least some level of misapprehension. The plaintiff, who is now self-represented, appears to think that if the matter is conducted and determined in the Northern Territory her claim will be managed in accordance with what she perceives to be a separate and more sympathetic claims management environment, and that the compensation available in the Northern Territory is more generous. That belief is misguided. Both the management of the claim and the compensation available will be largely unaffected by the forum in which these proceedings are determined.[10]

[30] The plaintiff's recent withdrawal of consent, although based on erroneous assumptions, has not required the filing of further process,

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10 While there are no doubt differences between the Northern Territory and South Australian legislation governing the assessment of damages at common law, both schemes are based on a relatively uniform tort law reform package. The plaintiff's principal misunderstanding is that in the Northern Territory she will be entitled to interim payments for loss of income and medical expenses prior to the resolution of the proceedings. That payments of that nature were previously made was a matter of policy rather than entitlement, and unrelated to the forum in which the proceedings are conducted.

submissions or evidence on the part of the defendant. Moreover, the question of the costs of the application for transfer remained to be determined in any event once it became apparent that the parties would not be able to reach agreement in that respect.

[31] In all the circumstances, it cannot be said that the plaintiff should reasonably have anticipated the defendant's application for transfer; and nor can it be said that this particular application for transfer was necessarily significant, exceptional or out of the usual run. While it is true that the defendant's application was both meritorious and reasonable, the plaintiff's resistance to the application up to the point of consent on 14 February 2017 was not unreasonable for the reasons already given. Thereafter, the disputation and delay has been occasioned largely by the defendant's application for costs. The plaintiff's resistance to that application was also not unreasonable. The withdrawal of the consent to transfer after the plaintiff's erstwhile solicitors ceased acting, although based on misapprehension, has not resulted in any significant costs impost.

[32] For those reasons, there is no call for the costs of the transfer application to be decided immediately and in the defendant's favour. That question should be left to the court to which the proceeding is transferred. As the plaintiff submits, that court will be in the best position to weigh up all relevant costs considerations at the conclusion of the proceedings.

[33] That being the determination, the application for taxation and payment forthwith falls away.

Disposition

[34] I make the following orders:

(a) Proceedings No 109 of 2016 (21651187) in this court are transferred to the Supreme Court of South Australia.

(b) Costs of the proceedings to date and of the application for transfer are to be costs in the cause.
