HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

JOHN PFEIFFER PTY LIMITED APPLICANT

AND

DAVID ROGERSON RESPONDENT

John Pfeiffer Pty Limited v Rogerson
[2000] HCA 36
21 June 2000
C14/1998

ORDER

1. *Special leave to appeal granted, the appeal treated as instituted and heard instanter, and allowed.*

2. *Orders of the Full Court of the Federal Court of Australia made on 8 July 1998 set aside. In place thereof order that:*

   (a) the appeal to that Court be allowed; and
   (b) the orders of the Full Court of the Supreme Court of the Australian Capital Territory made on 3 December 1997 be set aside and, in place of those orders, order that:
      i) the appeal to the Full Court of the Supreme Court of the Australian Capital Territory be allowed;
      ii) the orders of the Master made on 24 April 1997 be set aside;
      iii) the matter be remitted to the Master to be determined in accordance with the reasons of this Court; and
      iv) the costs of the whole of the proceedings before the Master to abide the outcome of that further hearing.

On appeal from the Federal Court of Australia

Representation:

B W Walker SC with A S Bell for the applicant (instructed by Hickson Wisewoulds)

T F Bathurst QC with F M G Parker and D J C Mossop for the respondent (instructed by Gary Robb & Associates)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with M A Perry and G A Hill intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

W C R Bale QC, Solicitor-General of the State of Tasmania with S K Lighton intervening on behalf of the Attorney-General of the State of Tasmania (instructed by Crown Solicitor for the State of Tasmania)

T I Pauling QC, Solicitor-General for the Northern Territory intervening on behalf of the Attorney-General for the Northern Territory (instructed by the Solicitor for the Northern Territory)

D Graham QC, Solicitor-General for the State of Victoria with S G E McLeish intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with R M Mitchell intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

B M Selway QC, Solicitor-General for the State of South Australia with M D Walter intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

M G Sexton SC, Solicitor-General for the State of New South Wales with N E Abadee intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for the State of New South Wales)

P M Donohoe QC with P A Walker intervening on behalf of the Attorney-General for the Australian Capital Territory (instructed by the ACT Government Solicitor)

CATCHWORDS

John Pfeiffer Pty Limited v Rogerson

Private International Law – Choice of law – Tort – Negligent act committed and damage suffered in New South Wales – Action commenced in Australian Capital Territory – Whether double actionability rule is a choice of law rule – Whether double actionability rule applies to proceedings in federal jurisdiction – Whether a single choice of law rule should be adopted consistently in both federal and non-federal jurisdiction in all courts in Australia – Whether the *lex fori* or *lex loci delicti* is applicable – The *lex loci delicti* governs torts committed in Australia which have an interstate element.

Private International Law – Substance and procedure – Distinction – Matters of substance bear upon existence or enforceability of remedies rights and obligations – Limitations on type and quantum of damages are substantive not procedural.

Limitation of Actions – Limitation provisions barring either right or remedy are substantive not procedural.

Constitutional Law (Cth) – Full faith and credit – Effect of s 118 of the Constitution upon common law choice of law rules – Whether a single choice of law rule should be adopted consistently in both federal and non-federal jurisdiction in all courts in Australia – Effect of Ch III of the Constitution upon common law.

Tort – Damages – Whether Pt 5 of the *Workers Compensation Act* 1987 (NSW) limits the amount of economic and non-economic loss recoverable.

Words and phrases – "choice of law" – "*lex loci delicti*" – "*lex fori*" – "double actionability rule" – "full faith and credit" – "substance and procedure" – "federal diversity jurisdiction".

Constitution, Ch III, s 118.
Judiciary Act 1903 (Cth), ss 79, 80.
Workers Compensation Act 1987 (NSW), Pt 5.

GLEESON CJ, GAUDRON, McHUGH, GUMMOW AND HAYNE JJ.

The issue

1 The applicant submits that the Court should reformulate the principles that govern how a claim in tort, brought in the courts of one Australian jurisdiction (here the Australian Capital Territory), should be determined when some (or, in this case, all) of the relevant facts occurred in another Australian jurisdiction (here New South Wales). The particular question is what effect the courts of the jurisdiction in which the proceedings are brought should give to legislation of the jurisdiction in which the tort was committed.

The federal context

2 Before turning to the facts which give rise to this application, it is important to note that the issue arises in a federal context, and not in an international context. We put issues that might arise in an international context entirely to one side[1]. Because the issues are in the Australian federal context, several preliminary but basic points should be made at the outset. First, while the phrases "law area" and "*lex fori*", adapted from the lexicon of private international law, may be used to identify each of the States and Territories which comprise the geographical area of Australia, these expressions are to be understood in the Australian federal context. Thus, each law area, if it be a State, is a component of the federation and, if it be a Territory, is a Territory of the federation. And with respect to matters that fall within federal jurisdiction, the Commonwealth of Australia is, itself, a law area. Across all these law areas there runs the common law of Australia, as modified from time to time and in various respects by the statute law of competent legislatures. Thus, "law area" and "*lex fori*" are used in a sense which involves the application by particular courts of the laws of particular legislatures and, in the case of the States and Territories, those laws may reach beyond the geographical area of the State or Territory in question.

3 Secondly, the common law of Australia includes the rules for choice of law, again subject to statutory modification. Thirdly, where those common law rules select the law of a law area other than that in which the court in question exercises jurisdiction as the law which determines the outcome of an action, generally they do so by applying the statute law of that other law area in preference to the common law. Sometimes, however, they may apply the common law in preference to statute law[2]. In the present case, the applicant

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1 cf *Berezovsky v Michaels* [2000] UKHL 25.

2 See, for example, *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20.

contends that the statute law of the law area in which the events in question occurred should be applied in preference to the common law. Other and more difficult questions arise where, in the case of the States and Territories of Australia, the statute law of two law areas differs and it is sought to apply one rather than the other as the governing law. That is not this case.

The facts and earlier proceedings

4 The applicant seeks special leave to appeal from the Full Court of the Federal Court of Australia. The application for special leave was heard by the whole Court as if on the hearing of the full appeal.

5 The applicant was sued by the respondent in the Supreme Court of the Australian Capital Territory for damages for personal injury suffered by the respondent in 1989 in a workplace accident. The action was framed in tort and the present matter must be decided on that basis notwithstanding that, in this Court, the respondent sought also to frame the case in contract.

6 The respondent, a carpenter, was employed by the applicant in the Australian Capital Territory where the applicant had its principal business office. The incident which led to the respondent's injury occurred, however, while the respondent was working for the applicant at the Queanbeyan District Hospital in New South Wales.

7 When the action came on for hearing before the Master of the Supreme Court of the Australian Capital Territory, the parties indicated that the case was in the nature of a test case to determine whether s 118 of the Constitution[3] requires that the law to be applied in the assessment of the respondent's damages is that of New South Wales rather than that of the Australian Capital Territory. The parties appear to have agreed before the Master that, if liability were established and the law to be applied were that of New South Wales, the damages to be allowed would be limited by Pt 5 of the *Workers Compensation Act* 1987 (NSW) ("the NSW Compensation Act"). If, however, the law to be applied were the law of the Australian Capital Territory, the parties agreed that those damages

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3 Section 118 provides:

> " Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State."

should be assessed in accordance with the common law at $30,000 together with out of pocket expenses.

8 The Master found that the applicant had failed to provide a safe system of work and was liable to the respondent. The Master concluded that the decision of this Court in *Stevens v Head*[4] bound him to hold that the law of the Australian Capital Territory applied to determine the quantum of the damages to be allowed and accordingly gave judgment for the respondent for $31,689.75 (being the sum of the agreed general damages and the agreed out of pocket expenses) together with costs.

9 From this judgment the applicant appealed to the Full Court of the Supreme Court of the Australian Capital Territory which dismissed the appeal with costs. The applicant appealed from that judgment to the Full Court of the Federal Court of Australia which again dismissed the appeal with costs. It is in respect of this last judgment that application is made for special leave to appeal.

The relevant New South Wales statutory provisions

10 Reference should be made to the relevant provisions of Pt 5 of the NSW Compensation Act. That Part is concerned with common law remedies for workplace injuries. Division 3 of Pt 5 applies to an award of damages in respect of injury to a worker or death of a worker resulting from or caused by an injury "being an injury caused by the negligence or other tort of the worker's employer."[5] It applies to an award of damages in respect of an injury "caused by the negligence or other tort of the worker's employer even though the damages are recovered in an action for breach of contract or in any other action."[6]

11 Section 151F provides that "[a] court may not award damages to a person contrary to this Division." Prima facie, as a matter of New South Wales statute law[7], the prohibition of s 151F is directed to the courts of New South Wales, at least where they are exercising State jurisdiction. If the court in question is a federal court or a New South Wales court exercising federal jurisdiction with

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4 (1993) 176 CLR 433.

5 s 151E(1).

6 s 151E(3).

7 *Interpretation Act* 1987 (NSW), s 12.

which it has been invested by the Parliament pursuant to s 77(iii) of the Constitution, the question will be whether s 151F is "picked up" by s 79 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act").

12 Other provisions of Div 3 of Pt 5 give content to the prohibition in s 151F. In particular, reference should be made to s 151G(2) and (4):

> "(2) The amount of damages to be awarded for non-economic loss is to be a proportion, determined according to the severity of the non-economic loss, of the maximum amount which may be awarded.
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> …
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> (4) If the amount of non-economic loss is assessed to be $36,000 or less, no damages for non-economic loss are to be awarded."

and to s 151H(1):

> "No damages are to be awarded for economic loss unless the injured worker has received a serious injury or dies as a result of the injury."

The parties are agreed that, if the regime established by these provisions applies to the respondent's claim, the matter should be remitted to the Master of the Supreme Court of the Australian Capital Territory to determine what damages, if any, should be awarded.

The nature of the problem

13 Federal, State and Territory courts have jurisdiction in personal actions if the defendant is served with the court's originating process within the territorial bounds of the court's jurisdiction[8]. Those courts will also take jurisdiction in certain other circumstances prescribed by rules of court or by the *Service and Execution of Process Act* 1992 (Cth). In this "long arm" jurisdiction a plaintiff must show some connection between the claim and the jurisdiction in which the claim is made.

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8 *Laurie v Carroll* (1958) 98 CLR 310; *Gosper v Sawyer* (1985) 160 CLR 548 at 564-565.

14 In by far the majority of cases, the jurisdiction of Australian courts in personal actions depends on the defendant's presence in the territorial jurisdiction at the time of service of the originating process. In such cases it is not necessary to show any other connection with the jurisdiction. Thus, questions can arise as to the law to be applied to determine the consequences which attach to an act or omission which occurred in a State or Territory other than that in which proceedings are brought. Those questions can arise whether the proceedings are in federal or non-federal jurisdiction.

15 No question as to the law to be applied arises for State or Territory courts if the events which give rise to the proceeding all occurred within the territory of the court's jurisdiction. It is the body of law comprising the Constitution, applicable Commonwealth legislation, applicable legislation of the State or Territory concerned, and the common law of Australia. But if the parties or the events have some relevant connection with another Australian jurisdiction, there is a question whether any of the legislation of that other jurisdiction should be taken into account in deciding any of the three issues of existence, extent or enforceability of rights and obligations. No question can arise about the other sources of law: effect must always be given by a State or Territory court to the Constitution[9] and to any applicable Commonwealth legislation, and subject to what follows, because there is a single common law of Australia[10], there will be no difference in the parties' rights or obligations on that account, no matter where in Australia those rights or obligations are litigated.

16 There may be cases where, although the common law applies both in the law area in which a particular case is litigated and in the law area in which the relevant events occurred, it may have been modified in one of them in some relevant particular. For example, contributory negligence may have been removed as an absolute defence, as was the case in *Anderson v Eric Anderson Radio & TV Pty Ltd*[11].

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9 Covering cl 5.

10 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 15; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 556; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566; *Lipohar v The Queen* (1999) 74 ALJR 282 at 289, 291, 316; 168 ALR 8 at 18, 22, 56.

11 (1965) 114 CLR 20.

17 If a court of a State or Territory must apply legislation of that State or Territory in deciding the existence, extent or enforceability of rights and obligations, but the courts of another State or Territory would not give effect to the rules found in that legislation (if the same issues were litigated between the same parties in that other State or Territory), the existence, extent or enforceability of the parties' rights and obligations will differ according to where the litigation is conducted. Similarly, if the courts of the jurisdiction in which the matter is to be heard do not give effect to rules found in the legislation of the jurisdiction where the events occurred (and which the courts of the latter jurisdiction would apply) there will be different outcomes according to where the litigation takes place. In the traditional language of private international law, if the forum does not give effect to the law of the place of the commission of the tort (the *lex loci delicti*), but instead applies the law of the forum (the *lex fori*), there will be different outcomes according to the jurisdiction in which the proceedings are brought.

18 Although the Commonwealth of Australia is a single law area with respect to matters within federal jurisdiction, a question can, nonetheless, arise in such matters as to whether the legislation of one State or Territory is to be applied rather than that of another. That question can arise in State and Territory courts exercising federal jurisdiction, in federal courts and in this Court. Commonly the question arises in "federal diversity jurisdiction"[12] where a resident of one State sues a resident of another in a court other than a court of the State or Territory in which the events in question occurred[13]. It can also arise in proceedings against

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12 Section 75(iv) of the Constitution provides that the High Court shall have original jurisdiction in all matters "between States, or between residents of different States, or between a State and a resident of another State". Section 39(2) of the *Judiciary Act* 1903 (Cth) vests the High Court's original jurisdiction concurrently in State courts, subject to exceptions which are not presently relevant.

13 See, for example, *R v Langdon; Ex parte Langdon* (1953) 88 CLR 158; *R v Macdonald; Ex parte Macdonald* (1953) 88 CLR 197; *R v Oregan; Ex parte Oregan* (1957) 97 CLR 323; *Pedersen v Young* (1964) 110 CLR 162; *Gleeson v Williamson* (1972) 46 ALJR 677; *Weber v Aidone* (1981) 55 ALJR 657; 36 ALR 345; *Guzowski v Cook* (1981) 149 CLR 128; *Robinson v Shirley* (1982) 149 CLR 132; *Pozniak v Smith* (1982) 151 CLR 38; *Bargen v State Government Insurance Office (Q)* (1982) 154 CLR 318; *Foxe v Brown* (1984) 59 ALJR 186; 58 ALR 542; *Fielding v Doran* (1984) 59 ALJR 511; 60 ALR 342; *Gardner v Wallace* (1995) 184 CLR 95.

the Commonwealth[14] or in proceedings by a resident of one State against another State[15], again if the proceedings are brought in a court other than a court of the State or Territory in which the events occurred.

19 The question in this case arises in federal jurisdiction, a question having arisen under the Constitution when the proceedings were first before the Master.

The state of the authorities

20 In cases which have some "foreign" element and concern the law of contract, or concern questions of status, it has long been accepted that the courts should identify and apply the law which governs the issue or issues that fall for decision. Thus, in cases concerning contracts, the courts seek to identify the proper law of the contract[16] and, in cases concerning questions of status, they seek to identify the relevant governing law[17]. The process of choice of law has, therefore, been well understood and accepted in these areas. In the area of tort, however, the position has been less clear.

21 It should be noted that the term "tort" is used in this context to denote not merely civil wrongs known to the common law but also acts or omissions which

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14 See, for example, *Musgrave v The Commonwealth* (1937) 57 CLR 514; *Parker v The Commonwealth* (1965) 112 CLR 295; *Suehle v The Commonwealth* (1967) 116 CLR 353; *Johnstone v The Commonwealth* (1979) 143 CLR 398; *State Bank (NSW) v Commonwealth Savings Bank* (1984) 154 CLR 579; *McCauley v Hamilton Island Enterprises Pty Ltd* (1986) 61 ALJR 235; 69 ALR 270; *Bowtell v The Commonwealth* (1989) 63 ALJR 465; 86 ALR 31.

15 See, for example, *Daly v State of Victoria* (1920) 28 CLR 395; *Griffin v South Australia* (1924) 35 CLR 200; *New South Wales v Bardolph* (1934) 52 CLR 455; *Crouch v Commissioner for Railways (Q)* (1985) 159 CLR 22.

16 *Robinson v Bland* (1760) 2 Burr 1077 [97 ER 717]; *Allen v Kemble* (1848) 6 Moo PC 314 [13 ER 704]; *Lloyd v Guibert* (1865) LR 1 QB 115; *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581; *Mount Albert Borough Council v Australasian Temperance and General Mutual Life Assurance Society* [1938] AC 224; *Bonython v The Commonwealth* (1950) 81 CLR 486; [1951] AC 201.

17 For example, *Kent v Burgess* (1840) 11 Sim 361 [59 ER 913]; *Berthiaume v Dastous* [1930] AC 79; *Della Torre v Della Torre* [1955] SASR 278.

by statute are rendered wrongful in the sense that a civil action lies to recover damages occasioned thereby. Thus, *Koop v Bebb*[18], which will be considered shortly, involved statutes of New South Wales and Victoria, both of which substantially reproduced *Lord Campbell's Act* and so gave an action in respect of wrongful death where the common law gave none.

22 Although the nineteenth century decision of the Court of Exchequer Chamber in *Phillips v Eyre*[19] was given in a context far removed from that of the Australian federal compact, it was taken for many years as stating the principles to be applied by courts in Australia when dealing with a claim in tort where the tort had been committed elsewhere in Australia[20]. In *Koop v Bebb*, a case which did not involve federal jurisdiction, this Court held, in 1951, that:

> "In the present state of authority it must be accepted that an action of tort will lie in one State for a wrong alleged to have been committed in another State, if two conditions are fulfilled: first, the wrong must be of such a character that it would have been actionable if it had been committed in the State in which the action is brought; and secondly, it must not have been justifiable by the law of the State where it was done"[21].

As the majority of the Court pointed out, this was the language of Willes J in *Phillips v Eyre*. For the statement of the first condition, Willes J had relied on *Liverpool, Brazil, and River Plate Steam Navigation Co Ltd v Benham* (*The "Halley"*)[22] although, as the majority in *Koop* also pointed out:

> "in that case the Privy Council decided that the defendant was not liable in England for an act done abroad by another person, not because of the character of the act according to English law, but because the person who

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18 (1951) 84 CLR 629.

19 (1870) LR 6 QB 1.

20 See, for example, *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35 at 69 per O'Connor J.

21 (1951) 84 CLR 629 at 642 per Dixon, Williams, Fullagar and Kitto JJ citing *Walpole v Canadian Northern Railway Co* [1923] AC 113 at 119; *McMillan v Canadian Northern Railway Co* [1923] AC 120 at 123, 124.

22 (1868) LR 2 PC 193.

did it was not one for whose defaults the defendant was responsible according to English law."[23]

23 The rule in *Phillips v Eyre*, adopted in *Koop*, can be seen to be a rule that requires "double actionability" and it is convenient to describe it in that way. But what law is applied if effect is given to the double actionability rule? Is the double actionability rule one which deals only with the existence of a cause of action in the forum? Or is one or other of the two limbs in *Phillips v Eyre* a choice of law rule?

24 In the course of argument in this application, the double actionability rule was spoken of as being directed to the question either of "jurisdiction" or "justiciability". Neither of those descriptions is completely accurate. They are, moreover, descriptions that may distract attention from important considerations.

25 Questions of jurisdiction (in the sense of authority to decide) are better kept separate from questions of the applicable law. A court has jurisdiction in a civil action either because the plaintiff has served the originating process on the defendant while within its territorial jurisdiction or because applicable "long arm" provisions have been invoked[24]. The assumption of jurisdiction raises no question as to the law to be applied in deciding the rights and duties of the parties. That last question might, in some cases, affect whether the court should decline to exercise its jurisdiction and stay the proceedings[25]. But the authority of a court to decide a question of *forum non conveniens* and, also, to decide the substantive rights and duties of the parties comes from the fact of service of the process.

26 Further, to describe the question as one of "justiciability" or, even, "procedural enforceability" distracts attention from the need to identify the content of the rules which are to be invoked in deciding the rights and duties of the parties. That can be illustrated by *Koop* which establishes or supports

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23 (1951) 84 CLR 629 at 642.

24 In crime, jurisdiction is founded upon presence to stand trial and the governing law always is that in force in the forum: *Lipohar v The Queen* (1999) 74 ALJR 282 at 301-302; 168 ALR 8 at 36.

25 See *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 565-566 per Mason CJ, Deane, Dawson and Gaudron JJ.

propositions which have not been challenged, and which are assumed in what follows in these reasons.

27 In *Koop*, the action was brought in the Supreme Court of Victoria in respect of a death resulting from an accident in New South Wales. This Court held that the provisions of the *Wrongs Act* 1928 (Vic) did not operate beyond the borders of Victoria and that the statute enacted a rule to form part of the general body of the law of Victoria relating to civil liability for wrongful acts, neglects and defaults. Nevertheless, the common law choice of law rules which then applied in Victoria meant that the Victorian Act determined the outcome of an action with respect to an accident in New South Wales[26]. By parity of reasoning, if the common law choice of law rules select the *lex loci delicti* as the law to be applied, it is not useful and may be misleading to ask whether a statute which confers a right of action in that law area extends to a proceeding brought in the courts of another law area to determine whether it is "justiciable" or "procedurally enforceable" in that law area. Many statutes have a territorial reach and institutional operation which is limited. But that does not necessarily mean that a cause of action conferred by the statute law of one State or Territory cannot be the subject of proceedings in the courts of another State or Territory. The question whether it can or cannot will only be answered by the choice of law rules.

28 In *Anderson v Eric Anderson Radio & TV Pty Ltd*, a case which was held not to involve federal jurisdiction[27], Windeyer J considered the question of choice of law in claims in tort where there was some connection with an Australian jurisdiction other than that of the forum[28]. The suggestion, that by then had been made in some academic writing[29], that the double actionability rule was no more than a threshold requirement, invited attention to what was the source of the law which the forum would apply to decide the rights of the parties.

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26 (1951) 84 CLR 629 at 641.

27 (1965) 114 CLR 20 at 24-25 per Barwick CJ, 37 per Taylor J, 44-45 per Windeyer J (Kitto and Menzies JJ not deciding).

28 (1965) 114 CLR 20 at 41-42.

29 Windeyer J referred to the review of Falconbridge, *Essays on the Conflict of Laws*, (1947) by Yntema in (1949) 27 *Canadian Bar Review* 116; Spence, "Conflict of Laws in Automobile Negligence Cases", (1949) 27 *Canadian Bar Review* 661; *Dicey's Conflict of Laws*, 7th ed (1958) at 943.

Windeyer J pointed out that to conclude that the courts of the forum would entertain an action on a foreign tort because the events were of a character actionable in the forum, does not necessarily mean that those courts must determine it in accordance with the municipal law of the forum. As his Honour said, "[a]ssumption of jurisdiction and choice of law are logically distinct."[30]

29 In *Anderson* Windeyer J concluded that the decisions in *The "Halley"* and *Koop* required the conclusion that:

> "under our system of private international law as it stands at present, a court that entertains an action based upon a foreign tort must (unless there be a statute to the contrary) decide the rights of the parties as it would in an action based on a similar event occurring within its own domain."[31]

30 Barwick CJ and Taylor J, who with Windeyer J constituted the majority of the Court in *Anderson*, did not address the distinction between actionability and choice of law that was considered by Windeyer J. Barwick CJ and Taylor J did conclude, however, that, as the action then in question had been brought in New South Wales, the law of that State applied to the issue of contributory negligence, notwithstanding that the events in question occurred in the Australian Capital Territory. That is, the majority concluded that the law of the forum was to be applied in determining the rights of the parties.

31 In *Breavington v Godleman*[32], and the related case of *Perrett v Robinson*[33], the Court reconsidered *Koop* and *Anderson*. *Breavington* concerned a motor accident that occurred in the Northern Territory. The appellant was a passenger in a motor vehicle owned by, and driven by an employee of, the Australian Telecommunications Commission ("Telecom") which collided with a car driven by the first respondent. The appellant sued the two drivers and Telecom in the Supreme Court of Victoria. (At the time of the accident the first respondent had been a resident of the Northern Territory but he had moved to Victoria before the action was brought. The Court's process was served on him in Victoria.) The parties accepted that Telecom was the Commonwealth for the purposes of s 56 of

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30 (1965) 114 CLR 20 at 41.

31 (1965) 114 CLR 20 at 42.

32 (1988) 169 CLR 41.

33 (1988) 169 CLR 172.

the Judiciary Act. Thus, the action (being an action against the Commonwealth) was an action in federal jurisdiction[34].

32 Six separate sets of reasons for judgment were given in *Breavington*. Different views were expressed about what, if any, influence or effect s 118 of the Constitution had on the resolution of the kind of problem presented by the case[35]. Different views were expressed about the operation of the double actionability rule[36] and about whether it should be modified in some way[37]. For immediate purposes, however, what is important to note is that a majority of the Court held that the law of the Northern Territory, as the *lex loci delicti*, was to be applied by the Supreme Court of Victoria in determining the appellant's entitlement to damages. Although there was some discussion in the case as to the significance of the matter being a matter within federal jurisdiction, no member of the majority rested his or her decision on that aspect. Thus, the majority of the Court clearly departed from what had been decided in *Koop* and in *Anderson*.

33 The Court returned to these subjects in *McKain v R W Miller & Co (SA) Pty Ltd*[38] and again in *Stevens v Head*[39]. Neither was a case in which the action was brought in federal jurisdiction. (Although in *McKain* federal jurisdiction was attracted when the cause pending in the Supreme Court of New South Wales was removed into this Court by order under s 40(1) of the Judiciary Act.) In *McKain*, a majority of the Court said that it was preferable "to state the common law rules for application by Australian courts in cases of Australian torts in terms to which a majority of this Court assent"[40]. The rules adopted[41] were those formulated by Brennan J in *Breavington*, namely:

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34 Constitution, s 75(iii).

35 (1988) 169 CLR 41 at 97-98 per Wilson and Gaudron JJ, 136-137 per Deane J; cf at 83 per Mason CJ, 117 per Brennan J, 150 per Dawson J, 164 per Toohey J.

36 (1988) 169 CLR 41 at 73 per Mason CJ, 142-143 per Dawson J, 155-156 per Toohey J.

37 (1988) 169 CLR 41 at 110-111 per Brennan J, 158 per Toohey J.

38 (1991) 174 CLR 1.

39 (1993) 176 CLR 433.

40 (1991) 174 CLR 1 at 38-39 per Brennan, Dawson, Toohey and McHugh JJ.

> "A plaintiff may sue in the forum to enforce a liability in respect of a wrong occurring outside the territory of the forum if – 1. the claim arises out of circumstances of such a character that, if they had occurred within the territory of the forum, a cause of action would have arisen entitling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce; and 2. by the law of the place in which the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind which the plaintiff claims to enforce.
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> This restatement is narrower in expression than the traditional formulation of the *Phillips v Eyre* conditions which speak of 'a character that … would have been actionable' and 'justifiable'. It defines more precisely the issues which are referred for determination to the lex fori and the lex loci respectively."[42]

That approach was reaffirmed by the same members of the Court in their joint judgment in *Stevens*. In *Stevens*, the majority said that:

> " This formulation [of the principles relating to intranational torts] focusses attention on the kind of civil liability which a plaintiff is seeking to enforce. A plaintiff's cause of action under the law of the forum thus depends in part upon an affirmative answer to the question whether, by the lex loci, the relevant facts gave and continue to give[43] rise to a civil liability of the kind which the plaintiff seeks to enforce."[44]

34 At this stage, it is important to note that the decisions of this Court in *Koop*[45], *McKain*[46] and *Stevens*[47] applied and developed the common law choice

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41 (1991) 174 CLR 1 at 39.

42 (1988) 169 CLR 41 at 110-111.

43 (1991) 174 CLR 1 at 39-40.

44 (1993) 176 CLR 433 at 453.

45 (1951) 84 CLR 629.

46 (1991) 174 CLR 1.

47 (1993) 176 CLR 433.

of law rules, which had been formulated by the courts of the United Kingdom, as the common law choice of law rules for Australia. They did so before it was held by this Court in *Lange v Australian Broadcasting Corporation*[48] that the common law of Australia must adapt to the Constitution. That being so, the reasoning in *Koop*, *McKain* and *Stevens* can only be accepted if it is consistent with the Constitution. Those decisions must be examined, therefore, to determine whether that is so. In particular, they must be examined to determine whether they are consistent with Ch III of the Constitution and the integrated judicial system which it mandates.

35 An examination of the decisions in *McKain* and *Stevens* reveals a number of matters. First, no question arose in either case as to the right of the plaintiff to maintain an action in the court in which proceedings were commenced and, thus, there was no issue in those cases as to the double actionability rule. Secondly, neither case was concerned with the question as to what law was to be applied to determine whether the defendant was liable in the action. Rather, they were concerned solely with the question whether certain statutory laws of the place of the wrong were to be classified as substantive or procedural[49], it being accepted that, if they were procedural, they were not to be applied.

36 Although the formulation in *McKain* and *Stevens* is a formulation suggestive of a double actionability rule and although neither case raised an issue as to the law to be applied in determining whether the defendant was liable, Dawson J, a member of the majority in *McKain* and in *Stevens*, was later to say that:

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48 (1997) 189 CLR 520.

49 In *McKain*, the question was whether s 36(1) of the *Limitation of Actions Act* 1936 (SA) or s 82(2) of the *Workers Compensation Act* 1971 (SA), both of which stipulated a limitation period of 3 years to commence an action for damages for personal injuries, were procedural or substantive, and thus applicable to bar an action commenced in the Supreme Court of New South Wales. Section 14(1) of the *Limitation Act* 1969 (NSW) provided for a limitation period of 6 years. In *Stevens*, the question was whether s 79 of the *Motor Accidents Act* 1988 (NSW), which restricted the amount of damages recoverable for non-economic loss suffered as a result of a motor accident, was procedural or substantive, and thus applicable in an action commenced in the District Court of Queensland. There was no comparable statute in force in Queensland.

> "[*McKain*] decided that, provided two conditions were met, an action could be maintained in a State other than that in which the tort occurred and that the law, procedural and substantive, to be applied in resolving the action was the law of the State in which the action was heard, that is to say, the law of the forum."[50]

37 A more important matter to be noted with respect to *Koop*, *McKain* and *Stevens* is that they were not matters in federal jurisdiction. The need to examine the reasoning in those cases is strengthened by the fact that it has no necessary application in matters of federal jurisdiction which are being heard in increasing numbers not only in the federal courts but in the courts of the States. And the difficulty of applying the reasoning in those cases to federal courts was acknowledged in *McKain*, it being said by the majority in that case that:

> "The problem for federal courts exercising Australia-wide jurisdiction and bound by s 79 of the *Judiciary Act* 1903 (Cth) raises additional questions for consideration which need not delay us here." (footnote omitted)[51]

38 There is considerable difficulty in thinking that the principles formulated by the majority in *McKain* can have any application, in at least some kinds of case, in federal jurisdiction. So, in an action commenced in this Court's diversity jurisdiction, there appears to be no scope for a double actionability rule. But before turning to the issues that arise in actions in federal jurisdiction, it is convenient to consider the nature of the right which is enforced by a court in respect of events which happened outside its jurisdiction and the source of the choice of law rules which that court applies.

Nature of the right enforced by courts in respect of events which happened outside their jurisdiction

39 In *Koop*, this Court held that the law of the forum enforces an obligation of its *own* creation in respect of an act done outside the territorial jurisdiction of the forum, but only if the act would have been a civil wrong if done in the territory of the forum and the act had a particular character according to the law of the place in which it was done[52]. This holding plainly rejected the vested rights

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50 *Gardner v Wallace* (1995) 184 CLR 95 at 98.

51 (1991) 174 CLR 1 at 35.

52 (1951) 84 CLR 629 at 644.

theory put forward by Holmes J in *Slater v Mexican National Railroad Co*[53]. Holmes J had described the theory in the following terms:

> "The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found."[54]

40 The view adopted in *Koop* that the forum enforces an obligation of its *own* creation appears to reflect the local law theory or theories[55] associated with Judge Learned Hand and Professor Cook[56]. As Judge Hand said in *Guinness v Miller*:

> "[N]o court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs."[57]

41 The local law theory, which, in part, may be based on the notion of comity between nations, provides support for the view that the forum should apply its own laws to determine both liability in the action and the extent of that liability with respect to events occurring outside its jurisdiction. But in actions

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53 194 US 120 (1904).

54 194 US 120 at 126 (1904). The vested rights theory stemmed, in the United States, largely from Story, *Commentaries on the Conflict of Laws*, 8th ed (1883), but it was entrenched by the *Restatement, Conflict of Laws*, which was published in 1934. It held sway in the United States for many years. Only on publication in 1971 of the *Restatement 2d, Conflict of Laws*, could it be said finally to have been supplanted as the dominant theoretical explanation of the private international law rules applied in the United States.

55 Cavers, "The Two 'Local Law' Theories", (1950) 63 *Harvard Law Review* 822.

56 See Cook, *The Logical and Legal Bases of the Conflict of Laws*, (1949), Ch 1.

57 291 F 769 at 770 (1923); affd *Hicks v Guinness* 269 US 71 (1925). See also *Direction der Disconto-Gesellschaft v United States Steel Corporation* 300 F 741 (1924); *Scheer v Rockne Motors Corporation* 68 F 2d 942 (1934); *Siegmann v Meyer* 100 F 2d 367 (1938).

commenced in federal jurisdiction, the acts or events all occurred within the jurisdiction – the law area of Australia – and the only task for the court is to identify the body of law that governs their consequences. That task neither requires nor is assisted by resort to either vested rights theories or local law theories.

The source of the choice of law rules

42 It was said by the majority in *McKain*[58] to be "axiomatic" that it is the governing system of law binding on the court of the forum which furnishes the rules for choice of law. A number of points should be made with respect to that statement. First and as has been indicated earlier in these reasons, the identification in this way of the "*lex fori*" has to be understood in the sense required for that term within the Australian federation.

43 The second point that should be made is that in *McKain* the majority used the expression "conflict of law rules" rather than "choice of law rules". The latter is the preferable expression. The unsatisfactory nature of the term "conflict of laws" was discussed by Dr J H C Morris in the sixth edition of *Dicey's Conflict of Laws*[59]. It was pointed out that the only "conflict" possible is that in the mind of the judge who is to decide which system of law to apply to the facts before the court, whereas the term "choice of law" correctly indicates the existence of the possibility of the application of one or other system of law to the facts of the case under consideration[60]. In the Australian federation, the term "conflict" is better used to identify inconsistency between laws, the inconsistency leading, to the extent of that inconsistency, to the invalidity of one law. Further and as already indicated, in actions commenced in federal jurisdiction, the question is not so much a question as to choice of law, but identification of the applicable law.

44 The third point which should be made with respect to the statement in *McKain* is that, as already pointed out but subject to certain State legislation dealing with one of the issues that arise in choice of law cases for Australian torts

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58 (1991) 174 CLR 1 at 34.

59 The sixth edition was published in 1949 and was the first edition under the editorship of Dr J H C Morris.

60 *Dicey's Conflict of Laws*, 6th ed (1949) at 7.

involving an interstate element[61], the choice of law rules are provided by the common law of Australia. It is now well accepted that the common law must adapt to the Constitution[62]. Ideally, it should also adapt so as to provide practical solutions to particular legal problems which occur in the federal system. Thus, ideally, the choice of law rules should provide certainty and uniformity of outcome no matter where in the Australian federation a matter is litigated, and whether it is litigated in federal or non-federal jurisdiction. The question whether the common law with respect to the choice of law rule for Australian torts involving an interstate element should now be modified, as the applicant contends, requires analysis of the manner in which it operates both in non-federal and federal jurisdiction.

Operation of the choice of law rules – non-federal jurisdiction

45 Two questions arise with respect to choice of law rules. First, what *kinds* of issues are subject to those rules. The second is whether the *source* of the content of the rules which the forum applies to the determination of the rights and duties of the parties is the law of the forum or some other law. These two questions lie at the heart of the issues raised with respect to torts involving an interstate element which are litigated in the courts of a State other than that in which the events in question occurred.

46 In *McKain*, the majority said:

> " Traditionally, a distinction has been drawn between substantive law (the subject of the conflict of law rules) and procedural law which is governed by the lex fori alone. Though the dividing line is sometimes doubtful or even artificial, the need to distinguish between substantive law and procedural law is clearly recognized for a number of forensic purposes."[63]

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61 That issue is whether limitation laws are substantive or procedural.

62 See *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 140; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566.

63 (1991) 174 CLR 1 at 40.

The majority accepted and applied this traditional distinction. That is, they accepted that only substantive questions (as opposed to procedural questions) were the subject of the choice of law rules.

47 A conclusion that questions of substance are governed by choice of law rules does not necessarily mean, however, that the relevant rule will direct attention to some law other than the law of the forum. As already indicated, the question whether the choice of law rule directs attention to the law of the forum or to some other law did not have to be decided in either *McKain* or *Stevens* because the relevant statute of the place of commission of the tort (upon which the defendant relied, in denial or diminution of liability to the plaintiff) was, in each case, classified as relating to a procedural issue.

48 In *McKain*, the statutory limitation provision of the place of commission of the tort was classified as procedural. Procedural issues being governed by the law of the forum, it was held that no effect should be given to the limitation provision of the place of commission. And in *Stevens*, the legislation of the place of commission (which placed limits on the amount of damages recoverable) was held not to deal with the substantive issue of heads of damage but the procedural issue of quantification of damages. Again, therefore, quantification was governed by the law of the forum and it was held that no effect should be given to the statute of the place of commission. Subsequent to *McKain*, legislation was enacted in several jurisdictions to provide that time limitation laws are to be treated as substantive rather than procedural[64].

49 It can be seen from *McKain* and from *Stevens* that, if the law of the forum applies to all substantive and procedural issues, the only scope for the operation of the law of the place of the commission of the tort is that afforded by the double actionability rule. That rule operates to give what is, in effect, a defence to the claim that is made, in cases where, by the law of the place, the circumstances of the occurrence would not give rise to a civil liability of the kind which the plaintiff seeks to enforce.

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64 *Choice of Law (Limitation Periods) Act* 1993 (NSW); *Choice of Law (Limitation Periods) Act* 1993 (Vic); *Limitation of Actions Act* 1936 (SA), ss 38, 38A; *Limitation of Actions Act* 1974 (Q), s 43A; *Choice of Law (Limitation Periods) Act* 1994 (WA); *Limitation Act* 1974 (Tas), ss 32A-32D; *Choice of Law (Limitation Periods) Act* 1994 (NT); *Limitation Act* 1985 (ACT), Pt 4, Div 4.

Applicable law in federal jurisdiction

50 As already indicated, it was held in *Anderson* that that case was not an action in federal jurisdiction and, thus, it was not necessary for the Court to consider whether either the double actionability rule adopted in *Koop* or a choice of law rule is applicable in matters within federal jurisdiction. Nor was that question specifically addressed in *Breavington*, although Wilson and Gaudron JJ were of the view that the choice of law rule should "take account of the existence of federal jurisdiction as delineated in Ch III of the Constitution."[65]

51 To understand the questions that arise in federal jurisdiction it is necessary to refer to ss 79 and 80 of the Judiciary Act. Those sections provide:

> " **79.** The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.
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> **80.** So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters."

52 There is one aspect of s 79 which was adverted to by Gaudron J in *The Commonwealth v Mewett* and which should be noted. Her Honour observed:

> "Given that the Commonwealth is a single nation and given, also, its integrated legal system, it is not strictly accurate to speak in terms of a court exercising federal jurisdiction in a State or Territory, as does s 79 of the *Judiciary Act*[66]. Rather, the jurisdiction of this Court extends throughout

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65 (1988) 169 CLR 41 at 86. See also at 122-125 per Deane J, 166-167 per Toohey J. But cf at 107, 114 per Brennan J.

66 See *Kruger v The Commonwealth* (1997) 190 CLR 1 at 136-137, 138-139 per Gaudron J.

> the Commonwealth, as does the jurisdiction of the Federal Court. In both cases, jurisdiction is exercised in Australia, not in a State or Territory."[67]

53 The observation by Gaudron J in *Mewett* also directs attention to the nature of the question posed with respect to torts which involve an interstate element and which are litigated in federal jurisdiction. The jurisdiction of this Court and the Federal Court[68] and the Family Court[69] is clearly Australia wide; so too (but, perhaps, less obviously) is the jurisdiction of courts invested with federal jurisdiction when that jurisdiction is exercised. Thus, strictly the question that arises in matters of federal jurisdiction does not involve any choice between laws of competing jurisdictions, but identification of the applicable law in accordance with ss 79 and 80 of the Judiciary Act.

54 Questions as to the law applicable in federal jurisdiction to determine tort actions involving an interstate element can arise in two contexts. They can arise in actions brought in State courts exercising federal jurisdiction or, as in this case, in a Territory court. Alternatively, they can arise in this Court or in a federal court created pursuant to Ch III of the Constitution.

55 *Musgrave v The Commonwealth*[70] has been understood as involving the proposition that, by operation of either or both ss 79 and 80, the common law choice of law rules apply to an action in tort brought in federal jurisdiction. In *Pedersen v Young*, Windeyer J put the matter this way:

> "When the *Judiciary Act* makes the law of a State binding upon courts exercising federal jurisdiction within the State, the law thus designated is, it has been held, the whole body of the law of the State including the rules of private international law so far as applicable."[71]

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67 (1997) 191 CLR 471 at 524-525.

68 *Federal Court of Australia Act* 1976 (Cth), s 18.

69 *Family Law Act* 1975 (Cth), s 27.

70 (1937) 57 CLR 514.

71 (1964) 110 CLR 162 at 169-170. See also *Musgrave v The Commonwealth* (1937) 57 CLR 514 at 532, 543, 547-548, but cf at 550-551; *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 32 at 39; *Parker v The*

(Footnote continues on next page)

There is legislation, earlier referred to, providing that time limitation laws are to be treated as substantive and not procedural. There are, however, no State laws providing either for an actionability rule or a choice of law rule for torts involving an interstate element. The relevant rules are rules of the common law[72]. Thus it was that various submissions in the present case proceeded on the basis that the Supreme Court of the Australian Capital Territory was obliged by s 80 to apply the common law choice of law rules as part of the common law of Australia.

56 No question presently arises as to the position which would obtain if s 80 were displaced by a specific statutory federal choice of law rule[73]. Nor is it necessary to determine what would have been the position if s 80 had not been enacted or were repealed. A question would have arisen as to whether the common law choice of law rules, as later formulated in these reasons, nevertheless apply in federal jurisdiction as part of the ultimate constitutional foundation.

57 The view that the common law rules with respect to actionability and choice of law apply in matters involving federal jurisdiction has the consequence, in effect, that if an action is brought in a State court exercising federal jurisdiction, the law of that State will govern the action no matter where the events in question occurred. However, when actions involving an interstate element have been brought in this Court, the question as to which law should govern the action has largely been transformed into questions as to choice of venue or choice of the forum to which the matter should be remitted under s 44 of the Judiciary Act. In practice, questions as to the applicable law have played a

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Commonwealth (1965) 112 CLR 295 at 306; *Suehle v The Commonwealth* (1967) 116 CLR 353 at 356.

72 See *The Commonwealth v Mewett* (1997) 191 CLR 471 at 526 per Gaudron J.

73 See, for example, *Domicile Act* 1982 (Cth), and compare *Trusts (Hague Convention) Act* 1991 (Cth).

significant role in the selection of venue or remittee forum[74]. However, so, too, have considerations of practical convenience[75].

58 Because ss 79 and 80 of the Judiciary Act both require reference to the statute law of the State or Territory in which the court concerned is exercising federal jurisdiction so far as that statute law is applicable, it follows that, subject to some qualifications which can be put to one side for the moment, the statute law of the State or Territory in which federal jurisdiction is exercised will be applied. And if the common law rules for choice of law in a case which has some interstate element are applicable and require reference to the laws of the forum, the law which will be applied will depend upon where the court is sitting[76]. In a case concerning a tort committed in Australia, and in respect of which a federal, State or Territory court is exercising federal jurisdiction, the existence, extent and enforceability of the rights and obligations of the parties may, therefore, be affected significantly by where the court sits.

Reconsideration: matters relevant to the federation: Ch III and s 118 – "full faith and credit"

59 At the least, the fact that, in matters involving federal jurisdiction, the outcome of an action for tort may be affected significantly by where the court sits is properly called odd or unusual. That is because, although the source of the power to decide is constant, the content of the rights and duties to which the court gives effect may vary according to where the power to decide is exercised in the federation. It is a result which warrants reconsideration of the question of the applicable law in matters involving federal jurisdiction. Moreover, as has been seen, little attention was given to that question in the decided cases.

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74 See, for example, *Parker v The Commonwealth* (1965) 112 CLR 295; *Gleeson v Williamson* (1972) 46 ALJR 677; *Guzowski v Cook* (1981) 149 CLR 128; *Pozniak v Smith* (1982) 151 CLR 38; *Fielding v Doran* (1984) 59 ALJR 511; 60 ALR 342.

75 See, for example, *Weber v Aidone* (1981) 55 ALJR 657; 36 ALR 345; *Robinson v Shirley* (1982) 149 CLR 132; *Crouch v Commissioner for Railways (Q)* (1985) 159 CLR 22.

76 *Robinson v Shirley* (1982) 149 CLR 132 at 136 per Brennan J.

60 It is, however, undesirable to restrict reconsideration to the question that arises in federal jurisdiction. Ordinarily, the question whether a matter falls within federal jurisdiction will depend on the identity of the parties or their State of residence, not the events which are said to give rise to tortious liability. For example, the rights of a plaintiff who is struck by a motor vehicle should not differ according to whether it was driven by an employee of the Commonwealth or by a private individual. So, too, they should not differ according to whether it was driven by a person resident in the same State or by a person resident in a different State.

61 Reconsideration of the rules to be applied with respect to torts which involve an interstate element but which are not litigated in federal jurisdiction is not precluded by the fact that *McKain* and *Stevens* have not stood for very long. Although it is clear that, in those cases, the majority adopted a modified double actionability rule, it is not entirely clear that those cases require application of the *lex fori* to questions of substance. Moreover and notwithstanding those decisions, the course of authority in this Court has not been free from doubt and difficulty.

62 In considering the rules which should apply with respect to Australian torts involving an interstate element but which are not litigated in federal jurisdiction, it is relevant to have regard to the requirement of s 118 of the Constitution that:

> " Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State."

63 In its terms, s 118 does not state any rule which dictates what choice is to be made if there is some relevant intersection between legislation enacted by different States. Nor does it, in terms, state a rule which would dictate what common law choice of law rule should be adopted. It may well be, however, that s 118 (and in some cases s 117, or even s 92 in its protection of individual intercourse[77]) deals with questions of competition between public policy choices reflected in the legislation of different States – at least by denying resort to the contention that one State's courts may deny the application of the rules embodied in the statute law of another State on public policy grounds[78].

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77 *AMS v AIF* (1999) 73 ALJR 927; 163 ALR 501.

78 cf *Loucks v Standard Oil Co of New York* 120 NE 198 at 202 (1918).

64 In *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd*[79], Rich and Dixon JJ and Evatt J suggested that s 118 precludes the courts of one State from concluding (as the primary judge had in that case) that the application of the statute of another State "would at the stage and in the circumstances in which it was invoked work manifest injustice to or, in effect, a fraud on one of the parties."[80] And in *Breavington*, six members of the Court appear to have accepted that s 118 may preclude the refusal of one State to apply the law of another on the grounds of public policy where the law of that other State is otherwise applicable[81]. However, it may also be that s 118 suggests that the constitutional balance which should be struck in cases of intranational tort claims is one which is focused more on the need for each State to acknowledge the predominantly territorial interest of each in what occurs within its territory than it is on a plaintiff's desire to achieve maximum compensation for an alleged wrong.

65 It has been said that the giving of full faith and credit to the law of another State only when the choice of law rules of the forum point to that law "is to give full faith and credit to one's own law rather than to that of the sister-state, a fact which the unity of the common law in Australia has so far concealed."[82] And there was a deal of debate in the oral argument in the present case about the effect of s 118. Some of those questions were considered in *Breavington*[83] but not resolved by the formulation of a choice of law rule deriving its force from s 118. However, the terms of s 118 indicate that, as between themselves, the States are not foreign powers as are nation states for the purposes of international law. That apart, it is not necessary in the present matter to resolve other questions respecting s 118. The matter is to be resolved, in our view, by developing the common law to take account of federal jurisdiction as delineated in Ch III of the Constitution and, also, to take account of the federal system in

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79 (1933) 48 CLR 565 at 577 and 587-588.

80 *Moolpa Pastoral Co Pty Ltd v Merwin Pastoral Co Pty Ltd* unreported, Supreme Court of Victoria per Macfarlan J cited (1933) 48 CLR 565 at 577 per Rich and Dixon JJ.

81 (1988) 169 CLR 41 at 81, 96-97, 116, 133-134, 150.

82 D St Leger Kelly, "Chief Justice Bray and the Conflict of Laws", (1980) 7 *Adelaide Law Review* 17 at 27-28.

83 (1988) 169 CLR 41 at 81-82, 95-100, 116-117, 129-136, 150.

which sovereignty is shared between the Commonwealth and the member States of the federation.

The common law and the Constitution

66 It was said in *Lange v Australian Broadcasting Corporation* that:

> " With the establishment of the Commonwealth of Australia ... it became necessary to accommodate basic common law concepts and techniques to a federal system of government embodied in a written and rigid constitution."[84]

And it was also pointed out that, within the "single system of jurisprudence" constituted by the Constitution, federal, State and Territory laws and the common law of Australia, "the basic law of the Constitution provides the authority for the enactment of valid statute law and may have effect on the content of the common law."[85]

67 In *Lange*, it was held that the common law of qualified privilege should be developed consistently with the existence of the implied constitutional freedom to discuss government and political matters. So, too, the common law with respect to the choice of law rule for tort should be developed to take into account various matters arising from the Australian constitutional text and structure. They include:

- the existence and scope of federal jurisdiction, including the investment of State courts with federal jurisdiction pursuant to s 77(iii) of the Constitution;

- the position of this Court as the ultimate court of appeal, not only in respect of decisions made in the exercise of federal jurisdiction;

- the impact of s 117 and s 118 of the Constitution upon any so-called "public policy exception" to a choice of law rule for tort;

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84 (1997) 189 CLR 520 at 562.

85 (1997) 189 CLR 520 at 564.

. the predominant territorial concern of the statutes of State and Territory legislatures; and

. more generally, the nature of the federal compact.

68 The matters we have referred to require that a somewhat different approach now be adopted with respect to Australian torts which involve an interstate element. Moreover, they favour the adoption of a single choice of law rule consistently in both federal and non-federal jurisdiction in all courts in Australia.

69 In *Lange*, the common law rule which was propounded with respect to qualified privilege was developed so as to satisfy what the Court identified as the constitutional imperative respecting freedom of communication. This imperative "operates as a restriction on legislative power" so that "[s]tatutory regimes cannot trespass upon the constitutionally required freedom."[86]

70 The matters we have mentioned as arising from the constitutional text and structure may amount collectively to a particular constitutional imperative which dictates the common law choice of law rule which we favour. It may be that those matters operate constitutionally to entrench that rule, or aspects of it concerning such matters as a "public policy exception". If so, the result would be to restrict legislative power to abrogate or vary that common law rule. However, we leave these questions open, not the least because there were no developed submissions upon them.

71 Finally, we would emphasise that, while the approach to the common law we take in this judgment was at the forefront of the submissions of the present applicant, it was not discussed in the judgments in *McKain* or *Stevens*, being decisions which pre-date *Lange*.

Choice of law rule – the various possibilities

72 It is convenient to deal first with the choice of law rule. The various possibilities which emerge from a consideration of the cases and academic writings in this and other jurisdictions are the *lex fori*, the *lex loci delicti*, and the proper law of the tort, in each case with or without a flexible exception.

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86 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566.

73 There are two main theoretical considerations that point in favour of the *lex fori*. The first, which was earlier referred to, is the theory that the forum enforces an obligation of its own creation. That being so, there is some force in the view that the forum should apply its own laws. Moreover, it may be said that it is to be inferred that it is the legislative will of the State whose courts are enforcing an obligation of that State's creation that those courts should apply the law of that State to which they owe their origin and from which they derive their authority. But such an answer can be seen to invite further consideration, especially in a federation. Even leaving aside any consideration of what follows from a federal system of government, an assertion that the courts of a State apply only the law of that State would seem to be satisfied, in any event, if the courts of the State in question apply that State's own rules to determine what law should be applied.

74 In Europe, reference has usually been made to the *lex loci delicti* as the law governing delictual liability[87]. The reference to that law has traditionally been founded in notions of sovereignty over the place of commission of the tort giving existence to the obligation which is enforced[88]. And these views competed with those of Savigny[89] and Waechter[90] that precedence should be given to the *lex fori*[91]. Resort to notions of sovereignty, however, offers no sure and simple basis for preferring one choice of law rule to another. Especially is that so in a federal system, like Australia, where "sovereignty" is shared between the federal, State, and Territory law areas, each with its own legislature and its own distinct democratic processes.

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87 Kahn-Freund, "Delictual Liability and the Conflict of Laws", (1968) II *Recueil des Cours* 5 at 15-19.

88 See, for example, Bartin, *Principes de Droit International Privé*, (1932), vol II at 290; Niboyet, *Traité de Droit International Privé Français*, (1947-1950), vol V, par 1427.

89 Savigny, *System des heutigen roemischen Rechts*, (1849).

90 Waechter, *Ueber die Collision der Privatrechtsgesetze verschiedener Staaten*, (1841-1842).

91 See the reference to Savigny in argument in *The "Halley"* (1868) LR 2 PC 193 at 195.

75 The chief theoretical consideration in favour of applying the law of the place of commission of the tort to decide the substantive rights of the parties (at least in intranational torts) is that reliance on the legal order in force in the law area in which people act or are exposed to risk of injury gives rise to expectations that should be protected. Similar values can be seen underlying the doctrine of estoppel, the presumption against ex post facto laws and the principles of stare decisis[92]. Moreover, in a federal system, a choice of law rule which proceeds on the footing that the predominant concern of State and Territory legislatures is with acts, matters and things in their respective law areas strikes a balance between the interests of those several legislatures whose laws may be involved in a particular dispute.

76 Ever since the seminal article by Morris in 1951, "The Proper Law of a Tort"[93], there has been considerable academic and judicial consideration given to whether the "mechanical" application of the *lex loci delicti* will always give what is thought, a priori, to be a fair or just result. Cases such as *M'Elroy v M'Allister*[94], *Lautour c Guiraud*[95] and *Babcock v Jackson*[96], in which residents of one jurisdiction were killed or injured in accidents happening in another jurisdiction with which the actors had no contact, have been held out as demonstrating the need for a more flexible rule than the unwavering application of the *lex loci delicti*. These kinds of consideration led to the decision of the House of Lords in *Chaplin v Boys*[97] and are reflected in different views expressed in *Breavington*[98]. And in the United States, since the *Restatement 2d, Conflict of*

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92 Rheinstein, "The Place of Wrong: A Study in the Method of Case Law", (1944) 19 *Tulane Law Review* 4 at 20-23.

93 (1951) 64 *Harvard Law Review* 881.

94 [1949] SC 110.

95 The leading decision of the Chambre Civile of the French Cour de Cassation, Cass Civ 25.5.1948, noted in Kahn-Freund, "Delictual Liability and the Conflict of Laws", (1968) II *Recueil des Cours* 5 at 17.

96 191 NE 2d 279 (1963).

97 [1971] AC 356 at 379-380 per Lord Hodson, 392 per Lord Wilberforce.

98 (1988) 169 CLR 41 at 76-77 per Mason CJ, 162-163 per Toohey J; cf at 112-114 per Brennan J, 147-148 per Dawson J.

Laws embraced the theory of the proper law of the tort, that approach has achieved widespread use[99].

77 More recently, in the United States, at least in the literature on the subject, there has been a revival of support for the *lex loci delicti*[100]. At the same time the effectiveness of the earlier search for the better law by an "interest" analysis, which seeks to determine the law that should be applied by reference to governmental interest in the application of the policy underlying the relevant statute law, has been doubted[101]. Further, the *Federal Tort Claims Act of 1948*[102] subjects the United States to tort liability "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

78 A rule which requires or permits courts to choose, as the governing law, the law of the jurisdiction having the most significant connections with the parties or events, leads to difficulties in practice. As Kahn-Freund pointed out more than 30 years ago:

> "There is no ultimate distinction between a connecting factor which is 'significant' and one which is 'accidental'. This is a matter of impression, of feelings, one might almost say an aesthetic matter which defies rational argument for or against. A discussion of the virtues of connecting factors such as 'place of act', 'place of injury', 'common domicil or residence or nationality of parties', etc, is possible, but not in terms of deductive

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99 See, for example, Symeonides, "Choice of Law in the American Courts in 1998: Twelfth Annual Survey", (1999) 47 *American Journal of Comparative Law* 327.

100 Korn, "The Choice-of-Law Revolution: A Critique", (1983) 83 *Columbia Law Review* 772 at 801; Dane, "Vested Rights, 'Vestedness', and Choice of Law", (1987) 96 *Yale Law Journal* 1191 at 1194-1204; Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law", (1992) 92 *Columbia Law Review* 249 at 336-337.

101 As to "interest" analysis, see *Alaska Packers Association v Industrial Accident Commission* 294 US 532 at 547 (1935). See also Currie, *Selected Essays on the Conflict of Laws*, (1963); Currie, "Comments on *Babcock v Jackson*, A Recent Development in Conflict of Laws", (1963) 63 *Columbia Law Review* 1212 at 1233-1243.

102 28 USC §1346(b).

> reasoning. There are only two methods of argument open to those who participate in such debates: one is the argument of tradition, the other is the argument of expediency."[103]

Moreover, it might be thought that, often enough, the search for the proper law of the tort has led, in the United States, to the application of the law of the forum simply because the plaintiff chose to institute the proceedings in that place.

79 Adopting any flexible rule or exception to a universal rule would require the closest attention to identifying what criteria are to be used to make the choice of law. Describing a flexible rule in terms such as "real and substantial" or "most significant" connection with the jurisdiction will not give sufficient guidance to courts, to parties or to those, like insurers, who must order their affairs on the basis of predictions about the future application of the rule. What emerges very clearly from the United States experience in those States where the proper law of the tort theory has been adopted is that it has led to very great uncertainty. That can only increase the cost to parties, insurers and society at large.

80 Whatever may be the advantages of a flexible rule or of a flexible exception to a universal rule in the case of international torts, the practical disadvantages are such that neither approach should be adopted with respect to Australian torts which involve an interstate element.

Lex fori v *lex loci delicti*

81 Before turning to the question whether the common law choice of law rule should be the *lex fori* or *lex loci delicti*, it is necessary to recognise that the place of the tort may be ambiguous or diverse. Difficulty will arise in locating the tort when an action is brought, for example, for product liability and the product is made in State A, sold in State B and consumed or used by the plaintiff in State C[104]. And the tort of libel may be committed in many States when a

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103 Kahn-Freund, "Delictual Liability and the Conflict of Laws", (1968) II *Recueil des Cours* 5 at 36.

104 cf *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458; *Buttigeig v Universal Terminal & Stevedoring Corporation* [1972] VR 626; *Macgregor v Application des Gaz* [1976] Qd R 175; *Jacobs v Australian Abrasives Pty Ltd* [1971] Tas SR 92.

national publication publishes an article that defames a person[105]. These difficulties may lead to litigants seeking to frame claims in contract rather than tort (as the NSW Compensation Act anticipated[106]) or for breach of s 52 of the *Trade Practices Act* 1974 (Cth) or some similar provision. Characterising such actions may be difficult and may raise questions whether the private international law rules about tort or some other rules are to be applied[107].

82 Moreover, even if the place of the tort can be located in a single jurisdiction, it will often enough be entirely fortuitous where the tort occurred. Why, so the argument goes, should the rights of Victorian residents injured when the car in which they are driven (by another Victorian) differ according to whether, if a driver falls asleep and the car runs off the road near the Victorian border, it does so south of Wodonga or north of Albury? But for every hard case that can be postulated if one form of universal rule is adopted, another equally hard case can be postulated if the opposite universal rule is adopted.

83 It is as well then to compare the consequences of the application, in cases of intranational torts, of the *lex loci delicti* with the consequences of applying the *lex fori*. If the *lex loci delicti* is applied, subject to the possible difficulty of locating the tort, liability is fixed and certain; if the *lex fori* is applied, the existence, extent and enforceability of liability varies according to the number of forums to which the plaintiff may resort and according to the differences between the laws of those forums and, in cases in federal jurisdiction, according to where the court sits.

84 From the perspective of the tortfeasor (or in many cases an insurer of the tortfeasor) application of the *lex loci delicti* fixes liability by reference to geography and it is, to that extent, easier to promote laws giving a favourable outcome by, for example, limiting liability. If the *lex fori* is applied, the tortfeasor is exposed to a spectrum of laws imposing liability.

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105 *McLean v David Syme & Co Ltd* (1970) 72 SR (NSW) 513; *David Syme & Co Ltd v Grey* (1992) 38 FCR 303; *Berezovsky v Michaels* [2000] UKHL 25.

106 s 151E.

107 Collins, "Interaction between Contract and Tort in the Conflict of Laws", (1967) 16 *International and Comparative Law Quarterly* 103; Pryles, "Tort and Related Obligations in Private International Law", (1991) II *Recueil des Cours* 9 at 166-191.

85 From the perspective of the victim (the plaintiff) application of the *lex loci delicti* can be said to make compensation depend upon the accident of where the tort was committed, whereas, if the *lex fori* is applied, the plaintiff can resort to whatever forum will give the greatest compensation.

86 In Australia, in all its law areas, the same common law rules apply and any relevant difference in substantive law will stem from statute. Applying the *lex loci delicti* will apply a single choice of law rule consistently in both federal and non-federal jurisdiction in all courts and will recognise and give effect to the predominant territorial concern of the statutes of State and Territory legislatures. These factors favour giving controlling effect to the *lex loci delicti* rather than the *lex fori*.

87 Application of the *lex loci delicti* as the governing law in Australian torts involving an interstate element is similar to the approach adopted in Canada following the decision of the Supreme Court of Canada in *Tolofson v Jensen*[108]. Moreover and so far as the subject matter permits, it gives effect to the reasonable expectations of parties. And it is a rule which reflects the fact that the torts with which it deals are torts committed within a federation. Accordingly, the common law should now be developed so that the *lex loci delicti* is the governing law with respect to torts committed in Australia but which have an interstate element.

Double actionability rule

88 It is necessary to consider the double actionability rule both in relation to federal and non-federal jurisdiction. So far as concerns federal jurisdiction, once it is appreciated that that jurisdiction extends throughout Australia, it follows that a court exercising that jurisdiction with respect to an Australian tort is exercising jurisdiction with respect to events that occurred in its own law area. That being so, there is no scope for the operation of a double actionability rule. And that is so whether or not the tort involves an interstate element.

89 So far as concerns non-federal jurisdiction, the question is whether, in a federation, the common law should any longer require double actionability as a threshold test before the courts of one State or Territory will recognise and enforce obligations arising as a result of tortious acts or omissions in another State or Territory. Somewhat different considerations apply in a context in

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108 [1994] 3 SCR 1022.

which the applicable law is the *lex loci delicti* from those that arise if the *lex fori* were to be applied.

90 Quite apart from s 118 of the Constitution, it would be incongruous if a State or Territory were to allow a remedy for an act or omission in another State or Territory which did not constitute an actionable wrong under the laws of that latter State or Territory. But application of the *lex loci delicti* negates that possibility. Thus, the sole question that arises in relation to a double actionability rule in non-federal jurisdiction is whether the courts of a State or Territory should be obliged to give a remedy in accordance with the law of the State or Territory in which the relevant events occurred when, if the events had occurred in the law area of the forum, none would be given.

91 The chief consideration which invites reference to the law of the forum, by application of a double actionability rule, was described by Cardozo J in *Loucks v Standard Oil Co of New York*:

> "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, *unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal*." (emphasis added)[109]

But, consistent with federation, why should questions of public policy of the kind mentioned by Cardozo J arise in considering whether a rule enacted by the statute of another integer of the federation should be given effect? How can the courts of one State or Territory say of the laws of another State or Territory in the same federal nation that those laws violate fundamental principles of justice or the like? As indicated earlier, it may well be that questions of this kind are resolved by the application of provisions like ss 117 and 118 of the Constitution. If that is so, the application of a general threshold requirement that the events be actionable according to the laws of the forum cannot be justified as based on giving effect to some public policy of the forum.

92 There is another consideration that militates against retention of a double actionability rule. If the wrong that is actionable in the forum is a wrong, some features of which are regulated by forum statute, reference to the law of the forum will, often enough, give to the relevant statute of the forum an operation

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109 120 NE 198 at 202 (1918).

greater than the operation given it as part of the law of the State which enacted it[110].

93 The State or Territory in which the events occurred may not only lay down a norm of conduct but may also provide its own special remedies for contravention of that norm – remedies which may not be available in the forum. So if one State enacts a law creating an actionable wrong of, for example, invasion of privacy it may make various provisions with respect to wrongs of that kind. The law may specify that these wrongs are to be dealt with by the courts of the State, but following particular procedures and giving novel remedies. The law may go further and entrust disputes not to courts of general or limited jurisdiction, but to a special tribunal set up for the purpose. The forum may know nothing of such an actionable wrong, its courts may have no equivalent procedures or remedies, and its legislature may not have established any equivalent tribunal.

94 Retention of a double actionability rule would, however, serve no purpose in such a case. For reasons to which we will come in considering the distinction between questions of procedure and questions of substance, a litigant who invokes the jurisdiction of a court must take the procedures and remedies of that court as they are. Prima facie, then, if the statute law of a State or Territory provides for a remedy at the hands of a specialist tribunal, and not through the courts, the remedy will be one that can be enforced only in that tribunal. But that result would follow from the distinction between questions of procedure (which are to be governed by the *lex fori*) and questions of substance (which are to be governed by the *lex loci delicti*) regardless of whether any double actionability rule is applied.

95 The retention of a double actionability rule for Australian torts must be considered not only in the context of a federal system, but, also, in the context of the general law as it has now developed. It is conceivable that, in some cases, if the forum does not provide curial relief of the kind provided by the law of the State or Territory in which the events occurred, that forum would be a clearly inappropriate forum[111]. In those circumstances, it would be appropriate to grant a

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110 cf *Norbert Steinhardt and Son Ltd v Meth* (1961) 105 CLR 440 at 442-443; reversed on other grounds (1962) 107 CLR 187 and *Pearce v Ove Arup Partnership Ltd* [1999] 1 All ER 769.

111 See *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

stay of proceedings – perhaps, on terms that the defendant submit to the jurisdiction of the courts of the State in which the events occurred.

96 If the selected forum is not clearly inappropriate, it is difficult to see any basis for concluding that a court of one State or Territory should refuse to entertain an action with respect to events occurring in another State or Territory simply because there would not be a remedy if the events happened within its jurisdiction, or because the *lex loci delicti* designated a particular court to entertain actions of a particular kind, to the exclusion of its superior courts of general jurisdiction. Rather, within the federal system, it is appropriate that each State and Territory recognise the interest of the other States and Territories in the application of their laws to events occurring in their jurisdiction. Accordingly, any requirement for double actionability in non-federal jurisdiction should be discarded. The consequence is that an action will be determined on the same basis whether it is brought in federal or non-federal jurisdiction.

Substance and procedure

97 As already indicated, the choice of law rules traditionally distinguish between questions of substance and questions of procedure. There is much history that lies behind the distinction, but search as one may, it is very hard, if not impossible, to identify some unifying principle which would assist in making the distinction in a particular case. But, as the majority said in *McKain*:

> "Though the dividing line is sometimes doubtful or even artificial, the need to distinguish between substantive law and procedural law is clearly recognized for a number of forensic purposes."[112]

98 Some statutes of limitation have traditionally been held to be procedural on the basis that they bar the remedy not the right[113]; other limitation provisions

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112 (1991) 174 CLR 1 at 40.

113 *Huber v Steiner* (1835) 2 Bing (NC) 202 [132 ER 80]; *Harris v Quine* (1869) LR 4 QB 653; *Alliance Bank of Simla v Carey* (1880) 5 CPD 429; *Noske v McGinnis* (1932) 47 CLR 563; *Pedersen v Young* (1964) 110 CLR 162; *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65; *Bargen v State Government Insurance Office (Q)* (1982) 154 CLR 318; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 473-474 per Toohey J; *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1.

have been held to be substantive[114]. But all limitation provisions can affect whether a plaintiff recovers. Questions of what heads of damage are allowable have been held to be substantive; but questions of quantification of damages have been held to be procedural[115]. But all questions about damages can affect how much a plaintiff recovers and, thus, statutes such as the NSW Compensation Act, which is in issue in this case, alter the rights of plaintiffs and, also, the obligations of defendants.

99 Two guiding principles should be seen as lying behind the need to distinguish between substantive and procedural issues. First, litigants who resort to a court to obtain relief must take the court as they find it. A plaintiff cannot ask that a tribunal which does not exist in the forum (but does in the place where a wrong was committed) should be established to deal, in the forum, with the claim that the plaintiff makes. Similarly, the plaintiff cannot ask that the courts of the forum adopt procedures or give remedies of a kind which their constituting statutes do not contemplate any more than the plaintiff can ask that the court apply any adjectival law other than the laws of the forum. Secondly, matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure. Or to adopt the formulation put forward by Mason CJ in *McKain*[116], "rules which are directed to governing or regulating the mode or conduct of court proceedings" are procedural and all other provisions or rules are to be classified as substantive[117].

100 These principles may require further elucidation in subsequent decisions but it should be noted that giving effect to them has significant consequences for the kinds of case in which the distinction between substance and procedure has

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114 *Maxwell v Murphy* (1957) 96 CLR 261; *Commonwealth of Australia v Dixon* (1988) 13 NSWLR 601 at 611 per Hope JA, 612 per Samuels JA; *Byrnes v Groote Eylandt Mining Co Pty Ltd* (1990) 19 NSWLR 13 at 25 per Kirby P, 39 per Hope AJA.

115 *Stevens v Head* (1993) 176 CLR 433 at 457 per Brennan, Dawson, Toohey and McHugh JJ; cf at 447-451 per Mason CJ. See also *Livesley v Horst Co* [1925] 1 DLR 159; *J D'Almeida Araujo Lda v Sir Frederick Becker & Co Ld* [1953] 2 QB 329; *Chaplin v Boys* [1971] AC 356; *Breavington v Godleman* (1988) 169 CLR 41.

116 (1991) 174 CLR 1 at 26-27.

117 *Stevens v Head* (1993) 176 CLR 433 at 445 per Mason CJ.

previously been applied. First, the application of any limitation period, whether barring the remedy or extinguishing the right, would be taken to be a question of substance not procedure (which is the result arrived at by the statutes previously referred to). The application of any limitation period would, therefore, continue to be governed (as that legislation requires) by the *lex loci delicti*. Secondly, *all* questions about the kinds of damage, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the *lex loci delicti*.

Conclusion

101 Development of the common law in the manner we propose is consistent with the assumption that underlies the State legislation with respect to limitation periods to which we have earlier referred and, also, with the terms of that legislation. That being so, there is no reason why the Court should leave the common law to operate in a manner that does not properly take account either of the fact of federal jurisdiction or the nature of the Australian federation.

102 Development of the common law to reflect the fact of federal jurisdiction and, also, the nature of the Australian federation requires that the double actionability rule now be discarded. The *lex loci delicti* should be applied by courts in Australia as the law governing all questions of substance to be determined in a proceeding arising from an intranational tort. And laws that bear upon the existence, extent or enforceability of remedies, rights and obligations should be characterised as substantive and not as procedural laws.

103 In the present case, the provisions of the NSW Compensation Act upon which the applicant relied (to deny or diminish the respondent's claim) should have been classified as provisions about a substantive issue which was governed by the *lex loci delicti*, New South Wales. The Supreme Court of the Australian Capital Territory was obliged to reach this result by application, pursuant to s 80 of the Judiciary Act, of the common law rules for choice of law which are part of the common law in Australia referred to in s 80.

104 Special leave should be granted, the appeal treated as instituted and heard instanter and allowed. The judgment of the Full Court of the Federal Court of Australia should be set aside and in lieu, the appeal to that Court allowed and the decision and order of the Full Court of the Supreme Court of the Australian Capital Territory set aside. In lieu of the order of the Full Court of the Supreme Court of the Australian Capital Territory, the appeal to that Court should be allowed, the order of the Master set aside and the matter remitted to the Master to be determined in accordance with these reasons. The costs of the whole of the

proceedings before the Master should abide the outcome of that hearing. Otherwise, there should be no order as to costs.

105 The respondent contends that he would be entitled to an award of damages in the sum of $1,689.75 under New South Wales law. This contention appears to turn upon the view that out of pocket expenses do not fall within the meaning of "economic loss" in s 151H of the NSW Compensation Act and are a category of damages the award of which is regulated by Div 3 of that statute. The operation of s 151H was not the subject of argument before the Master and we express no view upon the matter. The respondent's contention will be for determination by the Master, at the further hearing.

106 KIRBY J. This application for special leave to appeal, referred to a Full Court, concerns the choice of law rule applicable in the Australian Commonwealth. The facts, the provisions of the relevant legislation, the background to these proceedings, and the history of the applicable body of law, all appear in the reasons of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ ("the joint reasons"). I adopt that outline. I have come to similar conclusions.

Five questions

107 Five essential questions arise which this Court must answer to reach its orders. They are:

1. Is the present common law in Australia governing the choice of law[118], as applicable to the determination of a claim in respect of a civil wrong (tort), satisfactory?

2. Does the Constitution, properly understood, require a different choice of law rule for determining such a claim?

3. If the Constitution does not require a different rule, does the common law of Australia, conforming to the Constitution, suggest the need to re-express the current law?

4. If the current law is unsatisfactory, the Constitution does not oblige a different rule but the common law suggests a need for reformulation, should this Court stay its hand because the matter is one more appropriate to legislative rather than to judicial reform?

5. If the Court concludes that it can and should proceed to re-express the applicable principles for the choice of law to determine such a claim, what are those principles and, in particular, do different principles apply to a claim engaging federal as distinct from non-federal jurisdiction?

108 In my view the current laws are unsatisfactory[119]. Neither the provisions of

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118 See *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 39 applied in *Stevens v Head* (1993) 176 CLR 433 at 453.

119 The rule as formulated in *McKain* has been subjected to strong and sustained criticism. See Nygh, "The Miraculous Raising of Lazarus: *McKain v R W Miller & Co (South Australia) Pty Ltd*", (1992) 22 *University of Western Australia Law Review* 386 at 394; Pryles, "Of Limitations and Torts and the Logic of Courts", (1992) 18 *Melbourne University Law Review* 676; Juenger, "Tort Choice of Law in a Federal System", (1997) 19 *Sydney Law Review* 529 at 531. See also Pryles, "The Law Applicable to Interstate Torts: Farewell to Phillips v Eyre?", (1989) 63

(Footnote continues on next page)

the Constitution[120] nor the implications necessarily derived from its language and structure[121] yield a solution. Instead, the common law should be re-expressed to take into account the terms of the Constitution, the federal system of government it establishes and the Judicature for which it provides. This Court should not refuse to act in this case, leaving the matter for legislative reform[122]. It is possible to reformulate the applicable common law. This Court should do so, grant special leave and apply that law to the present matter.

An inappropriate borrowing from English law

109 The original source of the problem which calls for solution is the way in which this Court at first applied[123], and then adapted[124] and finally applied in a narrower expression[125], the traditional judicial formulation on the choice of law as propounded by the English Court of Exchequer Chamber in *Phillips v Eyre*[126]. A rule, expressed in England in respect of a suit brought there for an alleged assault and false imprisonment in Jamaica, came to control the approach to the choice of law in interjurisdictional cases within Australia and in other countries of the common law[127]. This was so despite the existence of many reasons suggesting the inappropriateness of the rule so stated for such widespread operation.

110 It was natural enough in colonial and post-colonial times for this development to have occurred. There are many similar borrowings in Australian

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Australian Law Journal 158 at 181 and Carter, "Torts in English Private International Law", (1981) 52 *British Year Book of International Law* 9.

120 Constitution, esp ss 117, 118. See also s 109.

121 Especially the integrated court system and unified common law. See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

122 cf *Lipohar v The Queen* (1999) 74 ALJR 282; 168 ALR 8.

123 *Koop v Bebb* (1951) 84 CLR 629 at 642.

124 *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20.

125 *Breavington v Godleman* (1988) 169 CLR 41 at 110-111; reaffirmed *Stevens v Head* (1993) 176 CLR 433 at 453.

126 (1870) LR 6 QB 1.

127 eg in Canada. See *McLean v Pettigrew* [1945] SCR 62.

law (extending even into constitutional elaboration[128]). This was the kind of unquestioning acceptance of English jurisprudence that occurred in the days of Empire. It was long reinforced in Australia by the supervision over Australian courts, including this Court, of the Privy Council. What is surprising is not that this occurred but that it endured for so long.

111 In the Canadian context the same tendency was explained by La Forest J, giving the reasons of the Supreme Court of Canada in *Tolofson v Jensen*[129]. He said[130]:

> "What strikes me about the Anglo-Canadian choice of law rules as developed over the past century is that they appear to have been applied with insufficient reference to the underlying reality in which they operate and to general principles that should apply in responding to that reality. Often the rules are mechanistically applied ... In dealing with legal issues having an impact in more than one legal jurisdiction, we are not really engaged in [a] kind of interest balancing. We are engaged in a structural problem."

112 In the nineteenth century, as his Lordship pointed out, there were "a number of forces that militated in favour of the English rule"[131], at least in the courts of the Empire. These included the power of the Imperial Parliament to legislate for the many British colonies and dependencies throughout the world and the "superintending judicial authority" of the Privy Council. The dominant position of Britain in the world also "led to the temptation, not always resisted, [to consider] that British laws were superior to those of other lands"[132]. Such considerations, and the ready familiarity of judges with the laws of their own forum, made it natural to expound and apply a choice of law rule that would

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128 See eg *Eastman v The Queen* [2000] HCA 29 at [248]-[256] as to the meaning of "appeal" in the Constitution, s 73.

129 [1994] 3 SCR 1022.

130 [1994] 3 SCR 1022 at 1046-1047.

131 [1994] 3 SCR 1022 at 1053.

132 [1994] 3 SCR 1022 at 1053. The holding in *Tolofson* has been criticised on the basis that, although likely to promote efficiency in the context of accident insurance schemes, it is unlikely to do so in other areas of law as complex factors accumulate to render formulated rules unjust in certain circumstances. See Walker, "Choice of Law in Tort: The Supreme Court of Canada Enters the Fray", (1995) 111 *Law Quarterly Review* 397 at 399.

enhance the role of the courts and law of the forum and diminish the significance of the "foreign law" of the place where the alleged wrong had occurred.

113 As La Forest J observed, "[a]ll the social considerations" which once favoured this approach "are gone now"[133]. Yet the ghost of *Phillips v Eyre* continues to walk, extracting a measure of loyalty in many jurisdictions. The time has come to lay that ghost to rest so far as the several Australian jurisdictions ("law areas") are concerned.

A confusion of related but different concepts

114 From the start, the language of the choice of law rules which Australian courts derived from *Phillips v Eyre* introduced a confusion that was to endure for a very long time. That confusion obscured separate concepts, wrapping them up in common terminology. Relevantly, the separate concepts include the issues of jurisdiction, *forum non conveniens*[134], procedural enforceability and choice of law[135].

115 The commingling of what we now label as rules governing "jurisdiction" and those rules dealing with "choice of law", in particular, is evident in *Phillips v Eyre*. A recognition of the clear differentiation between these two concepts was a long time in coming[136]. As the joint reasons point out, Windeyer J explained the difference in 1965[137]. But if the other members of the Court perceived it then, they made no reference to it. Again, there may have been practical reasons why this distinction would be blurred by English and dominion judges in imperial times. In modern circumstances, and at least within a single federal nation, there is no significant practical difficulty for a court in one law area to find and to apply the law of another law area of the federation. The attitudinal

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133 [1994] 3 SCR 1022 at 1053. In *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 at 1098 La Forest J expressed the view that the Canadian courts had made a "serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister-provinces".

134 The court whose jurisdiction is invoked by a person is judged not "convenient" in the legal sense for the exercise of the court's jurisdiction, which is therefore declined. See eg *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 566-570, 577-579.

135 *Tolofson v Jensen* [1994] 3 SCR 1022 at 1034.

136 *Tolofson v Jensen* [1994] 3 SCR 1022 at 1041.

137 In *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 41, in the aphorism "[a]ssumption of jurisdiction and choice of law are logically distinct".

and practical reasons that sustained the old approach in other places no longer apply. Indeed, they are inappropriate.

116 The establishment of jurisdiction in civil proceedings depends primarily upon having the parties to the proceedings lawfully before a court with the authority to deal with the proceedings[138]. But it may also require that consideration be given to whether, in terms of the actual law invoked to establish a cause of action, a party can prove that such law, in accordance with its terms, gives rise to a claim procedurally enforceable in the forum. A statutory cause of action, even if otherwise "tort-like"[139], may not be procedurally enforceable outside the law area in which the acts or omissions occurred giving rise to the claim. If, for example, a claim depends wholly on statute and is enforceable only in a specified tribunal and in a specified way (for example, one concerning entitlements to workers' compensation benefits or dust diseases entitlements), an attempt to enforce such an entitlement in a court of another law area may fail as misconceived[140]. A court of the same or of another law area might have no jurisdiction to entertain such a claim. An application to strike out, or dismiss, the claim would have to be upheld.

117 Such relief, and the determination of challenges alleging that the chosen forum is inconvenient[141], or that the claim is procedurally unenforceable, represent assertions of jurisdiction[142]. In appropriate cases where such considerations are relevant and are raised for interlocutory decision they would have to be decided by a court invited to grant relief in a case having some connection with a law area other than its own. Logically, such considerations ordinarily present themselves at the beginning of legal proceedings. That is why I prefer to deal with procedural enforceability as one of several preliminary

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138 By being present, or served with process when within the jurisdiction or otherwise rendered answerable to the jurisdiction of the court by the operation of valid and applicable "long arm" legislation. See *Flaherty v Girgis* (1987) 162 CLR 574.

139 "Tort-like" claims, although arising under statute, are sometimes treated as within the broad definition of tort. See Australian Law Reform Commission, *Choice of Law*, Report No 58, (1992) (hereafter "Law Reform Commission Report") at 66; Dicey and Morris, *The Conflict of Laws*, 11th ed (1987) at 1350.

140 cf *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554 at 567-573.

141 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247-248; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 566-570, 577-579; *Henry v Henry* (1996) 185 CLR 571 at 587; cf *James Hardie Industries Pty Ltd v Grigor* (1998) 45 NSWLR 20 at 35, 41.

142 *Tolofson v Jensen* [1994] 3 SCR 1022 at 1049.

issues. I accept that the result may be the same if such considerations are subsumed within the distinction between "procedural" and "substantive" matters[143]. But the nature of this kind of objection is such that, as a matter of practicality, it is usually likely to arise at the threshold of the proceedings.

118 Once jurisdiction is assumed, there remains the separate question of what law the court of the jurisdiction must apply. Only by recognising the distinction between these preliminary questions will the concepts of jurisdiction, inappropriate forum and procedural enforceability be kept separate and distinct from the choice of law. It is easy to confuse these points. By identifying them and marking them off as separate, the confusion of the past will be replaced by clarity of thought and greater ease of application of the applicable rules.

The essential federal consideration

119 The most serious defect in the adoption within Australia of rules for the choice of law pronounced by English courts with respect to wrongs that have occurred in foreign countries was the failure to appreciate the inappropriateness of an English approach to solve the problems of Australia. Even so great a judge as Windeyer J, as recently as 1964, felt able to say of the several Australian jurisdictions[144]:

> "The States are separate countries in private international law, and are to be so regarded in relation to one another."

120 Misled by this error, it was perhaps inevitable that courts in Australia, as in Canada and elsewhere, should continue to ignore the "structural problem" previously referred to or fail to consider how it was to be resolved "in a federal setting"[145]. Necessarily, within any federation there are constitutional imperatives that operate in ways quite different from the rules apt to the interface of the jurisdictions and laws of entirely distinct and independent countries.

121 The basic problem of persisting with the approaches to the choice of law rule as successively adopted by the English courts[146], and adapted by this Court, is the constitutional error involved in treating the several component law areas of

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143 Joint reasons at [97]-[100].

144 *Pedersen v Young* (1964) 110 CLR 162 at 170; cf *Laurie v Carroll* (1958) 98 CLR 310 at 331.

145 *Tolofson v Jensen* [1994] 3 SCR 1022 at 1047.

146 *Phillips v Eyre* (1870) LR 6 QB 1; *Machado v Fontes* [1897] 2 QB 231.

Australia as if they were, in relation to one another, "separate countries"[147]. Leaving aside for the moment any imperatives to be derived directly from the express commands of the Constitution[148], the whole purpose, character and organisation of a federation (at least one such as Australia) is inconsistent with such an approach[149].

122 A person against whom a civil wrong is committed within Australia might be unaware of the detail of the nation's constitutional arrangements. But that person is hardly likely to be unaware of the operation within the one country of differing legal regimes basically applicable in the different law areas into which Australia is divided (federal, State and Territory). As Mason CJ remarked in *Breavington v Godleman*[150]:

> "When an Australian resident travels from one State or Territory to another State or Territory he does not enter a foreign jurisdiction. He is conscious that he is moving from one legal regime to another in the same country and that there may be differences between the two which will impinge in some way on his rights, duties and liabilities so that his rights, duties and liabilities will vary from place to place within Australia. It may come as no surprise to him to find that the local law governed his rights and liabilities in respect of any wrong he did or any wrong he suffered in a State or Territory. He might be surprised if it were otherwise."

123 Whatever may be the rules applicable to the choice of law by the courts of one nation with respect to the law of another nation claimed to apply to the subject matter of the proceedings, different considerations arise within a federation. The moving force is not, as such, international comity but national integrity[151]. In substance this is because a federal nation is constituted by the people who make it up. They are entitled to expect, within its borders at least, an operation of the law that ultimately yields a single, certain and predictable legal outcome to any legal dispute[152]. The existence of separate law areas implies the

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147 *Pedersen v Young* (1964) 110 CLR 162 at 170.

148 Especially in ss 117 and 118.

149 *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839 at 879; 163 ALR 270 at 325; *R v Hughes* (2000) 74 ALJR 802 at 813-814; 171 ALR 155 at 170.

150 (1988) 169 CLR 41 at 78; cf *Tolofson v Jensen* [1994] 3 SCR 1022 at 1063.

151 *Clements v HM Advocate* [1991] SLT 388 at 393; *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 at 1098 per La Forest J.

152 cf *Breavington v Godleman* (1988) 169 CLR 41 at 121 per Deane J; *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 55 per Gaudron J.

possibility (at least so far as statute law is concerned) of apparent incompatibilities or inconsistencies that require resolution. To an extent, the Constitution itself provides explicitly for the resolution of some such inconsistencies[153]. However, apart from this, implicit in federation and in the division of the one nation into separate law areas defined in geographical terms is the fact that each law area will respect the entitlement of the other "to make and apply law within its territorial limit"[154]. Unlike the position that may arise with respect to the local enforcement of the law of a foreign nation, there are no reasons, within a federation such as Australia, meriting the public policy that protects the law of the forum and expels the law of the place where the wrong occurred[155].

124 Within a federal nation, principles of comity, that may in some circumstances lend a measure of effectiveness to foreign law, are reinforced, and even altered in their character, in respect of the law of another law area by feelings of common identity and national unity and by the operation of institutions which give expression to such feelings. In Australia, such institutions include the integrated courts system, the unified common law, the growth of federal legislation and the predominantly territorial concern of the statutes of the several States and Territories. It follows that to derive a choice of law rule for such a federation from principles expounded with respect to proceedings involving the law of foreign nations is fundamentally mistaken. To fashion such a rule without paying regard to its operation within a single federation is to leave out of the equation a most important legal consideration[156].

Increased mobility of persons, goods and services

125 Another factor in the Australian context which obliges a re-examination of the various adaptations of the rule in *Phillips v Eyre* is the different social and legal situation in which the problem of choice of law commonly presents itself today. One hundred and thirty years ago, when *Phillips v Eyre* was decided, interjurisdictional travel was relatively rare, slow and expensive[157]. The

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153 Especially ss 106, 107, 108 and 109. See Opeskin, "Constitutional Dimensions of Choice of Law in Australia", (1992) 3 *Public Law Review* 152.

154 *Tolofson v Jensen* [1994] 3 SCR 1022 at 1047.

155 cf Carter, "Torts in English Private International Law", (1981) 52 *British Year Book of International Law* 9 at 13.

156 cf *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839 at 862-863; 163 ALR 270 at 303.

157 cf *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463 at 496.

contemporary means of communication did not exist. The significance of this phenomenon was recognised in *Tolofson* where La Forest J remarked[158]:

> "[T]o accommodate the movement of people, wealth and skills across state lines, a byproduct of modern civilization, [legal systems] will in great measure recognize the determination of legal issues in other states. And to promote the same values, they will open their national forums for the resolution of specific legal disputes arising in other jurisdictions consistent with the interests and internal values of the forum state."

126 If this point has force in respect of global and other international movement, it has even greater significance for movement within the one federal nation[159]:

> "The nature of our constitutional arrangements – a single country with different provinces exercising territorial legislative jurisdiction – would seem to me to support a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country."

127 Facilitating increased mobility of persons, goods and services within a nation is usually one of the objectives of federation. In Australia, it is expressly protected by s 92 of the Constitution[160]. In consequence of such mobility, which has been greatly enhanced by the modern technology of travel and communications, the number of civil wrongs having a connection with two or more law areas of Australia was bound to increase substantially. The provision of a choice of law rule which recognises this development is essential.

Self-selection of venue and forum shopping

128 Within a federal nation such as Australia, the capacity of a party to legal proceedings to choose the forum within which to bring such proceedings can be one of the advantages of the interconnected polity. However, such a facility ought not to involve the capacity of one party seriously to prejudice the legal rights of an opponent. The legitimacy of "forum shopping" is the subject of much controversy[161]. An entitlement of a litigant to choose an advantageous law

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158 [1994] 3 SCR 1022 at 1047.

159 [1994] 3 SCR 1022 at 1064.

160 *Cole v Whitfield* (1988) 165 CLR 360; cf *AMS v AIF* (1999) 73 ALJR 927 at 935-936, 944-945, 955-958; 163 ALR 501 at 512-513, 524-527, 540-545.

161 See generally Law Reform Commission Report; *Ferens v John Deere Co* 494 US 516 at 527 (1990). In the United States, despite calls for rationalisation, there are

(Footnote continues on next page)

area within which to pursue its legal claims has sometimes been defended as a means of furthering the ends of material justice[162]. However, at least so far as the enforcement of legal rights for civil wrongs within the Australian Commonwealth is concerned, this viewpoint is a minority one and in my opinion correctly so[163].

129 It may be reasonable to recognise the right of a litigant to choose different courts in the one nation by reason of their advantageous procedures, better facilities or greater expedition. However, it is not reasonable that such a choice, made unilaterally by the initiating party, should materially alter that party's substantive legal entitlements to the disadvantage of its opponents. If this could be done, the law would no longer provide a certain and predictable norm, neutrally applied as between the parties. Instead, it would afford a variable rule which particular parties could manipulate to their own advantage. Such a possibility would be obstructive to the integrity of a federal nation, the reasonable expectations of those living within it and the free mobility of people, goods and services within its borders upon the assumption that such movement would not give rise to a significant alteration of accrued legal rights[164].

130 In Australia, the consideration of the mobility of people, goods and services within a federation therefore encourages both the broadest possible access to the available courts within the unified Judicature of the nation and the adoption of a choice of law rule which helps to promote an identical outcome for the parties' substantive rights, wherever in that nation those rights fall to be determined by a court of law.

Procedure versus substance

131 The distinction between procedural rights (which must be decided by the court of the law area in which the proceedings are brought) and substantive rights (which will be otherwise determined) is well settled in this area of discourse. However, the boundaries between the two categories are indistinct. What is "substantive" "shades off by imperceptible degrees into the 'procedural', and ...

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many choice of law approaches: Kay, "Theory into Practice: Choice of Law in the Courts", (1983) 34 *Mercer Law Review* 521 at 585.

162 Juenger, "What's Wrong with Forum Shopping?", (1994) 16 *Sydney Law Review* 5; cf Juenger, "Marital Property and the Conflict of Laws: A Tale of Two Countries", (1981) 81 *Columbia Law Review* 1061; Helfer, "Forum Shopping for Human Rights", (1999) 148 *University of Pennsylvania Law Review* 285.

163 cf *Tolofson v Jensen* [1994] 3 SCR 1022 at 1052.

164 *Tolofson v Jensen* [1994] 3 SCR 1022 at 1055.

the 'line' between them does not 'exist', to be discovered merely by logic and analysis, but is rather to be drawn so as best to carry out our purpose"[165]. Accordingly, differentiating between the two classifications is sometimes controversial. This is shown in many cases[166] where the line has been drawn by reference to the language of a disputed law rather than to its function and the consequences of its application[167].

132 According to the Canadian Supreme Court, legal writers of the civil law tradition are "mystified" by the decisions of common law courts to the effect that (depending on its language) a statute of limitation may be classified as merely "procedural". The explanation usually given for this surprising result is that many such statutes, according to their terms, do no more than remove the remedy in the courts of the jurisdiction which has enacted the statute[168]. Yet most law reform bodies that have examined this issue have concluded that statutes of limitation, whatever their language, should be classified as "substantive" and not "procedural"[169]. Within Australia, legislative reforms have sought to achieve this result[170]. The consequence of such legislation is effectively to reverse earlier court rulings.

133 The Canadian Supreme Court did not consider it necessary to await legislation to do away with this distinction in cases of such a kind[171]. It explained that "the purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of *both* parties"[172]. This

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165 Cook, *The Logical and Legal Bases of the Conflict of Laws* (1949) at 166 cited in *Tolofson v Jensen* [1994] 3 SCR 1022 at 1068; cf *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 24; York, "Let It Be: The Approach of the High Court of Australia to Substance and Procedure in *Stevens v Head*", (1994) 16 *Sydney Law Review* 403 at 405.

166 The cases on statutes of limitations are collected in the joint reasons at [98]; cf *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 40-44.

167 Law Reform Commission Report at 125ff.

168 See discussion *Tolofson v Jensen* [1994] 3 SCR 1022 at 1069.

169 Law Reform Commission Report at 133.

170 See eg *Choice of Law (Limitation Periods) Act* 1993 (NSW).

171 *Tolofson v Jensen* [1994] 3 SCR 1022 at 1071.

172 *Tolofson v Jensen* [1994] 3 SCR 1022 at 1071-1072.

Court should adopt a similar principle whilst recognising that there is no bright line between "substance" and "procedure". Doing so will, in turn, contribute to reducing the capacity of the parties to affect adversely the rights of others merely by electing to bring a claim in the courts of one law area of the nation rather than another.

134 Applying this principle, the terms of s 151G of the *Workers Compensation Act* 1987 (NSW), for example, are clearly part of the substantive law of the State of New South Wales, the Australian law area where the acts occurred that gave rise to the civil wrong for which the respondent sued. Provisions which affected the substantive entitlements of one party and the obligations of the other were not simply procedural.

Uncertainty and unpredictability of the law

135 The review of authority contained in the joint reasons demonstrates the serious divisions that have existed in this Court in recent years concerning the choice of law rule applicable to civil claims within Australia and the consequential attempts to find a formula that would command majority assent. Unfortunately, the present formula is still affected by the old thinking derived from *Phillips v Eyre*. It is insufficiently attentive to the federal context in which an Australian choice of law rule must be expressed. It responds inadequately to the increased mobility of people, goods and services within Australia and to the need for an efficient use of Australia's integrated court system. It also continues (as the present proceedings illustrate) to permit a party with a claim for a civil wrong to select a law area that will advantage that party's substantive legal interests at the cost of the substantive legal interests of the party's opponent. Furthermore, the approach hitherto adopted has paid insufficient regard to the particular consideration of federal jurisdiction in Australia. It addresses inadequate attention to the true foundation for distinguishing between matters of substance and matters of procedure. The present rule has created considerable confusion and difficulty of application[173]. It has led to many judicial calls for clarification by this Court[174].

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173 *Mason v Murray's Charter Coaches & Travel Services Pty Ltd* (1998) 88 FCR 308 at 321-322; *Jones v TCN Channel Nine Pty Ltd* (1992) 26 NSWLR 732 at 736; *Nalpantidis v Stark* (1996) 65 SASR 454 at 457, 470; *Wilson v Nattrass* (1995) 21 MVR 41 at 51, 57-58.

174 eg *Thompson v Hill* (1995) 38 NSWLR 714 at 743 per Clarke JA.

136 The goals that should apply to a "choice of law" rule are clear. It should offer results that are certain and predictable[175]. The present rules for the choice of law within Australia in respect of claims for civil wrongs, on the contrary, subject courts to "mental convolutions"[176] and parties to uncertainties and injustices that are inappropriate. Subject to what follows, I would therefore conclude that it is appropriate to reconsider the choice of law rule which is required by the common law of Australia.

A constitutional norm or constitutional context?

137 Having reached this point in my reasons, it is necessary to ask whether, as has sometimes been suggested in this Court, the Constitution itself mandates a particular choice of law regime[177]. The view has been expounded that the Constitution provides a choice of law rule either by reason of its express commands[178] or as an implication from the integrated Judicature and the unitary system of law for which the Constitution provides[179]. I have previously indicated a measure of sympathy for this thesis[180]. In this Court I have reserved my opinion on the point[181]. Certainly, s 118 of the Constitution, the most relevant provision, is more than merely evidentiary[182].

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175 Law Reform Commission Report at 59. Certainty of application was said to be the "overwhelming desideratum" of an international rule: *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 38.

176 Law Reform Commission Report at 130.

177 *Breavington v Godleman* (1988) 169 CLR 41 at 129-136 per Deane J; cf Gummow, "Full Faith and Credit in Three Federations", (1995) 46 *South Carolina Law Review* 979 at 1000.

178 For example, ss 106, 107, 108, 109, 117 and 118.

179 *Breavington v Godleman* (1988) 169 CLR 41 at 121 per Deane J; cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

180 See eg *Byrnes v Groote Eylandt Mining Co Pty Ltd* (1990) 19 NSWLR 13 at 19-21; *Goliath Portland Cement Co Ltd v Bengtell* (1994) 33 NSWLR 414 at 434.

181 *Lipohar v The Queen* (1999) 74 ALJR 282 at 318, 324; 168 ALR 8 at 58, 66-67.

182 *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565; *Breavington v Godleman* (1988) 169 CLR 41 at 96.

138 The proposition that the Constitution itself establishes a choice of law rule is not without difficulties[183]. Although this is by no means determinative, the Convention debates on what became of s 118 of the Constitution do not suggest a purpose on the part of the founders that the section should operate as a choice of law provision[184]. Nor is this the way that the analogous provision in the United States Constitution has been interpreted[185].

139 Until now, the majority view in Australia[186] has been that it is first necessary, by the application of the common law, to ascertain the law applicable to the particular case and only then does the obligation of which s 118 speaks attach[187]. In terms, s 118 is confined to a requirement that full faith and credit be given to the "laws, the public Acts and records, and the judicial proceedings of every State". No reference is made in the section to the laws of the Territories[188]. Thus no mention is made of the highly developed legislation of the self-governing Territories which are now distinct law areas within the federation. Moreover, the language of "faith and credit" is not apt to describe the making of a choice where there are two or more available possibilities. The absence of any language in s 118 of the Constitution to resolve such difficulties tends to

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183 Opeskin, "Constitutional Dimensions of Choice of Law in Australia", (1992) 3 *Public Law Review* 152.

184 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 8 April 1891 at 883; Pryles and Hanks, *Federal Conflict of Laws* (1974) at 63-66; Sykes and Pryles, *Australian Private International Law*, 3rd ed (1991) at 327-329.

185 United States Constitution, Art IV, s 1. That provision has not been regarded as "the solvent of interstate conflicts": *Breavington v Godleman* (1988) 169 CLR 41 at 83 per Mason CJ. See Jackson, "Full Faith and Credit – The Lawyer's Clause of the Constitution", (1945) 45 *Columbia Law Review* 1 at 12-14; Nadelmann, "Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal", (1957) 56 *Michigan Law Review* 33; *Allstate Insurance Co v Hague* 449 US 302 at 322 (1981); cf *Alaska Packers Association v Industrial Accident Commission* 294 US 532 at 547 (1935).

186 *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35 at 69 per O'Connor J; *Pedersen v Young* (1964) 110 CLR 162 at 165 per Kitto J; *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 24, 37, 46; *Permanent Trustee Co (Canberra) Ltd v Finlayson* (1968) 122 CLR 338 at 343.

187 *Breavington v Godleman* (1988) 169 CLR 41 at 150; *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 30, 55; *Stevens v Head* (1993) 176 CLR 433 at 439.

188 But see the Constitution, covering cl 5.

reinforce the argument that the section is not, as such, concerned with the choice of law.

140 A particular problem in elaborating the Constitution to require a choice of law rule is that, depending on its terms, the rule so chosen would be insusceptible to ready legislative amendment or variation[189]. A reflection on the legal literature in this area, including the reports of law reform bodies[190], demonstrates the complexities of the many issues to be addressed and the several questions that arise in applying any choice of law rule to the multitude of factual situations calling forth a choice. I will mention some of those problems later.

141 The foregoing are therefore reasons for caution in embracing a constitutional norm, at least at this stage of our understanding of the requirements of the Constitution, and particularly of s 118. That section has rarely come under the scrutiny of this Court. I have concluded that it is neither necessary nor appropriate in this appeal to resolve the outer limits of the section's specific obligations.

142 Nevertheless, for the reasons already stated, it is certainly necessary and appropriate to reconsider the choice of law rule required by the common law of Australia. Such reconsideration should result in the re-expression of the rule in a way harmonious to the text and character of the Constitution and the institutions which it establishes and recognises. The common law of Australia must conform to the Constitution[191]. It cannot run counter to the constitutional imperatives. The content of the common law adapts itself to the Constitution. So it does in the choice of law rule which the common law adopts for application by Australian courts.

143 The conclusion that s 118 and other provisions of the Constitution do not themselves provide a choice of law rule does not deny that the Constitution affects any choice of law rules enacted by the parliaments of Australia or expressed by the judiciary as rules of the common law. Thus, if such a choice of law rule directed attention to the law of another State, s 118 of the Constitution

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189 cf *Sun Oil Co v Wortman* 486 US 717 at 729 (1988).

190 See eg The Law Commission and The Scottish Law Commission, *Private International Law: Choice of law in tort and delict* (1990) and the Law Reform Commission Report.

191 *Breavington v Godleman* (1988) 169 CLR 41 at 135; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 140; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566; *Lipohar v The Queen* (1999) 74 ALJR 282 at 319; 168 ALR 8 at 60-61.

would, in some circumstances, prevent forum courts from disregarding legislation of that State on grounds of public policy[192]. This interpretation of s 118 recognises that the provision may have a significant and substantive operation, as well as evidentiary operation[193]. The emerging rule must thus be subject to the Constitution; but the Constitution does not yield its precise content.

Common law elaboration or judicial restraint?

144 It remains to decide whether the Court should stay its hand or respond to the request of the applicant to reformulate the choice of law rule applicable to proceedings such as the present. The need for care in responding to such an invitation is clear enough. The choice of law rule in England has been replaced by legislation[194] following earlier judicial attempts, presumably considered inadequate, to ameliorate the law in the House of Lords[195] and the Privy Council[196]. Should this Court delay the development of the common law to await equivalent legislative initiatives in Australia?

145 In a recent case bearing some analogies to the present, *Lipohar v The Queen*[197], I concluded that the Court should not elaborate a new common law rule but should leave it to the several parliaments of Australia to reformulate the law if they chose to do so[198]. However, *Lipohar* was a case in which those parliaments (or some of them) had already ventured into the field and had enacted specific legislation pursuant to recommendations of the Standing Committee of Attorneys-General[199]. It was also a case involving criminal

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192 *Jones v Jones* (1928) 40 CLR 315 at 320-321; *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565 at 577 per Rich and Dixon JJ, 587 per Evatt J.

193 *Stevens v Head* (1993) 176 CLR 433 at 464 per Gaudron J.

194 *Private International Law (Miscellaneous Provisions) Act* 1995 (UK).

195 *Chaplin v Boys* [1971] AC 356.

196 *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190; cf *Pearce v Ove Arup Partnership Ltd* [1999] 1 All ER 769 at 802-804.

197 (1999) 74 ALJR 282; 168 ALR 8.

198 (1999) 74 ALJR 282 at 320-321; 168 ALR 8 at 62.

199 *Criminal Law Consolidation Act* 1935 (SA), s 5C. There were statutes in other States and in the ACT. See *Lipohar v The Queen* (1999) 74 ALJR 282 at 321; 168 ALR 8 at 62.

liability. As I perceived it, it involved an attempt, effectively with retrospective operation, to introduce a new rule which would have enlarged the criminal liability of the accused in a way that was contrary to basic principle[200]. Such considerations do not apply in the present proceedings, although it must be recognised that any re-expression of the applicable common law does have an impact on the rights and obligations which the present parties (and others engaged in litigation) would otherwise have been entitled to regard as applicable to them under the previous formulations of this Court's choice of law rule.

146 In 1988 the Australian Law Reform Commission ("the Commission") was asked to produce a report on whether federal law "relating to the choice of law and of procedure to be applied in proceedings in federal courts, other courts exercising federal jurisdiction, Territory courts and other courts exercising jurisdiction under laws for the government of a Territory are adequate and appropriate to modern conditions"[201]. The Commission produced its report in 1992. That report made specific and detailed recommendations for legislative reform.

147 The reforms recommended covered a wide field of choice of law issues. Such issues ran far beyond those raised by the present application. They included choice of law in statutory compensation schemes[202], in respect of claims in contract[203] and in respect of matters involving succession and trusts[204]. They addressed, in considerable detail, the distinction between substance and procedure[205]. In tort and tort-like claims, the Commission came to conclusions in some ways similar to (but in other ways different from) those favoured in the joint reasons[206]. Most notably, in tort and tort-like claims, the Commission recommended (as the Law Commissions in England and Scotland had earlier done) that the court of the forum should have the power, exceptionally, to decide that the claim or question before it should be determined in accordance with the law in force in a place other than that "where the person was when the injury was

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200 *Lipohar v The Queen* (1999) 74 ALJR 282 at 322-324; 168 ALR 8 at 64-66.

201 Law Reform Commission Report at xvi.

202 Law Reform Commission Report, Ch 7.

203 Law Reform Commission Report, Ch 8.

204 Law Reform Commission Report, Ch 9.

205 Law Reform Commission Report, Ch 10.

206 Law Reform Commission Report at 175: Draft Uniform State and Territory Choice of Law Bill 1992, cl 6(8).

inflicted"[207]. No such "flexible exception" has recommended itself either to the Supreme Court of Canada[208] or to the majority in this Court[209].

148 The existence of a law reform report, with draft legislation, is not necessarily a reason to restrain this Court in a matter before it from deciding the case in a way that involves the elaboration or re-expression of the pre-existing common law. The general caution that must be observed in extending or modifying binding legal rules and principles is well recognised[210]. The methodology to be adopted where incremental development of the common law is appropriate is also settled[211]. However, the choice of law rule represents a part of the law which has been made by the judges. In the eight years since the Commission's report was delivered, no action has been taken by any parliament of Australia to implement its proposals, either with or without modification. Such legislation as has been enacted (dealing with the classification of limitations law) is entirely compatible with the common law elaboration now proposed[212]. No legislation exists which is incompatible with that exposition.

149 Injustice, uncertainty and unpredictability are the burdens of the present state of the law. It is the duty of this Court to address those concerns. It will remain open to the parliaments of Australia, within any constraints that are imposed by the Constitution or by current federal law, to consider and, if they choose to do so, to implement either the broader regime involving the proposals which the Commission has advanced, or different proposals. Nothing decided in this appeal will prevent that course.

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207 Law Reform Commission Report at 174: Draft Uniform State and Territory Choice of Law Bill 1992, cl 6(3).

208 *Tolofson v Jensen* [1994] 3 SCR 1022.

209 See joint reasons at [79]-[80]; cf *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 38-39.

210 *Breen v Williams* (1996) 186 CLR 71 at 115; cf *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26 at 36-41, 49-52, 58-59.

211 *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 225-226; *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26 at 36-41, 49-52, 58-59.

212 See eg *Choice of Law (Limitation Periods) Act* 1993 (NSW).

Recognition of certain difficulties

150 In reaching the foregoing conclusion, I have not overlooked the many complexities which a re-expression of a choice of law rule in respect of civil wrongs involves. These difficulties include identification of:

1. Where, in the case of civil wrongs involving injury or death, the liability arises for the purpose of the rule in a particular case[213].

2. The way in which the particular law area whose law applies is to be determined where a civil wrong has connection with several law areas within Australia[214].

3. What is to occur if the claim is framed both in contract and in tort and how the court chooses between the distinct approaches hitherto required by the common law according to this classification of the nature of the proceedings[215]. This consideration, although mentioned in this Court, does not fall to be decided in this application[216].

4. Whether a claim for contribution is of its character "tortious", and whether such a claim attracts the choice of law rule for civil wrongs[217].

5. Whether, in a particular case, a claim based on a statute is to be regarded as a "tort-like" claim or not[218].

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213 Law Reform Commission Report at 53-54, 56.

214 Law Reform Commission Report at 57. The Supreme Court of Canada has recognised that in some situations where an act occurs in one place but the consequences are directly felt elsewhere, the decision about where precisely the tort takes place may raise thorny issues: see *Tolofson v Jensen* [1994] 3 SCR 1022. Questions still arise in Canada having regard to the terms of provincial legislation: see *Cowley v Brown Estate* (1997) 147 DLR (4th) 282 at 290.

215 Law Reform Commission Report at 65.

216 See joint reasons at [5] having regard to the way the respondent's action was framed at trial.

217 Law Reform Commission Report at 64.

218 Law Reform Commission Report at 66.

6. Whether claims against insurers, subrogated to a party or claiming pursuant to statute, are within the choice of law rule selected for civil wrongs generally[219].

7. What law is applicable where the act or omission involved has not yet happened but is said to be imminent and a party seeks injunctive relief from a court[220].

8. Whether the parties are entitled by mutual agreement to choose as applicable the law of the forum and whether, if they do so, it is open to the court concerned to determine that it would not be appropriate to accept jurisdiction on such a basis[221].

9. How the choice of law rule adopted for the category of civil wrongs is to be applied or modified in the case of claims framed under fair trading laws[222], for breach of trust[223] etc.

10. What different choice of law rule should be adopted in the case of civil wrongs having an international character or at least some connection with a legal jurisdiction outside the several law areas of Australia[224].

151 All of the foregoing are matters which are addressed by the Commission. It is not necessary for this Court to consider them in this application. However, the existence of such issues must be recognised in order to test the propositions which are adopted and to accept that, in default of comprehensive legislation, any choice of law rule now stated will need further elaboration as different questions are presented to the courts involving different claims and parties in different factual situations.

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219 Law Reform Commission Report at 188.

220 Law Reform Commission Report at 55.

221 Law Reform Commission Report at 181: Draft Uniform State and Territory Choice of Law Bill 1992, cl 13.

222 Law Reform Commission Report at 179: Draft Uniform State and Territory Choice of Law Bill 1992, cl 10.

223 Law Reform Commission Report at 180: Draft Uniform State and Territory Choice of Law Bill 1992, cl 11.

224 Law Reform Commission Report at 142; *Tolofson v Jensen* [1994] 3 SCR 1022 at 1050. As to the difference see Dutson, "Choice of Law in Tort in Domestic and International Litigation", (1998) 26 *Australian Business Law Review* 238 at 253.

The applicable choice of law rules

152 *Re-expressed "rules"*: Having accepted the necessarily limited questions that are now for decision, and the desirability of, and justification for, the reformulation of the applicable rules for the choice of law, I would favour the following re-expression of the choice of law rules as applicable to interjurisdictional civil wrongs (torts) in Australia. Necessarily, the "rules" are stated in general terms and not in the prescriptive language of a statute[225].

153 *Application*: The rules apply to claims brought in an Australian court in respect of an intranational civil wrong, that is, one arising out of acts or omissions that have occurred wholly within one or more of the law areas of the Commonwealth of Australia. Whether the acts or omissions do so arise may involve a task of judicial classification[226]. In their terms, the rules do not apply where such acts or omissions occur, in whole or in part, outside the law areas of Australia, that is, where they involve an international element. The rules apply to acts or omissions constituting a civil wrong and those acts or omissions provided for by statute which are classified as analogous. They do not apply to other legal claims, such as those arising from breach of contract, breach of trust etc.

154 *Assumption of jurisdiction – preliminary issues*: Where the acts or omissions that give rise to a civil wrong occur in one Australian law area (State or Territory) and a party brings proceedings in respect of such wrong in another Australian law area (State or Territory) a number of preliminary issues may be presented. It may be useful to identify them, as such, in order to ensure that they are distinguished from considerations appropriate to the choice of law. I do not suggest that these preliminary issues will be raised, or that they will need to be determined, in every case. But where they do arise the court of the Australian law area in which the party brings the proceedings (the forum) *may* where relevant and *must* where required by law to do so:

(1) satisfy itself that it has jurisdiction to hear the proceedings having regard to the amenability of the parties to the court's orders and the court's jurisdictional competence in respect of such a claim;

(2) decide whether the proceedings before it should be stayed or dismissed on the grounds of *forum non conveniens*; and

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225 cf *James Hardie Industries Pty Ltd v Grigor* (1998) 45 NSWLR 20 at 35 per Spigelman CJ.

226 *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 at 468-469.

(3) satisfy itself that the claim is procedurally enforceable before it, that is, that it extends, in its own terms, to a proceeding brought in the forum.

155 Where the foregoing are decided favourably to the party propounding the claim, the court of the forum will not apply the previous double actionability rule as a prerequisite to the actionability of the proceedings. It will proceed to hear and determine the claim according to law.

156 Where proceedings are brought in the High Court, a federal court or other Australian court exercising federal jurisdiction, there is but one relevant Australian law area, namely the Commonwealth of Australia. Questions of the court's jurisdiction, whether the court is *forum non conveniens* and whether the claim is procedurally enforceable may still require decision when clearly and properly raised. But no question of double actionability arises. Accordingly, the double actionability rule shall not be applied.

157 *Choice of law*: Subject to the Constitution, where the court of the forum has jurisdiction which it exercises and where proceedings for a civil wrong are actionable in accordance with the preceding rules, the court shall, in determining the substantive rights and obligations of the parties, apply to the facts found, the common law of Australia as modified by the statute law of the place where the acts or omissions occurred that give rise to the civil wrong in question.

158 The problem of the case where acts or omissions occurred in more than a single law area of Australia (State or Territory) is (as the Supreme Court of Canada recognised) a tricky one. It may be appropriate to solve it by applying the substantive law of the law area within Australia with which the proceedings have their predominant territorial connection. No final conclusion on this aspect of the matter need be stated in the present proceedings.

159 Subject to the Constitution, where the proceedings are brought in the High Court, a federal court, a Territory court or another Australian court exercising federal jurisdiction, such court shall, in determining the rights and obligations of the parties, apply, as applicable, the law of the Commonwealth, the laws of each State or Territory as required by s 79 of the *Judiciary Act* 1903 (Cth) or, where so required, the common law in accordance with s 80 of that Act.

160 *Court procedures*: Subject to the Constitution and applicable federal law, for the purposes of proceedings of the kind previously referred to, the parties must take the court, whose jurisdiction is invoked, as they find it. That court's powers and procedures are those provided in the laws constituting that court and regulating its proceedings.

161 The court whose jurisdiction is invoked shall apply its own procedural laws. For the purpose of deciding whether a law of another law area is, or is not, "procedural":

(1) A law which in substance affects the existence, extent or enforcement of the rights and obligations of both parties shall not be classified as "procedural". Without limiting the generality of this statement, a law providing for the limitation of actions or a limitation on the recovery of damages shall be classified as "substantive"; and

(2) Other laws which are concerned with the actual conduct of court proceedings shall be classified as "procedural".

Application of the rules to the facts of the case

162 When the foregoing rules are applied to the present application, the outcome is as follows. The Supreme Court of the Australian Capital Territory ("the Supreme Court") had jurisdiction over the parties who were both lawfully before it. So much was not disputed. No point was ever raised, or would have been arguable, that the Supreme Court was otherwise than a convenient forum for the determination of the respondent's entitlements at law. Both parties were resident in the Australian Capital Territory. It was therefore unnecessary in these proceedings to consider that separate question. The respondent's claim in tort was not one which, by applicable legislation, was procedurally restricted to enforceability in a special court or tribunal. It was a claim in negligence at common law. Accordingly, there was no need to consider any impediment on that ground. None was suggested. There was thus no obstacle in the Supreme Court to the hearing and determination of the respondent's claim according to law.

163 The Master of the Supreme Court should not have applied a double actionability rule. In my view, the Supreme Court was exercising federal jurisdiction when it determined the respondent's claim[227]. Accordingly, s 80 of the *Judiciary Act* operated to pick up the common law in Australia to govern the Supreme Court as the "Court in which the [federal] jurisdiction is exercised". This included the common law of Australia governing choice of law which operates uniformly throughout Australia, subject to any lawful local statutory exceptions. There were no such exceptions here. The uniform common law rule for the choice of law therefore bound the Master to apply to the facts found, the common law, subject to local statutory provisions in the law area of the place where the acts or omissions occurred giving rise to the wrong in question.

164 In the present case, the foregoing meant the application of the common law of Australia as applicable in New South Wales, as modified in turn by any relevant statutory law of that State. The statutory modification applicable was

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227 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 73 ALJR 1324 at 1350-1351; 165 ALR 171 at 207.

that governing the recovery of damages in such claims. This was not a procedural law which could be ignored by the court of the forum because it was bound only by its own procedural rules. It was classified as a matter of substantive law. It was therefore to be applied by the court of the forum, that is, the Supreme Court. Once applied, it limited the recovery which the respondent might make in his proceedings in the Supreme Court. The limitation in question was the same whether the respondent brought those proceedings in a court of New South Wales, in the Australian Capital Territory or in any other court of Australia having jurisdiction in the case.

Orders

165 It follows that, to dispose of the application, I agree in the orders proposed by Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

166 CALLINAN J. This case raises a question as to the application, in proceedings brought out of New South Wales, of legislation enacted in that State to restrict the quantum of damages recoverable by persons injured in New South Wales in the course of their employment by employers entitled to be indemnified under policies of insurance effected pursuant to that legislation. It has been submitted that that question involves consideration of these further matters: what is the appropriate law to be applied in respect of torts wholly committed in one State or Territory of Australia and made the subject of proceedings brought in another State or Territory in Australia; whether ss 151F, 151G and 151H of the *Workers Compensation Act* 1987 (NSW) ("the Act") are substantive or procedural provisions for choice of law purposes; and, the relevance and operation in the context of this case, of Ch V of the Constitution.

Facts and Previous Proceedings

167 The respondent was employed by the applicant as a carpenter. On 4 July 1989 in the course of his employment, at Queanbeyan in New South Wales, he suffered injury when he tripped over some webbing. The respondent, conscious of the cap upon damages imposed by ss 151F, 151G and 151H of the Act, sued for damages for personal injuries in the Supreme Court of the Australian Capital Territory.

168 The sections provide:

"**151F General regulation of court awards**

A court may not award damages to a person contrary to this Division.

151G Damages for non-economic loss

(1) (Repealed)

(2) The amount of damages to be awarded for non-economic loss is to be a proportion, determined according to the severity of the non-economic loss, of the maximum amount which may be awarded.

(3) The maximum amount which may be awarded for non-economic loss is $204,000, but the maximum amount may be awarded only in a most extreme case.

(4) If the amount of non-economic loss is assessed to be $36,000 or less, no damages for non-economic loss are to be awarded.

(5) If the amount of non-economic loss is assessed to be between $36,000 and $48,000, the amount of damages to be awarded for non-economic loss is as follows:

Damages = [Amount so assessed - $36,000] x 4

(6) (Repealed)

(7) Division 6 of Part 3 (Indexation of amounts of benefits) applies as if the amounts of $204,000, $36,000 and $48,000 were adjustable amounts and were referred to in section 81(1). However, section 80(2) does not apply to the amounts of $36,000 and $48,000.

(8) If an amount mentioned in this section:

(a) is adjusted by the operation of Division 6 of Part 3, or

(b) is adjusted by an amendment of this section,

the damages awarded are to be assessed by reference to the amount in force at the date of injury.

151H No damages for economic loss unless injury serious

(1) No damages are to be awarded for economic loss unless the injured worker has received a serious injury or dies as a result of the injury.

(2) A serious injury is, if received before the commencement of Schedule 2(2) to the *Workers Compensation (Benefits) Amendment Act 1991*:

(a) an injury for which the compensation otherwise payable under section 66 for the loss or losses resulting from that injury is, in the opinion of the court, not less than 33 per cent of the maximum amount from time to time referred to in section 66(1), or

(b) an injury for which damages for non-economic loss of not less than $67,800 are to be awarded in accordance with this Division (whether or not compensation is payable under section 66).

(2A) A serious injury is, if received on or after the commencement of Schedule 2(2) to the *Workers Compensation (Benefits) Amendment Act 1991*:

(a) an injury for which the compensation otherwise payable under section 66 for the loss or losses resulting from that injury is, in the opinion of the court, not less than 25 per cent of the maximum amount from time to time referred to in section 66(1), or

(b) an injury for which damages for non-economic loss of not less than $48,000 are to be awarded in accordance with the Division (whether or not compensation is payable under section 66).

(3) (Repealed)

(4) Division 6 of Part 3 (Indexation of amounts of benefits) applies as if the amount of $48,000 were an adjustable amount and were referred to in section 81(1). However, section 80(2) does not apply to the amount of $48,000.

(5) For the purposes of determining whether an injury is a serious injury, the court has the powers under this Act of the Compensation Court relating to the reference of a matter to a medical referee or medical panel for report.

(6) If an amount mentioned in this section:

(a) is adjusted by the operation of Division 6 of Part 3, or

(b) is adjusted by an amendment of this section,

the damages awarded are to be assessed by reference to the amount in force at the date of the injury."

169 There is no statutory cap upon damages for personal injuries in the Australian Capital Territory.

170 The action was tried by Master Connolly on 31 January 1997. Liability was established. On 24 April 1997 the Master gave judgment in favour of the respondent in the sum of $31,689.75 with costs.

171 It was agreed before the Master that if ss 151F, 151G and 151H applied to the respondent's cause of action his entitlement to compensation would be confined to "out of pocket" expenses agreed in the sum of $1,689.75. Otherwise he would be entitled to an additional $30,000 assessed in accordance with the law of the Australian Capital Territory. However, it may be that some further consideration will need to be given to a dissection of the amounts in issue.

172 The applicant appealed to the Full Court of the Supreme Court of the Australian Capital Territory. The appeal was heard by Miles CJ, Crispin and Ryan JJ on 3 December 1997 and dismissed on that day. Their Honours, as had the Master, regarded themselves as bound by *McKain v R W Miller & Co (SA) Pty Ltd*[228] and *Stevens v Head*[229] to reach this conclusion.

173 The applicant then appealed, pursuant to s 24(1)(b) of the *Federal Court of Australia Act* 1976 (Cth), to a Full Federal Court constituted by O'Connor, Higgins, Cooper, Finn and Merkel JJ who unanimously dismissed the appeal for the same reason as the Full Court of the Supreme Court of the Australian Capital Territory had rejected the appeal from the Master. The Master and the Judges were all of the view that the provisions of the Act that they had to apply were relevantly indistinguishable from s 79 of the *Motor Accidents Act* 1988 (NSW)[230]

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228 (1991) 174 CLR 1.

229 (1993) 176 CLR 433.

230 "**Determination of non-economic loss**

(1) No damages shall be awarded for the non-economic loss of an injured person as a consequence of a motor accident unless the injured person's ability to lead a normal life is significantly impaired by the injury suffered in the accident.

(2) The amount of damages to be awarded for non-economic loss shall be a proportion, determined according to the severity of the non-economic loss, of the maximum amount which may be awarded.

(3) The maximum amount which may be awarded for non-economic loss is $180,000 (or the maximum amount declared for the time being under section 80), but the maximum amount shall be awarded only in a most extreme case.

(4) If the amount of non-economic loss is assessed to be $15,000 or less, no damages for non-economic loss shall be awarded.

(5) If the amount of damages to be awarded for non-economic loss in accordance with subsections (1)-(3) is more than $15,000 but less than $55,000, the following deductions shall be made from that amount:

(a) if the amount of damages is less than $40,000 - the amount to be deducted is $15,000;

(b) if the amount of damages is not less than $40,000 - the amount to be deducted is $15,000, or $15,000 reduced by $1,000 for every $1,000 by which the amount of damages exceeds $40,000."

which was held, by a majority of the Court (Brennan, Dawson, Toohey and McHugh JJ; Mason CJ, Deane and Gaudron JJ dissenting) in *Stevens v Head* to be procedural and not substantive provisions[231].

The Applicant's Appeal in this Court

174 The Court was told that this was a test case. The application for special leave was treated by the Court as if it were a hearing of an appeal. The grounds of appeal to this Court are as follows:

> "1. The Court erred in finding that Section 151G and Section 151H of the *Workers Compensation Act* 1987 (as amended) (NSW) are procedural laws governing the quantification of damages.
>
> 2. The Court erred in finding that the thresholds applied by Section 151G and Section 151H of the said Act were not relevantly different from the provision of the *Motor Accidents Act* 1988 (as amended) (NSW) considered by this Court in *Stevens v Head* (1993) 176 CLR 433.
>
> 3. The Court erred in finding that the substantive laws of the place of the tort did not partially extinguish or make contingent a civil liability of the kind the Respondent sought to enforce.
>
> 4. The Court erred in failing to consider the effect of the Constitution, in particular, failing to give full faith and credit to the laws of New South Wales."

175 Answers to the following questions may be sufficient to dispose of this application: what is the substantive law to be applied, the law of the place of the commission of the tort, or the law of the forum in which the proceedings were brought; and, is the law in issue here, the New South Wales provisions, substantive or procedural.

176 The starting point is to ascertain what choice of law should be made according to the law of the Australian Capital Territory, that is to say, the common law of the Territory on that topic; as there has been no legislative intervention there to alter the common law. And by reason of the holding of the majority of the Court in *Lipohar v The Queen*[232] I take that common law to be the common law of Australia.

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231 (1993) 176 CLR 433 at 460.

232 (1999) 74 ALJR 282 at 289 per Gaudron, Gummow and Hayne JJ; 168 ALR 8 at 18-19.

177 In *McKain*[233] the majority (Brennan, Dawson, Toohey and McHugh JJ; Mason CJ, Deane and Gaudron JJ dissenting) stated the "double actionability" rule in terms which were repeated by the same majority in *Stevens*[234]. The formulation differed slightly from what the Court held in *Koop v Bebb*[235] and *Anderson v Eric Anderson Radio & TV Pty Ltd*[236]:

> "A plaintiff may sue in the forum to enforce a liability in respect of a wrong occurring outside the territory of the forum if - 1. the claim arises out of circumstances of such a character that, if they had occurred within the territory of the forum, a cause of action would have arisen entitling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce; and 2. by the law of the place in which the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind which the plaintiff claims to enforce."

178 In *Koop* the second limb of the rule was stated in terms of non-justification according to the law of the State where the acts occurred, rather than actionability in that State[237]. In both *Koop*[238] and *Anderson*[239], however, the defendant's conduct would in fact have been actionable in both jurisdictions.

179 In this application, the applicant submits that the question of the applicable choice of law rule for cross-border torts (which had been the subject of full argument in *Breavington v Godleman*[240] and which resulted in a majority decision[241] in favour of the application of the *lex loci delicti*) was neither a live

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233 (1991) 174 CLR 1 at 39.

234 (1993) 176 CLR 433 at 453.

235 (1951) 84 CLR 629.

236 (1965) 114 CLR 20.

237 (1951) 84 CLR 629 at 642 per Dixon, Williams, Fullagar and Kitto JJ; see also *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 23 per Barwick CJ, 27-28 per Kitto J.

238 (1951) 84 CLR 629.

239 (1965) 114 CLR 20.

240 (1988) 169 CLR 41 at 45-48.

241 Mason CJ, Wilson, Brennan, Deane and Dawson JJ; Toohey and Gaudron JJ dissenting.

issue in *McKain*[242] nor the subject of any argument or submissions in that case, a matter which was adverted to by the Justices who were in the minority, Mason CJ[243], Deane J[244] and Gaudron J[245]. Nor was the correctness of the rule as formulated in *McKain*[246] challenged in *Stevens*[247].

180 The applicant contends that these and other matters provide a basis for the re-opening of *McKain* and *Stevens*. The other matters are of the kind discussed by Gibbs CJ in *The Commonwealth v Hospital Contribution Fund*[248], and about which I made some remarks in *Esso Australia Resources Ltd v Commissioner of Taxation*[249].

181 Although *McKain* and *Stevens* are recent cases, they have not proved to be of simple and easy application. They were decided by very narrow majorities. Furthermore, there are aspects of the reasoning of the majority in both cases that cannot be satisfactorily reconciled with quite a deal of the reasoning in *Breavington* in which there were six different judgments delivered.

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242 (1991) 174 CLR 1.

243 (1991) 174 CLR 1 at 15, 17.

244 (1991) 174 CLR 1 at 45.

245 (1991) 174 CLR 1 at 54, 56.

246 (1991) 174 CLR 1.

247 No party sought to re-argue its correctness: see (1993) 176 CLR 433 at 439.

248 (1982) 150 CLR 49 at 56-58. See also *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ.

249 (1999) 74 ALJR 339 at 368; 168 ALR 123 at 162.

182 The correctness of *McKain* and *Stevens* has been subject to strong and persuasive criticism by a number of authors: Nygh[250], Morris[251], Pryles[252], Juenger[253], Hancock[254], Carter[255] and the Australian Law Reform Commission[256]. The principle for which the cases stand has been replaced and amended by legislation in the United Kingdom[257]. There had been earlier attempts to ameliorate its consequences by the House of Lords[258] and the Privy Council[259],

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250 See Nygh, "The Miraculous Raising of Lazarus: *McKain v R W Miller & Co (South Australia) Pty Ltd*", (1992) 22 *University of Western Australia Law Review* 386 at 394:

> "I believe that the majority judgment in *McKain* is wrong in principle … There is no logical reason for the double-barrelled rule in *Phillips v Eyre*".

251 Morris, "Torts in the Conflict of Laws", (1949) *12 Modern Law Review* 248 and "The Proper Law of a Tort", (1951) 64 *Harvard Law Review* 881.

252 Pryles, "The Law Applicable to Interstate Torts: Farewell to Phillips v Eyre?", (1989) 63 *Australian Law Journal* 158 at 181 and "Of Limitations and Torts and the Logic of Courts", (1992) 18 *Melbourne University Law Review* 676.

253 Juenger, "Tort Choice of Law in a Federal System", (1997) 19 *Sydney Law Review* 529 at 531.

254 Hancock, *Torts in the Conflict of Laws* (1942) at 89 cited in Carter, "Torts in English Private International Law", (1981) 52 *British Year Book of International Law* 9 at 13.

255 Carter, "Torts in English Private International Law", (1981) 52 *British Year Book of International Law* 9.

256 Australian Law Reform Commission, *Choice of Law*, Report No 58, (1992), par 6.14.

257 *Private International Law (Miscellaneous Provisions) Act* 1995 (UK).

258 *Chaplin v Boys* [1971] AC 356.

259 *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190.

and it has been overturned judicially in Canada[260]. It does not represent the universal law of the United States[261].

183 The various matters to which I have referred provide compelling reasons why *McKain* and *Stevens* should be reconsidered.

184 The continued application of *McKain* and *Stevens* stands, as pointed out by Deane J in *Stevens*[262], as an open invitation to litigants to forum shop with consequences which could have a significant impact upon the economic, social and other policies of States which have legislated in respect of them differently from other States. This in turn could lead to diversity of judicial approach. It is undesirable that courts might be placed in a position which could lead to a perception, however unwarranted, that they are in competition with one another, or may be seeking to attract litigants from other courts. The present case is a clear example of forum shopping.

185 The applicant not surprisingly embraces in its submissions the reasoning of Mason CJ in *Breavington*[263]. In *Breavington*, the Court held, in a case in which a plaintiff who had sustained personal injuries in a motor vehicle accident in the Northern Territory in respect of which he sued for damages in Victoria, that the

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260 *Tolofson v Jensen* [1994] 3 SCR 1022.

261 There is no single "United States" position. Under the first *Restatement, Conflict of Laws*, it was stated, that, with minor exceptions, all substantive questions relating to the existence of a tort claim are governed by the local law of the place of the wrong.

Under the *Restatement 2d, Conflict of Laws*, the general principle is stated in §145:

> "The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in §6."

The rule for personal injuries is stated in §146:

> "In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in §6 to the occurrence and the parties, in which event the local law of the other state will be applied."

262 (1993) 176 CLR 433 at 462.

263 (1988) 169 CLR 41.

law to be applied by the Victorian court in determining the entitlement to damages, was the *lex loci delicti*, the law of the Northern Territory. Their Honours who sat on the Court (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ) as has been noted, reached this conclusion by different routes.

186 There is common thread in the reasons of the minority in *McKain* and *Stevens* which does accord with the decision and much of the reasoning in *Breavington*.

187 Speaking of statutes of limitation in *McKain*, Mason CJ said this[264]:

> "Moreover, it is simply no longer accepted that all matters which touch upon a remedy are necessarily to be treated as procedural or adjectival. Thus, the question of what heads of damage are recoverable is now treated as a substantive issue[265] and a statute placing a limit on the amount of damages recoverable is not regarded simply as a matter concerning quantification of damage (which, on traditional analysis, has been treated as a procedural consideration) but rather as an express limitation on substantive liability[266]. In *Breavington* I rejected the notion that the principles according to which damages for personal injury are to be assessed is a matter of procedure and concluded that the measure of damages is plainly a question of substantive law[267]. It follows that, even if it be correct to say that a statute of limitations only affects the availability or otherwise of a remedy, that circumstance, of itself, should not dictate that statutes of limitation be classified as procedural."

188 In *McKain*, Deane J adhered to what he had said in *Breavington*[268] and concluded that whether a matter was merely procedural or substantive depended upon the real effect of the application of the particular law. His Honour said[269]:

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264 (1991) 174 CLR 1 at 24.

265 *Chaplin v Boys* [1971] AC 356.

266 *Livesley v Horst Co* [1925] 1 DLR 159; *Allan J Panozza & Co Pty Ltd v Allied Interstate (Qld) Pty Ltd* [1976] 2 NSWLR 192; *Breavington v Godleman* (1988) 169 CLR 41.

267 (1988) 169 CLR 41 at 79.

268 (1988) 169 CLR 41 at 120ff.

269 (1991) 174 CLR 1 at 48-49.

> "In truth, however, the traditional distinction between right and remedy provides no acceptable basis for classifying limitation provisions as procedural and not substantive. As a matter of substance, the unavailability of a remedy by reason of a limitation period will ordinarily be of immeasurably greater significance than the theoretical persistence of the underlying right. Even as a matter of theory, the existence and extent of a remedy is commonly accepted as an incident and measure of a right. A limitation provision, such as s 36(1) or s 82(2), is not directed to regulating court proceedings in any real sense. Where applicable and invoked by a defendant, such a provision deprives a plaintiff of his or her right to a remedy and confers upon the defendant immunity from judgment. Where the law of one jurisdiction, under which a cause of action arises, provides that the action can be brought only within a designated period, the barring of the action after that period is as much a substantive provision of the law of that jurisdiction as was the provision, whether statutory or customary law, which gave rise to the cause of action in the first place. To say that a law which gives rise to a cause of action is substantive but a law which confines the bringing of the action and bars the remedy is merely procedural seems to me to confound reality and good sense." (footnote omitted)

189 Gaudron J said[270]:

> "It should be noted that the South Australian provisions, when construed in the way I have indicated, are not properly characterized as 'procedural' laws. On the basis that there is a complete dichotomy between 'procedural' and 'substantive' laws, they are to be characterized as 'substantive'."

190 Their Honours in the minority in *Stevens* regarded themselves as free to adhere to what they had said in *McKain*. Mason CJ in *Stevens* reiterated and expanded upon what he had said in the earlier case[271]:

> "As I observed in *McKain*[272], the simplicity of the proposition that matters of substance should be determined according to the law of the cause and matters of procedure according to the law of the forum belies the difficulty of identifying just what is procedural and what is substantive. In that case, I stated my reasons for rejecting the traditional equation drawn

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270 (1991) 174 CLR 1 at 62.

271 *Stevens v Head* (1993) 176 CLR 433 at 445.

272 (1991) 174 CLR 1 at 22.

> between matters relating to a remedy and matters of procedure[273] and proposed a new criterion for the substance-procedure distinction which has its genesis in the principal reason for drawing the distinction at all. That criterion characterized as procedural 'those rules which are directed to governing or regulating the mode or conduct of court proceedings'[274]. All other provisions or rules are to be classified as substantive.
>
> While Deane J and Gaudron J, to a lesser extent, expressed similar opinions in their separate judgments, the majority of the Court chose to follow the traditional approach to the substance-procedure dichotomy and, in the circumstances of that particular case, distinguished between statutes of limitation which cut off resort to the courts for enforcement of the claim and statutes which extinguish a civil liability and destroy a cause of action. That particular conclusion is relevant only by analogy in this case, however, which deals not with statutes of limitation, however described, but with provisions dealing with the awarding of damages."

His Honour later discussed the substantive nature of the process of the assessment of damages[275]:

> "In *Breavington*[276] and again in *McKain*[277], I expressed my view that provisions or rules dealing with the measure of damages are substantive in nature. In the latter case, Deane J expressed the same opinion[278]. Although, at first glance, this view might appear to be in conflict with the authorities noted above, a close analysis of precisely what is meant by the assessment or quantification of damages indicates that this conflict is illusory and also illustrates clearly that the appellant's argument must fail."

191 In *Stevens*, Gaudron J explained what had been decided in *McKain*[279]:

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273 (1991) 174 CLR 1 at 22-27.

274 (1991) 174 CLR 1 at 26-27.

275 (1993) 176 CLR 433 at 447-448.

276 (1988) 169 CLR 41 at 79.

277 (1991) 174 CLR 1 at 24.

278 (1991) 174 CLR 1 at 48.

279 (1993) 176 CLR 433 at 465-466.

> "The second matter is that no issue arose in *McKain* as to the substantive law to be applied in that case which was brought in New South Wales with respect to events in South Australia. It was common ground that it was the law of South Australia. Only two issues arose. The first was whether a distinction was to be made between 'substantive law' and 'procedural law', with the New South Wales Court applying its own procedural laws. The second was whether, if that distinction was to be made, a South Australian limitation provision was to be regarded as procedural or substantive[280]. Some passages in the majority judgment in that case may suggest that the law of the forum applies to determine the consequences which attach to interstate torts, or some of those consequences … But that is not a matter that was decided by that case. That is clear from the statement in that judgment that 'the plaintiff conceded that the substantive law of the place of the wrong is "imported into the forum" and that concession is consistent with the second part of the conflict of law rules as we have stated them'[281]."

192 In my opinion what should be regarded as procedural are the laws and regulations which are reasonable and necessary, in the *lex fori* for the conduct of the action only; that is to say the laws and rules relating to procedures such as the initiation, preparation, and the prosecution of the case, the recovery processes following any judgment and the rules of evidence. That a test of reasonable necessity is appropriate is consistent with the explanation of Sir William Beckett[282] quoted by Deane J[283] in *McKain*:

> "Its basis is an obvious practical necessity. In each country courts are organized in the manner found appropriate by the *lex fori*, which determines which courts have jurisdiction in different classes of cases, the method in which proceedings must be instituted and the pleadings, written and oral, conducted, the manner and the stage at which evidence must be given and judgment delivered, and the means by which the judgments can be executed. In all these matters it is obvious that an English court cannot be expected at one time to apply French and at another Japanese procedure, and it is impossible for any law other than the *lex fori* to apply. There is

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280 See, for their respective formulations of the issues, (1991) 174 CLR 1 at 18 per Mason CJ, 33 per Brennan, Dawson, Toohey and McHugh JJ, 46 per Deane J, 56 per Gaudron J.

281 (1991) 174 CLR 1 at 40.

282 Beckett, "The Question of Classification ('Qualification') in Private International Law", (1934) 15 *British Year Book of International Law* 46 at 66.

283 (1991) 174 CLR 1 at 49.

absolute unanimity in the systems of all countries that all these matters are governed by the *lex fori*."

193 In any realistic and practical sense the application of a statute of limitations will have the most profound of impacts upon the rights of the parties. With almost equal force the same may be said of provisions limiting either heads of damage or measures of damages, particularly in tort cases.

194 In tort cases the infliction of non-minimal damage is integral to the establishment of the tort and the availability of the remedy: damage is the gist of the action. The measure of damage for breach of contract has usually been regarded as a matter of substance. In *Ekins v East-India Co*[284] interest on damages for breach of contract was awarded in accordance with the law of the place of the contract[285]. In the first edition of Cheshire's *Private International Law*[286] the author notes that the measure of damage for breach of contract "belongs to the domain of substantive law". So too, when status is involved in a case, the courts look to the law where the status, for example of a married person, was created, the place of the marriage[287].

195 In the first edition of Dicey's *The Conflict of Laws*, the author stated[288]:

"Any rule of law which solely affects, not the *enforcement* of a right but the *nature* of the right itself, does not come under the head of procedure."

196 The same opinion as Mason CJ formed in *McKain* was expressed by La Forest J in *Tolofson v Jensen*[289]. His Lordship concluded that:

"the purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of *both* parties".

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284 (1717) 1 P Wms 395 [24 ER 441].

285 *Arnott v Redfern* (1826) 3 Bing 353 [130 ER 549]; *Fergusson v Fyffe* (1841) 8 Cl & Fin 121 [8 ER 49].

286 (1935) at 531.

287 *Berthiaume v Dastous* [1930] AC 79 at 81.

288 Dicey, *The Conflict of Laws* (1896) at 712.

289 [1994] 3 SCR 1022 at 1071-1072.

197 In the United States, the *Restatement 2d, Conflict of Laws* discusses the distinction between substance and procedure in these terms[290]:

> "These characterizations, while harmless in themselves, have led some courts into unthinking adherence to precedents that have classified a given issue as 'procedural' or 'substantive', regardless of what purposes were involved in the earlier classifications."

198 The *Restatement* also uses language such as "how its judicial machinery functions" and "administering the courts' processes"[291].

199 The statutory cap upon damages imposed by the Act is in truth a matter of real substance and should be so treated in the forum in which the trial took place.

200 I would uphold the appeal for the reasons I have stated: that ss 151F, 151G and 151H of the Act form part of the *lex loci delicti*. They are matters of substance and not procedure. They fell for application in the proceedings in the court of the Australian Capital Territory in which the respondent brought his action.

201 What I have held is sufficient to dispose of the case. I do not think it necessary or appropriate to formulate any different a rule from the double actionability rule that the majority stated in *McKain* and *Stevens* and which I have quoted earlier in these reasons. Nor is it necessary for me to look to the possible application or otherwise of s 118 of the Constitution for the resolution of this case.

202 I would say this however; that the double actionability rule does appear to me to have a real purpose to serve in the Federation. History shows that the model for s 118 of the Constitution, Art IV, s 1[292] of the Constitution of the United States has had a far from uniform construction in that country[293]. The proposition (slightly adapted) stated in *Pacific Employers Insurance Co v*

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290 §122, comment b.

291 §122, comment a.

292 "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

293 For example contrast *Alaska Packers Association v Industrial Accident Commission* 294 US 532 (1935) with *Pacific Employers Insurance Co v Industrial Accident Commission* 306 US 493 (1939).

Industrial Accident Commission[294], that a forum State should not be obliged to apply an obnoxious law of another State[295], is one which has the attraction of reserving to the States a right (in respect of a claim for a remedy in the forum that would not otherwise be available there) to reject that which is alien to the policies of a particular State.

203 Section 118 seems, I might say, to have been little discussed during the convention debates. In 1897, in Adelaide, Mr Barton (as he then was) gave several illustrations[296] of the intended operation of s 118 none of which would suggest that a jurisdiction should provide a remedy in its courts in circumstances in which that remedy is repugnant to the laws and policies of the jurisdiction in which a case is brought.

204 The respondent, after properly conceding that the point had not previously been taken, sought to argue that the respondent had a case for breach of contract also, and that the law applicable to that cause of action was the law of the Australian Capital Territory: that such a cause of action was implicit in the respondent's statement of claim; that that case had not been addressed by the intermediate courts; that accordingly the case should be remitted for that issue to be determined; and that, therefore, this was not an appropriate case for this Court to decide finally at this point. The argument, in that regard must be rejected. The pleadings do not allege any breach of contract. The allegation of "breach of duty" was made in combination with allegations and particulars of negligence only, and, were so described in the statement of claim. The absence of any reference anywhere to contract shows that the respondent chose to frame and pursue his rights by reference to tort exclusively. The applicant pleaded contributory negligence. The respondent filed no reply denying the availability of contributory negligence because his remedy was based in contract[297]. The case therefore was framed in negligence only and so litigated[298].

205 However, the parties are agreed that the matter does need to be remitted to the Master for further consideration. Why this is so is stated in the reasons of the majority which I do not repeat and with whose proposed orders I concur.

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294 306 US 493 (1939).

295 306 US 493 at 501 (1939).

296 *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 20 April 1897 at 1005-1006.

297 cf *Astley v Austrust Ltd* (1999) 197 CLR 1.

298 *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481; 60 ALR 68.