

INFLEXIBLY INFLEXIBLE: WHY CHOICE OF LAW IN TORT QUESTIONS STILL WON'T GO AWAY

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*The High Court of Australia recently changed the common law rule for choice of law in tort matters to a rule which requires the application of the law of the place of the tort. The change for domestic or intranational choice of law came in 2000 in *John Pfeiffer Pty Ltd v Rogerson*, and the change for international cases came two years later in *Regie Nationale des Usines Renault SA v Zhang*. In both contexts, the High Court opted for an inflexible rule which leaves Australian judges no discretion to apply any other law than that of the place where the tort occurred.*

*Four choice of law in tort cases decided by the High Court since *Zhang*, however, have made it very clear that flexibility can and does come in, even though the rule purports to deny it.*

This paper looks at these back-door varieties of flexibility and argues for a reconsideration of the value of an openly and transparently flexible rule.

I INTRODUCTION

In 2000, the High Court, in deciding *John Pfeiffer Pty Ltd v Rogerson*¹ ('*Pfeiffer*'), abandoned the rule in *Phillips v Eyre*,² at least as it applied to conflicts of tort laws between Australian jurisdictions. Academic commentators and law reform groups had been calling for someone – the Commonwealth Parliament, the state parliaments, or the High Court – to make this change for many years. An abortive attempt to move to a *lex loci delicti* rule had been made in *Breavington v Godleman*³ ('*Breavington*') in 1988. Finally, in 2000, we truly could dance on the grave of *Phillips v Eyre*.⁴

The decision in *Pfeiffer* must be applauded for its move to a straightforward, rational rule of applying the law of the place of the tort. If some were bemused by the High Court's reliance on rather difficult constitutional grounds for making this move, our minds were largely put at rest by the decision two years later in

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1 (2000) 203 CLR 503

2 (1870) LR 6 QB 1. The rule in *Phillips v Eyre* (which it is a pleasure to relegate to a footnote) applied forum law to foreign torts if the two limbs of the rule were satisfied: the matter would have given rise to liability in the forum if the events had occurred there, and the matter was in fact actionable in the place where the events did occur.

3 (1988) 169 CLR 41. In 1991 a bare majority of the High Court in *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 had re-endorsed the rule in *Phillips v Eyre* in a slightly different form after it had seemingly been abandoned in *Breavington*.

4 Matthew Goode, 'Dancing on the Grave of *Phillips v Eyre*' (1983-1985) 9 *Adelaide Law Review* 345.

*Regie Nationale des Usines Renault SA v Zhang*⁵ ('Zhang'), which extended the new choice of law rule to international conflicts purely as an exercise in proper maintenance of the common law.

Things were much better now.

And yet they were not perfect. For the High Court defied the academic and law reform advice and the international trend in one important respect. Both *Pfeiffer* and *Zhang* adopted an inflexible rule which applies the law of the place of the tort, even when the matter before the court is far more closely and meaningfully connected to some other jurisdiction.

In the decade leading up to these cases, the Australian Law Reform Commission had reported on choice of law in 1992 and recommended a *lex loci delicti* rule, which could be displaced only where there is 'a substantially greater connection with a place other than that where the tort occurred'.⁶ In the United Kingdom, since 1995, legislation had provided for a *lex loci delicti* rule to be displaced where 'it is substantially more appropriate' that another law apply.⁷ And, in 1971, the *Hague Convention on the Law Applicable to Traffic Accidents* provided for the application of the law of the place where the accident occurred *except* in a range of situations where the matter is more closely connected to another jurisdiction,⁸ while in 1973 the *Hague Convention on the Law Applicable to Products Liability* similarly provided a general rule of the law of the place of the injury, but with exceptions.⁹ And, since 1971, the *Restatement (Second) of Conflict of Laws*, in its treatment of personal injury torts, had called for the application of the law of the place where the injury occurred unless 'some other state has a more significant relationship ... to the occurrence and the parties'.¹⁰

Despite the weight of this opinion, the majority of the High Court in *Pfeiffer* rejected flexibility on the ground it would import an unacceptably high level of uncertainty into choice of law in tort cases, at least intranational ones. In *Zhang*, the majority simply held that the *lex loci* rule will not be subject to flexibility. Earlier in their judgment it had been suggested that the public policy exception to the application of foreign law would meet any need for flexibility in these international cases.¹¹

5 (2002) 210 CLR 491.

6 Australian Law Reform Commission, *Choice of Law Rules* 58 (1992) s 6.62.

7 *Private International Law (Miscellaneous Provisions) Act 1995* (UK) c 42, s 12(1).

8 *Hague Convention on the Law Applicable to Traffic Accidents*, opened for signature 4 May 1971, 965 UNTS 411, arts 3 and 4 (entered into force 3 June 1975).

9 *Hague Convention on the Law Applicable to Products Liability*, opened for signature 2 October 1973, 1056 UNTS 187, arts 5 and 6 (entered into force 1 October 1977).

10 *Restatement (Second) of Conflict of Laws*, §146 (1971).

11 *Zhang* (2002) 210 CLR 491, 515. The use of the public policy exception to provide flexibility is discussed in the second part of the paper.

Gary Davis made a number of trenchant criticisms of the rejection of flexibility in the intranational situations in his very thorough note on *Pfeiffer*.¹² Following *Zhang*, the criticism of the inflexibility was more muted.¹³ I suppose it was felt, after *Zhang*, that the matter was settled and that the flexibility debate was over. While the limited comments on that issue in *Zhang* could arguably be characterised as obiter, the majority's holding as to flexibility in *Pfeiffer* could not. This was because *Pfeiffer* was a strong case for flexibility in that most or all the relevant connections there were to the ACT, except for the fact that the injury actually occurred in New South Wales. The Court heard argument on the flexibility question and it was addressed squarely in the majority's reasons for decision.

One suspects that there was also a sense among academic commentators that the major battle (against the rule in *Phillips v Eyre*) had been won and perhaps there was little will left to keep the debate going. The reality is that there are very few choice of law in tort cases which come before the Australian courts and an inflexible *lex loci delicti* rule should dispose of the great majority of those satisfactorily.

It will be argued here, however, that the High Court's quest for certainty in this area of law was not only doomed, but misguided. It was doomed as the High Court's own recent decisions make clear.¹⁴ It was misguided because certainty and predictability, while desirable, can only be purchased at a price and sometimes that price is too high.

This article will first look at the High Court's decisions in four cases which have arisen since *Zhang*, with an emphasis on their implications for an inflexible certainty. Then the certainty/flexibility question will be considered in more general terms.

II ESCAPE DEVICES—ALIVE AND WELL

Brainerd Currie used the pejorative label 'escape devices' for some of the methods that counsel and judges had evolved to avoid the application of rigid, territorially based choice of law rules.¹⁵ These methods include characterisation, selecting the place of contracting or the place of the tort for example, renvoi, and invocation of the forum's public policy. Thus, characterising a matter as one of contract rather

12 Gary Davis, 'Case Notes: *John Pfeiffer Pty Ltd v Rogerson* – Choice of Law in Tort at the Dawning of the 21st Century' (2000) 24 *Melbourne University Law Review* 982.

13 Geoffrey Lindell, 'Case Notes: *Regie Nationale des Usines Renault SA v Zhang*: Choice of Law in Torts and Another Farewell to *Phillips v Eyre* but the *Voth* Test Retained for *Forum Non Conveniens* in Australia' (2002) 3 *Melbourne Journal of International Law* 364; Matthew Duckworth, 'Case Notes: *Regie Nationale des Usines Renault SA v Zhang*: Certainty or Justice – Bringing Australian Choice of Law Rules for International Torts into the Modern Era' 24 (2002) *Sydney Law Review* 569; Robert Yezerski, 'Cases and Comments: Renvoi Rejected?: The Meaning of the "lex loci delicti" after *Zhang*' (2004) 26 *Sydney Law Review* 273.

14 *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575; *Blunden v Commonwealth* (2003) 218 CLR 330; *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331; *Sweedman v Transport Accident Commission* (2006) 226 CLR 362.

15 Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963) 159.

than tort would invoke quite a different choice of law rule and perhaps lead to a very different result. Any possibility of locating the relevant connecting event, such as the place of the tort in more than one jurisdiction, created leeways of choice which again might affect the overall result in the case. When the court's own choice of law rule directs it to apply the law of another place, a willingness to look to the choice of law rules of that other place (*renvoi*) opens the possibility of applying a different law with, yet again, a different result. As a last resort, the forum could invoke its own public policy as a reason not to apply the law chosen by the relevant choice of law rule. These escape devices therefore rendered seemingly certain and predictable results anything but sure. It should be clear from the following discussion of the cases which have arisen since *Pfeiffer/Zhang* that the potential to escape their 'certain' rule is wide indeed.

A GUTNICK AND THE PLACE OF THE TORT

In *Dow Jones and Company Inc v Gutnick*¹⁶ ('*Gutnick*') the central issue was the place of the tort. Allegedly defamatory statements, uploaded onto an internet publication in the United States and downloaded by readers in Australia, led to Mr Gutnick's bringing suit in his home state of Victoria. The defendant sought a stay on *forum non conveniens* grounds. To succeed under the test articulated by the High Court in *Voth v Manildra Flour Mills Pty Ltd*,¹⁷ the defendant had to show that Victoria was a clearly inappropriate forum. One factor relevant to a determination of that issue was the law to be applied to the matter. Under *Zhang*, it was clear that the law of the place of the tort governed. But where had the tort occurred – in New Jersey and/or New York where the material was uploaded, or in Victoria where it was downloaded and perhaps read? If the rule in *Zhang* left room for flexibility, or if it had created a special rule for defamation cases as the ALRC report had recommended,¹⁸ the case could have been analysed in terms of the most appropriate law to be applied. As things stood, the case fell to be analysed in terms of technicalities of the law of defamation. Is there anything undesirable in that? I have no doubt the High Court justices, given the spotlight they were operating under with this case,¹⁹ were happy to be able to treat it as a blackletter defamation case, rather than having to apply an open-textured, overtly policy-driven choice of law analysis. But the reality that the case perhaps hides is that the strict, inflexible application of the *lex loci delicti* cannot resolve the most pressing choice of law torts questions facing our courts today.

16 (2002) 210 CLR 575.

17 (1990) 171 CLR 538.

18 ALRC 58, above n 6, s 6.57. The recommendation was for treating the residence of the plaintiff as the place of the tort.

19 Geoffrey Robertson QC appeared for the defendant, and intervenors included Amazon.com, Inc, Associated Press, Association of Alternative Newsweeklies, Bloomberg LP, Cable News Network LP, LLLP, Guardian Newspapers Ltd, Knight Ridder, Inc, Media/Professional Insurance, The New York Times Company, News Limited, Online News Association, Reuters Group PLC, Time Inc, Tribune Company, The Washington Post Company, Yahoo! Inc, Internet Industry Association, and John Fairfax Holdings Ltd. High Court Transcripts M3/2002 (28 May 2002). *The Age* carried the headline 'The World Logs on to Gutnick's Internet Case', D Farrant, *The Age* (Melbourne), 28 May 2002.

Despite hysterical newspaper headlines claiming the High Court of Australia had single-handedly brought the internet as we knew it to an end, the result in *Gutnick* seemed entirely right to most legal commentators.²⁰ Of course, Victoria was not a clearly inappropriate forum. Even if the Australian *forum non conveniens* test were easier to satisfy, this was not an appropriate case for its application. As a generality, defamation plaintiffs who choose to sue at home to protect their local reputations ought not find that their local courts are ‘inappropriate’ fora. This does not mean, though, that their local law, here Victorian law, is the obviously right law to apply to the substance of the defamation issues. If Victorian law is the law which should be applied in *Gutnick*, why is it appropriate? According to our rule from *Zhang*, it is appropriate because the tort occurred in Victoria. This premise, that the tort occurred in Victoria, in turn depended on technicalities of the law of defamation, rather than upon any concerns of the law regulating choice of law. This mechanical approach to choice of law has been widely, and rather thoroughly, condemned by commentators ranging from Walter Wheeler Cook to Peter Nygh.²¹

What *Gutnick* highlights for us is that there will always be cases where it is very difficult to feel that there is an obvious place of the tort, cases where reasonable minds will hold strongly differing views of where the tort occurred. In such cases, where the place of the tort is a strongly contested issue, surely other concerns must be brought in to decide the choice of law question. We see courts saying that the place of a tort may be here for jurisdiction purposes but there for choice of law purposes.²² If this is so, there must be choice of law concerns being invoked to place the tort sometimes. But what are these concerns? Our existing rule not only does not articulate them, it appears to deny their existence.

The problem highlighted by cases of internet defamation or fraud, of mass injury cases like the Agent Orange litigation, of environmental or industrial torts, is that they sometimes do not have a natural ‘place’, at least as our law now stands. Courts, in order to place such torts on a map, must let a variety of concerns influence them. To pretend, as our courts must under *Zhang*, that this process is certain and predictable, that it is mechanical rather than policy based, is not only deeply unsatisfying, but ultimately unsustainably transparent. In *Gutnick* the majority

20 *The New York Times* opined that the High Court had dealt ‘A Blow to Online Freedom’ on 11 December 2002. On the same day in *The Times* David Rowan’s headline was ‘Publish Online and Be Damned’. The *Financial Review* took a more realistic and legal approach in ‘*Gutnick*: A Storm in a Teacup’ on 12 December 2002.

21 See Lea Brilmayer, *Conflict of Laws: Foundations and Future Perspectives* (1991) 22-33 for an historical overview of the critiques by Cook and the American Legal Realists of the First Restatement’s attempts to impose rigid rules, and Peter Nygh and Martin Davies, *Conflict of Laws in Australia* (7th ed, 2002) 274-286.

22 *Gutnick* (2002) 210 CLR 575, 637 (Kirby J): ‘In *David Syme & Co Ltd v Grey* (1992) 38 FCR 303, 314, Gummow J suggested that there was no compelling reason why the “process of identification and localisation is to be performed in the same way in relation to both jurisdiction and choice of law”. His Honour went on to cite the following passage from Cheshire and North: “It has always been questionable whether jurisdictional cases should be used as authority in the choice of law context ... [W]hilst a court may be prepared to hold that a tort is committed in several places for the purposes of a jurisdictional rule, it should insist on one single *locus delicti* in the choice of law”’. See also Nygh and Davies, above n 21, 420.

observes that '[i]n considering where the tort of defamation occurs it is important to recognise the purposes served by the law regarding the conduct as tortious', and yet an inflexible rule does not allow consideration of these purposes to come into the choice of law exercise.²³

B BLUNDEN AND THE LAW OF THE PLACE OF THE TORT

There is no denying that *Blunden v Commonwealth*²⁴ ('*Blunden*') was an unusual choice of law case and perhaps big implications ought to be drawn from it with care. It arose out of the plaintiff's claim to compensation from the Commonwealth for injuries sustained in the collision between HMAS *Voyager* and HMAS *Melbourne* on the high seas in 1964. What, if any, statute of limitations should apply was in issue. The unusual aspect was that attempts to apply the *lex loci delicti* rule from *Pfeiffer/Zhang* were hampered by the fact that there was no law of tort or of limitations of actions in effect in the place of the tort as it had occurred on the high seas. Despite the rarity of tort claims arising in such legal vacuums, the Commonwealth invited the High Court to articulate a choice of law rule for such actions and gave a range of examples to indicate the potential need for a rule.²⁵ The rule which the Commonwealth preferred was a closest connection rule, ie apply the law of the place with the closest connection to the matter before the court.

And yet, even in this narrow category of case, the High Court was unwilling to compromise its stance on flexibility. A closest connection rule would smack too much of a proper law of the tort approach.²⁶ The degree to which the High Court seems spooked by the proper law of the tort is surprising and will be discussed below. At this point, though, the case is an example of the flexibility which exists within the question of identifying the law of the place where the tort occurred, flexibility which makes something of a mockery of the quest for certainty behind the strict *lex loci* rule.

In the result, the Court held that the applicable limitations act was that of the Australian Capital Territory as the law of the forum invoked by s 80 of the *Judiciary Act 1903* (Cth). As Mutton points out, this result undercuts certainty by encouraging forum shopping and making the applicable law dependant upon the choice of federal or non-federal forum, at least.²⁷

23 *Gutnick* (2002) 210 CLR 575, 600 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

24 (2003) 218 CLR 330.

25 Including torts committed aboard unregistered pleasure craft or unregistered pirate ships, by one of two swimmers in the middle of the ocean, on new volcanic islands, on a reef in the middle of the ocean, and in war zones where there is no regime recognised as being in control under Australian law. These are cited in Alicia Mutton, 'Choice of Law on the High Seas: *Blunden v Commonwealth*' (2004) 26 *Sydney Law Review* 427, 435 n 68 where it is also noted that the joint judgment dismisses these possibilities as too fanciful to require a choice of law rule of their own.

26 *Blunden* (2003) 218 CLR 330, 345 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

27 Mutton, above n 25, 334-337.

C NEILSON AND RENVOI

The Court's treatment of the renvoi issue raised in *Neilson v Overseas Projects Corporation of Victoria Ltd*²⁸ ('*Neilson*') goes much further in highlighting the shortcomings of an inflexible rule. Here the plaintiff, Mrs Neilson, had fallen and injured herself in China, in the apartment her husband's employer, Overseas Projects Corporation of Victoria Ltd, had provided for them. Specifically, she fell from a stairway landing that had no railing. She brought her suit in Western Australia where she was living once she returned to Australia. Chinese law, as the *lex loci delicti*, had a one-year limitations period for such matters, and Mrs Neilson was out of time if that law applied. Chinese law also provided for the application of the law of the place of the injury, but went on to state that '[i]f both parties are nationals of the same country or domiciled in the same country, the law of their own country or of their place of domicile may also be applied'.²⁹ This wording raised a possibility of renvoi, of applying the choice of law rule of the place of the tort with the result that Australian substantive tort or limitation law might apply rather than Chinese substantive law.

For the uninitiated, for a court to have regard to foreign choice of law rules opens the logical possibility of an 'infinite regression' if those rules would apply, say, the law of the forum, as the Chinese law would apply Australian law, but the law of Australia says apply Chinese law, which says apply Australian law. ... This is the renvoi problem. As a court must break the circle somewhere and, as almost any solution can be viewed as somewhat arbitrary, a high level of choice or flexibility comes in the door with the renvoi. And, of course, the decision to have regard to those choice of law rules, rather than looking only to the substantive foreign tort law, is a choice the court also makes.

The majority of the Court in effect accepted the possibility of renvoi in tort, even though they clearly wanted to distance themselves from such a general rule. Gleeson CJ sounded uncomfortable as he held that there was 'no evidence to suggest' that looking to Chinese choice of law rules would set up an infinite regression.³⁰ This was based on his view that there was 'no suggestion' that the Chinese choice of law approach would, in turn, pick up our own Australian choice of law rules.³¹ The risk of opening the door to renvoi, however, does not lie in there being evidence before the court that the other country would bounce the matter back to the forum, but in the logic of that ultimate possibility.

Gummow and Hayne JJ also tried to reassure us that the problem was not an abstract one of the logical absurdities of renvoi, but rather a practical one of the proper application of this specific Chinese law in this specific case.³² And yet, their

28 (2005) 223 CLR 331.

29 Ibid. This wording is taken from the judgment of Justice McHugh, 345-6. There were issues of the proper translation and meaning of the Chinese law, which are not relevant to the point being made here.

30 Ibid 341-2.

31 Ibid.

32 Ibid 362, 365.

decision will have the force of general principle.³³ The ‘scholarly debates’ as to the proper response to the possibility of renvoi were dismissed as being unhelpful to the judge deciding an actual case. These debates attempt to face the ‘intellectual challenge presented by questions of conflict of laws’ which in the quoted words of Kahn-Freund are ‘its main curse’,³⁴ and buying into them would come at a great cost to certainty and simplicity which, according to their Honours, should be the goal, even if it is not wholly attainable.

The discomfort the topic of renvoi causes for Gummow and Hayne JJ is perhaps most clear in their lukewarm tendering of the unconvincing solution offered by Scrutton LJ in *Casdagli v Casdagli* that, having allowed one bounce back (a single renvoi), the court may view the potential for further bouncing as ended:

[Lord Scrutton] suggested that one possible solution to the conundrum thus presented was to regard the reference to the law of the domicile as requiring reference back to the law of the forum ‘but not that part of [the law of the forum] which would remit the matter to the law of domicile, *which part would have spent its operation in the first remittance*’ (emphasis added).³⁵

The suggestion that the forum’s choice of law rules ‘spend’ their force in one application would indeed work very well as a practical solution, but it is far from satisfying as a theoretical explanation of that solution.

Kirby J was far more willing to engage with the reality of renvoi, but he ultimately expressed agreement with Gummow and Hayne JJ and with Heydon J to the effect that it is not necessary in this case to decide the general question of the application of ‘a principle of renvoi’ in Australian choice of law, or apparently even in Australian choice of law in tort.³⁶ For him, too, the question before the Court was the proper application of Chinese law to these facts.

Callinan J held that

although the *lex loci delicti* is to be applied to cases brought in Australian courts, if the evidence shows that the foreign court would be likely to apply Australian law by reason of its choice of law rules or discretions, then the Australian common law of torts should govern the action. This is a solution which offers finality and limits the need to search for and apply foreign law.³⁷

It is also a solution which suffers from the arbitrariness of most proposed solutions to the renvoi problem. It is perhaps worth recalling that Callinan J saw value in

33 Ibid 366-9.

34 Otto Kahn-Freund, *General Problems of Private International Law* (1976) 320, quoted in *Neilson* (2005) 223 CLR 331, 364 (Gummow and Hayne JJ).

35 *Casdagli v Casdagli* [1918] P 89 quoted in *Neilson* (2005) 223 CLR 331, 374 (Gummow and Hayne JJ), and also referred to at 415 by Callinan J.

36 Ibid 388.

37 Ibid 415.

the forum-wending rule of *Phillips v Eyre*, and so is perhaps happy enough with a single renvoi, which will give effect to forum (Australian) substantive law.³⁸

Heydon J said, and Kirby J agreed, that the ‘problem in this case is not to be solved by seeking to identify some principle of universal or general application. It is to be solved by construing Art 146’ [of the relevant chapter of the Chinese General Principles].³⁹ He cites the context of art 146 as a range of provisions which deal ‘exclusively with foreigners in relation to the civil law of China’ and concludes that the proper interpretation of art 146 is therefore that

It contemplates that when a Chinese court decides to apply the law of the country of which the parties are nationals or domiciliaries to a claim for compensation for damages resulting from an infringement of rights, it is to decide to apply that law in such a way as to prevent any remission of the controversy to China.⁴⁰

One could perhaps make the same argument about our own strictly inflexible choice of law rule for foreign torts, ie that by the same token our law also does not contemplate recourse to foreign choice of law rules.

The upshot of these judgments is that whenever the law of the place of the tort provides for the application of the *lex loci* but with flexibility, Australian courts must at least consider exercising that flexibility too. As noted above, many jurisdictions now do provide such a rule with such flexibility. This seems to mean that foreign flexibility now comes in the back door of Australian choice of law in tort, making the certainty and simplicity and predictability promised by our inflexible rule in *Zhang* rather illusory.

For example, imagine two Australian parties are travelling together in Britain and one is injured due to the negligence of the other. Back home in Australia the injured party brings suit. *Zhang* assures us that British law certainly applies. But when the court looks to British conflictual law, as *Neilson* requires it to do, it finds that British legislation calls for the application of the *lex loci*, unless

it appears, in all the circumstances, from a comparison of —

- (a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and
- (b) the significance of any factors connecting the tort or delict with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable

38 *Pfeiffer* (2000) 203 CLR 503, 202 (Callinan J). The remission back to Australian law here accomplishes the same result in an international context.

39 *Neilson* (2005) 223 CLR 331, 420 (Heydon.J).

40 *Ibid.*

law for determining those issues or that issue (as the case may be) is the law of that other country.⁴¹

According to the various judgments in *Neilson*, the Australian court must now consider whether the British law, properly construed, means that a British court would apply Australian law to this case.

Despite the attempts in *Neilson* to present that question as a straightforward one of statutory interpretation, it is a very difficult one indeed for all the reasons that renvoi is viewed as difficult by any judge, or commentator, or student who has tried to understand and articulate it. Ultimately, the *Neilson* Court's attempts at minimising the complexity and implications of the question fail once it is understood that all renvoi cases could as convincingly be characterised as mere exercises in construing the foreign choice of law rules. The key choice the court makes is whether to have regard to foreign choice of law rules *at all*, not how to construe them once their relevance is admitted. Once this relevance is admitted, the concept of renvoi is engaged whether the court wishes it to be or not.

One must be curious as to why the High Court did engage with the interpretation of Chinese conflicts rules in *Neilson*, when there was a mass of persuasive precedent and commentary rejecting any renvoi in tort.⁴² A cynical suggestion would be that the judges felt that this was an appropriate case for flexibility, but that they felt a bit sheepish about reversing themselves on that point so soon after *Zhang*. Such cynicism regarding the use of renvoi as an escape device from the rigours of a rigid rule would not be surprising.

My own suspicion is less that the judgments are result-driven than that they display a level of contempt for the difficulties presented by this area of law. Intellectual conundrums and mental puzzles may be the bane of the conflict of laws, but the solution surely is not to dismiss the difficulties logically raised by the law in this area as mere mind games indulged in by scholars. Such contempt for the complexities of conflicts cases and the thought that has gone into resolving these may explain the High Court's choice of an inflexible rule in *Pfeiffer* and *Zhang* to begin with.

D SWEEDMAN AND CHARACTERISATION

In *Sweedman v Transport Accident Commission* ('*Sweedman*'), the Motor Vehicle Accidents Commission of Victoria sought indemnity from the New South Wales owner of a car driven by the tort-feasor according to the provisions of the Victorian *Transport Accident Act 1986*. The claim to indemnity arises out of a tort originally. Of course, statutorily created rights such as this have long plagued courts faced with deciding whether to treat the issue as one of choice of law or of statutory construction/extraterritorial validity. And courts have chosen on occasion to characterise such claims arising from such statutes as tort, contract, or neither.

41 *Choice of Law (Miscellaneous Provisions) Act 1995* (UK) s 12.

42 Most notable and relevant perhaps is the ALRC's recommendation of no renvoi in intranational cases and none at all except in cases involving status. ALRC 58, above n 6, s 4.12.

Yet it is worth pointing out that the ALRC recommendation had been to treat them as ‘tort-like’ for choice of law purposes.⁴³ The majority of the High Court in *Sweedman*, however, characterised the claim as ‘a quasi-contractual cause of action in the nature of a quantum meruit’.⁴⁴ This characterisation obviously had the effect of taking the whole matter out of the reach of the rigid *lex loci delicti* rule of *Pfeiffer*. The relevant choice of law rule became instead the law with the closest and most real connection to the matter.

In his discussion of the choice which courts have in characterising matters in order to invoke a choice of law rule, Nygh had advocated what he called a functional approach to characterisation, rather than an analytical or mechanical one. In critiquing the non-functional approach to choice of law method, specifically as it is used in characterisation, he said ‘[s]ince abstract qualities are fictions the courts are in fact exercising a discretion for which they do not have to account’.⁴⁵

Whether the tort-like character, or the contract-like character, or whatever character the matter is given by the courts is fictional, it is clear that courts have a good deal of choice at the characterisation stage in some cases. *Sweedman* is such a case. The escape device of characterisation is available to avoid the necessity of applying the law of the place where the tort actually happened (New South Wales). Not only did it invoke a different choice of law rule, but a highly flexible one at that. Thus Callinan J would have characterised the matter as one of tort, but if he had used the majority’s choice of law rule for quasi-contract or restitution (of applying the law with the closest and most real connection), he would have found that to be the law of New South Wales, whereas the majority had found it to be the law of Victoria.

These four cases make plain the inadequacy of an inflexible, cut and dried *lex loci delicti* rule. If a desirable degree of flexibility is to be sacrificed for the sake of certainty and predictability, and the *Pfeiffer* majority clearly says that is the rationale behind its opting for inflexibility, then these cases demonstrate that the sacrifice has been in vain. If renvoi, the place of the tort and characterisation are still available ‘escape devices’, the desired certainty and predictability will not flow from the application of a rigid rule. So we have lost all the benefits of flexibility and have gained little or nothing in return.

III A MORE GENERAL LOOK AT INFLEXIBILITY

The problems with an inflexible rule are not limited to the ease with which it can be circumvented. The power of flexibility to give satisfactory results in the few cases where the general rule will not be lost.

43 ALRC 58, above n 6, s 6.77. See also Nygh and Davies, above n 21, 432-3.

44 *Sweedman* (2006) 226 CLR 362, 383 (Gleeson CJ, Gummow, Kirby and Hayne JJ) quoting Nettle JA, who adopted an approach taken by Bray CJ in *Nominal Defendant v Bagor's Executor and Trustee Company Ltd* [1971] SASR 346, 365-366; *Hodge v Club Motor Insurance Agency Pty Ltd* (1974) 7 SASR 86, 91.

45 Nygh and Davies, above n 21, 284.

Of course, flexibility is always at the cost of certainty and predictability. And yet, in most areas of law, most of the time, a degree of flexibility is valued above absolute certainty.⁴⁶ The majority in *Pfeiffer* said that courts, parties and insurers need certainty in this area, but surely certainty is needed in all areas of law. Why is the need greater here? I suspect there is not greater need for predictability, but rather a greater perception of long-standing uncertainty about where this area of law has been heading, which has perhaps produced a higher level of anxiety among legal advisors, parties and insurers. What these parties desperately needed and deserved was a sensible rule, not necessarily a rigid rule. Before *Pfeiffer*, the uncertainty in choice of law in torts was not due to any flexibility within the existing rule, but to the irrationality of and conflicting judicial attitudes towards the existing rule. Thus the rigidity the High Court introduced addressed a non-existent problem.

In other words, what our choice of law in tort rule should *be* had been a difficult and highly contested question for some time leading up to the decisions in *Pfeiffer* and *Zhang*. The High Court had shown itself divided as well as willing to change and unchange the rule at short notice.⁴⁷ Uncertainty ruled the field. Predictability was at a low ebb. So it is not surprising the *Pfeiffer* Court wished to settle the question with some conclusiveness. A workably certain and predictable rule, though, did not need to be rigid and unyielding.

The reasons given by the majority in *Pfeiffer* for a rigid rule are not terribly persuasive if examined closely. There is no separate attention given to the proposal of the ALRC, or the example of the British legislation, or to the various academic and judicial pleas for flexibility. The whole idea of flexibility is instead conflated with the proper law of the tort approach.

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.⁴⁸

Not only does the majority in *Pfeiffer* invoke the uncertainties of a proper law rule as a reason for total rigidity, but the spectre of the American version of the proper law approach is called up. And to further muddy the argument, the proper

46 Mortensen comments that our choice of law rule for torts is 'one of unusually stark simplicity in choice of law – and, for that matter, in the common law generally'. Reid Mortensen, *Private International Law in Australia* (2006) 425.

47 *Breavington* (1988) 169 CLR 41, which discarded the rule in *Phillips v Eyre* by a majority of four to three with three separate grounds offered in the three majority judgments, was in turn overruled in effect by *McKain v Miller* (1991) 174 CLR 1. The 'almost intolerable confusion surrounding the choice of rules in tort' prior to *Pfeiffer* and *Zhang* is well described in Lindell, above n 13, 365-368.

48 *Pfeiffer* (2000) 203 CLR 503, 538.

law approach is, in turn, conflated with governmental interest analysis, again as practiced in the United States. So any flexibility at all equals the 'very great uncertainty' that is (rather blithely) stated to exist in the United States.⁴⁹

The conflict of laws is certainly complex in the United States but the cause has not been shown to lie in the flexibility inherent in the proper law of the tort approach taken in some states. The lack of predictability and certainty which does exist in the American cases is primarily a product of the number of jurisdictions at play in the American conflictual landscape and of the lack of jurisdiction of the US Supreme Court to set choice of law rules for the nation. Each state is free to adopt its own approach to choice of law questions.⁵⁰ And transactions across state lines throw up more choice of law cases there, as the common law generally differs from state to state in ways the appellate jurisdiction of the Australian High Court prevents from happening here. The use of jury trials in many civil actions in the United States raises further complications.⁵¹ This was always going to be a messy situation, even if each US state nominally adopted the same rule. It is worth noting that the seemingly rigid rules of the First Restatement were not able to produce certainty and predictability in the American context. By these same tokens, or rather the absence of them, the situation in Australia simply does not present the potential for such chaos no matter what rule the High Court adopts.

Another factor destabilising the conflict of laws in America is the intellectual warring in both conflicts scholarship and conflicts cases there surrounding competing notions of interest analysis in recent decades. But, of course, interest analysis is not *necessarily* a key component of a proper law approach, and a proper law approach is not *necessarily* a component of a flexible approach.

Thus the majority of the High Court did not really offer any reasons not to soften the *lex loci delicti* rule with a 'flexible exception'.⁵² The case which has been made by commentators, law reform bodies, and legislators for a strong default rule in favour of the law of the place of the tort coupled with a discretion to apply another law if that other law were more really, substantially or significantly connected to the matter is not answered by the Court.⁵³ Rules articulated in terms of real, substantial or significant connections present courts with discretion, and that means with some hard questions. Of course, reasonable minds will differ on exactly when the connections to a place other than the place of the tort are real, substantial or significant *enough* to override the default rule. But when those commentators, law

49 Ibid.

50 And they do. In his yearly survey of conflict of laws cases, Symeonides charted seven separate approaches taken by states to choice of law in tort questions. Symeon C Symeonides, 'Choice of Law in the American Courts in 1997' (1998) 46 *American Journal of Comparative Law* 233, 266. In the same year the author reports that American choice of law cases – of all types – were holding steady at around a thousand per year.

51 Ibid 236. Here Symeonides notes a case where the issue arose as to whether the question of which law had the most significant relationship to a matter was one for the judge or the jury.

52 It seems to be the convention to disown the ugliness of this phrase through the use of inverted commas.

53 See text accompanying n 6-10 above.

reform bodies and legislatures opt for a flexible rule, they must believe our judges are up to this difficult task.

As for the needs of parties for certainty in the law, it is unclear why parties to a tort choice of law case are more in need of knowing exactly what the law will be before litigating, than are parties in the wide range of other matters which give some discretion or flexibility to judges. Flexibility would of course be productive of a degree of doubt as to a party's chances in pursuing or defending litigation. But the question is: *should* there be doubt because interests and values other than those of expedient settlement for insurance companies are in play? Great slabs of our law could be discarded if expediency were the only goal of law. More specifically, and as Gary Davis and Geoff Lindell have pointed out,⁵⁴ our choice of law in contract rule requires our courts to ascertain and apply the proper law of the contract. Now, it is true the notion of 'the proper law' in tort is not the very same as the notion of 'the proper law' in contract. But, in both, it grants a degree of open-endedness and discretion. It remains a mystery, following the cases in which the Court has applied its inflexible rule, why the needs of parties and advisors to tort matters cannot be met with a proper law approach, while the needs of commercial players can.

The majority in *Pfeiffer* also expressly cited the needs of insurers as relevant, but insurers were not parties before the Court, and argument had not been heard on their needs. I have great confidence in the abilities of actuaries employed by insurance companies to make accurate, or at least profitable, estimations of the exposure of insurers to liability, whatever the choice of law rule our courts endorse. And the place of the tort is not more predictable than other choice of law rules until the tort has occurred. So this certainty is useful only in settlement negotiations, rather than earlier in decisions as to whether to insure, and at what premium, and on what terms. John Gava and I have argued elsewhere that courts are often poorly equipped to make law to serve the needs of the marketplace and, more importantly, that this is not their proper role.⁵⁵ The majority's consideration of the needs of insurers in fashioning the choice of law rule in *Pfeiffer* is worrying in both these senses.

So the reasons against flexibility don't seem to stand up.

What are the reasons *for* flexibility other than its inherent usefulness in preserving a court's power to do justice in the individual case? The ubiquity of the suggested exception to the *lex loci delicti* rule, the instance where the parties' connections are all with one jurisdiction, while the tort occurred in another, tells us that there is at least an intuitive sense that it may be right in these cases to apply the parties' own, or personal, law. But this intuition is firmly grounded in some very sensible and rational realities.

One basis grounded in notions of political rights has been espoused by Lea Brilmayer. She argues that there is a fundamental right to be left alone by political systems into which one has no input and with which one has no voluntary

54 Davis, above n 12, and Lindell, above n 13.

55 John Gava and Janey Greene, 'Do We Need a Hybrid Law of Contract? Why Hugh Collins is Wrong and Why it Matters' (2004) 63 *Cambridge Law Journal* 605.

affiliation.⁵⁶ To think about this point in the Australian context, imagine a South Australian couple go on a holiday into Victoria where the woman is injured due to the man's negligent driving. Further imagine that she later sues him in the courts of South Australia and that unlimited common law damages are available there. The argument is made by his insurer that Victorian law should apply, which, we will imagine, strictly limits damages in automobile accident cases. Brilmayer's point, transplanted from its American context, is that in such a case the parties had been living in, and presumably entitled to vote in, South Australia where they thus had the opportunity to influence the shape of the law. On the other hand, they had had no opportunities whatever to vote against or lobby against the caps on damages under Victorian law.

In a related argument, Jaffey claims that it is never unjust to apply a party's 'own' law to him or her.⁵⁷ Not only do parties have input into their own law, but they can be assumed to know of it and to insure in accordance with it. In contrast, the High Court cites the statement of Catherine Walsh to the effect that personal connecting factors are giving way across the board in the conflict of laws to territorial ones which link events to a law area.⁵⁸ Walsh's focus appears to have been product liability cases. But in contract we can see a contrary trend in the increasing weight given to mandatory laws of jurisdictions whose connections to the matter may be heavily influenced by the parties' personal law(s).⁵⁹ And of the multitude of approaches taken in tort noted above, many make the personal connections of the parties highly relevant.

Insurance and compensation schemes, at least in motor vehicle accident cases, raise another consideration favouring exceptions to the *lex loci* in cases such as the one being imagined. Our South Australian couple presumably has registered and insured their car in compliance with South Australian law and has paid premiums set to provide full common law damages. They are presumably not entitled to any reduction in premium or other advantage that Victorian drivers may have as a quid pro quo for their lower compensation payouts. Thus our South Australian plaintiff falls between the cracks, whereas, if the facts were reversed, a Victorian plaintiff injured in South Australia would get the double benefit of lower Victorian premiums, etc, and the higher South Australian damages.⁶⁰ Parallel considerations of fairness to the parties arise in international cases as well as in domestic ones.

And finally, though reasonable minds certainly do differ here, years of informal polling of students, colleagues and friends leads me to conclude that most parties most of the time would expect their 'own' law to apply in cases like this one, especially within a federation. I am not a great believer in letting 'party expectations'

56 Brilmayer, above n 21, 229-230.

57 A J E Jaffey, 'Choice of Law in Tort: A Justice-Based Approach' (1992) 2 *Legal Studies* 98.

58 Catherine Walsh, 'Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Product Liability Claims' (1997) 76 *Canadian Bar Review* 91, 109-110 quoted in *Zhang* (2002) 210 CLR 491, 517.

59 See eg, *Akai v The People's Insurance Co Ltd* (1996) 188 CLR 418.

60 ALRC 58, above n 6, ch 7.

drive the law, but many others give weight to this consideration. I believe it cuts heavily in favour of flexibility in the sort of case, real or hypothetical, at hand.

As the law stands under *Pfeiffer*, Victoria's limits on recovery would apply to our original hypothetical plaintiff. Of course, this plaintiff is not really very hypothetical at all. From the 1892 case of *Great Southern Railroad Co v Carroll* through *Babcock v Jackson*, *Chaplin v Boys*, to our own *Nalpantidis v Stark*, the facts of which closely resemble our hypothetical, cases arise which make an inflexible rule at least arguably inappropriate.⁶¹ In the hypothetical, as in *Nalpantidis v Stark*, the South Australian court must sacrifice the common law and legislative policies of its own state in favour of the legislative policy of Victoria. The parties must have a law apply to their situation which they had almost certainly not expected, a law which they had had no voice in shaping. The defendant's insurer will get a windfall of lower liability than the defendant's insurance premiums were premised upon. All in the name of certainty.

If the justifications offered in *Pfeiffer* for a rigid rule are less than satisfactory, it is fair to say there are none at all offered in *Zhang*.

The submission by the Renault companies is that the reasoning and conclusion in *Pfeiffer* that the substantive law for the determination of rights and liabilities in respect of intra-Australian torts is the *lex loci delicti* should be extended to foreign torts, despite the absence of the significant factor of federal considerations, and that this should be without the addition of any 'flexible exception'. That submission should be accepted.⁶²

What is offered in *Zhang* is the surprising suggestion that, if the law of the place of the tort is somehow not appropriate, the public policy exception to all choice of law rules might be invoked.⁶³ This is a worrying suggestion on various levels. First, it seems to admit that an inflexible rule will not always be desirable or workable. Second, it then suggests corrupting the whole notion of public policy in order to deal with the unnecessary problems posed by an unnecessarily inflexible rule. And, of course, the High Court has held since *Merwin v Moolpa*⁶⁴ that for the courts of one state (the forum) to hold the otherwise applicable law of a sister state inapplicable on the grounds it offends the public policy of the forum is an unconstitutional denial of full faith and credit to the laws of that sister state.

The flexibility theoretically offered by the public policy exception is thus not available intranationally. So it would offer no relief to our hypothetical South Australian plaintiff who was injured in Victoria. And arguably it is in the domestic context that flexibility is most appropriate. It is precisely when 'popping over' for an interstate drive or doing work for the day or the week interstate that one

61 *Great Southern Railroad Co v Carroll* 11 So 803 (Ala 1892); *Babcock v Jackson* 191 NE 2d 279 (NY, 1963); *Chaplin v Boys* [1971] AC 356; *Nalpantidis v Stark* (1995) 65 SASR 454. *Nalpantidis* was decided prior to *Pfeiffer* under the rule in *Phillips v Eyre* as restated in *McKain v Miller* which had held no flexibility existed at least in intranational cases.

62 *Zhang* (2002) 210 CLR 491, 520.

63 *Zhang* (2002) 210 CLR 491.

64 *Merwin Pastoral Company Pty Ltd v Moolpa Pastoral Company Pty Ltd* (1933) 48 CLR 565.

is unlikely to review one's insurance cover and make decisions based on the likelihood of there being different liability rules or compensation schemes over the state line.

What would the policy exception look like in an international context? What it has looked like in its sparingly used past, is the House of Lords refusing to apply Nuremburg laws which deprived German Jews of their citizenship, on the grounds that such legislation is not valid law according to English public policy.⁶⁵ But what the High Court majority in *Zhang* is suggesting, would amount to an Australian court saying that the general tort law or damages law or limitations of actions law of some other country is so abhorrent to Australian values that it cannot be given effect here. It would look like the House of Lords pronouncing Maltese law denying damages for pain and suffering repugnant to English ideas of justice.⁶⁶ Or like the High Court holding that Chinese law in *Neilson* or US law in *Gutnick* violates Australian public policy. This would, of course, be a violent expansion of the concept of public policy as it is understood in the conflict of laws. And it would give the concept of public policy the potential to swallow up the choice of law rules entirely. But, worst of all, it would be dishonest. For the reality is that those foreign laws do not offend our policy; they simply reflect different policy decisions made by different sovereign states.⁶⁷ To the extent that we have, in our courts, any unwillingness to apply those foreign laws, it is because we think they do not deliver justice to the parties before the court on the day. The problem would not be with the laws themselves, but with their application in a discrete situation. Thus it would simply be untrue to say they violate our public policy.

What would be true, honest and transparent would be to say that, while applying the law of the place of the tort generally delivers intuitively satisfactory results, occasionally it will not, and in those cases it is desirable that the court have discretion to apply a more appropriate law.

This discussion has openly accepted that there is enough of an intuition that the law of the place of the tort sometimes is not the most appropriate law to apply to cast a rigid rule into question. The standard example of such cases, the one hypothesised above, has vexed courts for some time now. Add to it the cases like *Gutnick* and *Blunden*, where the very place of the tort itself will be contested or not provide a decisional rule, and the certainty and predictability our inflexible rule promised to supply melts away before our eyes.

65 See eg, *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249.

66 Which, it is submitted, would have been a startling thing to find in *Chaplin v Boys* [1971] AC 356 or in *Neilson* or *Gutnick*.

67 As Cardozo J, ever quotable, put it: 'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.' *Loucks v Standard Oil Co of New York* 120 NE 198, 201 (NY, 1918); and see discussion in Nygh and Davies, above n 21, 282.

IV CONCLUSION

This paper was driven by a curiosity and bemusement as to the High Court's seeming horror of allowing Australian judges any discretion whatsoever in deciding choice of law in tort cases, intranational as well as international. I have suggested at points above that I suspect the judicial and academic dissent which surrounded this issue for some time before *Pfeiffer* may have led the Court to opt for a rule that looks as if it might provide a very high level of certainty. And I suggested that there might have been a level of contempt for the contributions of thinkers – judicial and academic – who, despite having produced a great deal of noise in the past fifty years, had not been able to produce a rule which commanded a lasting consensus. These suggestions perhaps sound less respectful of the High Court's efforts than I mean them to. In my own earlier contribution to the noise, I tried to argue that choice of law in tort is hard, has always been hard, and likely always will pose some very hard questions.⁶⁸ My own conclusion was that a strong rule in favour of the law of the place of the tort, coupled with a discretion in courts to apply another law, if justice to the parties before the court seems to so demand, is probably the best we can do. The recent spate of cases has not changed my view. The High Court's desire to settle the questions raised in this area is understandable, but the reality that the questions are hard must not be swept under the carpet. The hard cases should not be allowed to make less good law than we deserve.

68 Janey Greene, 'Choice of Law in Tort – The Song that Never Ends' (1998) 26 *Federal Law Review* 349.