HIGH COURT OF AUSTRALIA

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

REGIE NATIONALE des USINES RENAULT SA & ANOR — APPELLANTS

AND

FUZU ZHANG — RESPONDENT

Regie Nationale des Usines Renault SA v Zhang
[2002] HCA 10
14 March 2002
S9/2001

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

B W Walker SC with A S Bell and R D Glasson for the appellants (instructed by Connery & Partners)

R F Margo SC with S E Pritchard for the respondent (instructed by T D Kelly & Co)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Regie Nationale des Usines Renault SA v Zhang

Private international law – *Forum non conveniens* – Tort – Allegedly negligent design and manufacture overseas of motor vehicle by foreign company registered, but not carrying on business, in Australia – Motor vehicle accident in New Caledonia – Continuing damage suffered in New South Wales – Action commenced in New South Wales Supreme Court – Supreme Court declined to exercise its jurisdiction and stayed the proceedings – Whether exercise of discretion miscarried – Relationship between Supreme Court Rules authorising orders declining jurisdiction and judicial decisions on *forum non conveniens* – Whether Supreme Court a clearly inappropriate forum – Relevance of circumstance that foreign law is to be applied as the *lex causae* – Whether discretion to grant stay of proceedings should be re-exercised.

Private international law – Choice of law – Tort – Allegedly negligent design and manufacture overseas of motor vehicle by foreign company registered, but not carrying on business, in Australia – Motor vehicle accident in New Caledonia – Continuing damage suffered in New South Wales – Whether French law would be the *lex causae* applied in a trial in New South Wales –Whether Australian common law should recognise the *lex loci delicti* as the substantive law to be applied in actions for torts committed in a foreign law area – Whether the "double actionability" rule applies – Whether a single choice of law rule should be adopted consistently in Australia in respect of both international and intranational torts – Whether "flexible exception" applies to recognition of *lex causae* – Whether public policy exceptions applicable to *lex causae*.

Practice and procedure – Pleadings – Requirements as to pleadings of applicant on a stay motion seeking to rely upon a foreign *lex causae*.

Practice and procedure – Action – Stay – Cause of action arising out of jurisdiction – Motor vehicle accident in New Caledonia – Action brought in New South Wales – Plaintiff alleges defective design and manufacture of the motor vehicle – Defendants not present in New South Wales – Plaintiff relies on "long arm" provision in Supreme Court Rules and damage in jurisdiction to found action – Application by defendants for stay – Applicable law – Principles – *Forum non conveniens*.

Words and phrases – "inconvenient forum".

Supreme Court Rules 1970 (NSW), Pt 10.

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

The facts

1 The appellants ("the Renault companies") are foreign companies whose principal place of business is in France. Neither Renault company is registered in Australia as a foreign company and they do not maintain any office or employ any persons in this country. The first appellant sells to Volvo Australia Pty Ltd ("Volvo") in France motor vehicles which Volvo then sells to various dealerships throughout Australia.

2 The respondent ("Mr Zhang") entered Australia in 1986 and undertook postgraduate university studies. In late 1990-1991, Mr Zhang was advised by the Australian immigration authorities that he would be granted permanent residency in this country were he to leave Australia and then make application for such residency from outside Australia. On 1 February 1991, Mr Zhang travelled to New Caledonia with the objective of lodging an application for permanent residency with the Australian Consulate in Noumea. He since has been granted Australian citizenship and has been employed as a systems analyst.

3 On 5 February 1991, whilst in New Caledonia, Mr Zhang hired a Renault 19 sedan. On the next day, 6 February 1991, Mr Zhang suffered serious injuries when he lost control of the car whilst driving along an unsurfaced roadway; the car somersaulted several times, came to rest on its roof, which was crushed into the passenger compartment. Mr Zhang spent 14 days in hospital in Noumea. He then was transported back to Sydney and he was a patient at the spinal unit of the Royal North Shore Hospital until about June 1991. Mr Zhang remains severely disabled.

The litigation

4 Mr Zhang sought recourse to the Supreme Court of New South Wales to recover damages from the Renault companies for his injuries. In response, there was an application by the Renault companies to stay Mr Zhang's action on the footing that the Supreme Court is an inappropriate forum for the trial of the action.

5 Mr Zhang instituted his action on 4 February 1994. He alleged that the motor vehicle in which he was injured was negligently designed and manufactured by one or other of the Renault companies and as a result of that negligence he

suffered and continued to suffer injury, loss and damage[1]. Because neither of the Renault companies had a presence in Australia, Mr Zhang invoked the "long arm" jurisdiction of the Supreme Court as detailed in Pt 10 of the Supreme Court Rules 1970 (NSW) ("the Rules").

6 In the joint judgment of this Court in *Agar v Hyde*, it was said[2]:

> "Service of originating process of the Supreme Court of New South Wales on defendants outside Australia is regulated by Pt 10 of the Rules of that Court. It is necessary to pay close attention to the terms of those Rules and to notice the several ways in which the present Rules differ from rules that apply, and have been considered, in other jurisdictions. Learning that has developed in connection with those other rules cannot automatically be applied to the Rules which govern the proceedings which are the subject of the present appeals."

Jurisdiction and choice of law

7 Further, it was emphasised in a passage in *John Pfeiffer Pty Ltd v Rogerson*[3] to which reference will be made, that questions of jurisdiction are to be distinguished from those of choice of law. The keeping of the distinction is rendered more difficult by the circumstance that each of the terms "jurisdiction" and "choice of law" itself requires further analysis. In *Lipohar v The Queen*, Gaudron, Gummow and Hayne JJ said of "jurisdiction"[4]:

> "It is used in a variety of senses, some relating to geography, some to persons and procedures, others to constitutional and judicial structures and powers."

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1 In the alternative, the action was framed in "quasi-contract". The respondent later consented to a stay of that action and it may be put to one side.

2 (2000) 201 CLR 552 at 569 [39].

3 (2000) 203 CLR 503 at 521 [25].

4 (1999) 200 CLR 485 at 516 [78].

Their Honours referred to the expression "federal jurisdiction" as identifying "the authority to adjudicate" derived from a particular source, namely the Constitution and federal laws, and went on to say[5]:

> "'Jurisdiction' may be used (i) to describe the amenability of a defendant to the court's writ and the geographical reach of that writ, or (ii) rather differently, to identify the subject matter of those actions entertained by a particular court, or, finally (iii) to locate a particular territorial or 'law area' or 'law district'." (footnotes omitted)

8 The authority to adjudicate which Mr Zhang sought to invoke was that of the Supreme Court manifested, in particular, in the *Supreme Court Act* 1970 (NSW) and the Rules providing for "long arm" jurisdiction.

9 Rule 1A of Pt 10 of the Rules provided that, subject to rr 2 and 2A, originating process might be served outside Australia in 24 enumerated cases. In particular, par (e) of r 1A(1) provided for the service of originating process:

> "where the proceedings, wholly or partly, are founded on, or are for the recovery of damages in respect of, damage suffered in the State caused by a tortious act or omission wherever occurring".

It was upon this paragraph that the respondent relied and nothing turns upon the availability of a head under r 1A(1) for the service of originating process outside Australia. It is common ground that the respondent has suffered damage in New South Wales and will continue to do so, within the meaning of par (e) of r 1A(1).

10 In *Pfeiffer*, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ observed[6]:

> "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

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5 (1999) 200 CLR 485 at 517 [79].

6 (2000) 203 CLR 503 at 521 [25]. See also (2000) 203 CLR 503 at 548 [115] per Kirby J.

> or because applicable 'long arm' provisions have been invoked[7]. 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[8]. 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."

At the heart of the present appeal is the point made in the third and fourth sentences of the above paragraph. The answer to the question as to the law to be applied in deciding the rights and duties of Mr Zhang and the Renault companies affects the decision whether the Supreme Court should decline to exercise its jurisdiction and stay the action brought against the Renault companies.

The stay application

11 Pursuant to the requirement in Pt 10, r 2A, there was appended to the statement of claim filed by Mr Zhang, a notice stating:

> "1. The Court may, on application made by you in accordance with the rules of the Court, set aside the service on you of this Statement of Claim where –
>
> (a) Service is not authorised by the rules of the Court; or
>
> (b) This Court is an inappropriate forum for the trial of the proceedings.
>
> 2. Alternatively you may submit to the jurisdiction of the Court by filing the prescribed form of unconditional notice of appearance.

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7 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) 200 CLR 485 at 526-528 [104]-[108].

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

3. If you do not make an application under paragraph 1 or file a notice under paragraph 2, the Court may give leave to the Plaintiff to proceed against you."

The Renault companies moved in a manner indicated in par 1 of this notice. They did so by motion filed on 25 March 1996. The application was heard by Smart J. The issue before his Honour concerned not the authorisation of service by the Rules, but the question whether the Supreme Court was, as Smart J put it, "an inappropriate forum in which to try Mr Zhang's action against the Renault companies". Both sides read affidavits and there was brief cross-examination of one deponent.

12 It is accepted that the law of France applies in New Caledonia and that its courts are part of the French judicial system. However, the evidence respecting the position in New Caledonia which was admitted on the motion heard by Smart J concentrated upon procedural aspects of litigation there and upon comparing and contrasting the conduct of litigation in New Caledonia and in New South Wales. Little is to be gleaned from that evidence of the substantive law respecting product liability claims, for example the existence of strict liability rules and distinctions between claims in contract (with the possibility of different privity rules to those of the common law) and delict[9].

13 Smart J stayed the cause of action based in negligence upon condition that the Renault companies submit to the jurisdiction of the courts of New Caledonia. Further conditions imposed were that the Renault companies not raise and waive any limitation defence, that they not apply for security for costs and that they meet the costs of any independent court appointed expert. His Honour also, by consent, ordered the stay of a cause of action pleaded in "quasi-contract". It may be that the pleader here had been attempting to cast into terms understood (albeit, perhaps, regarded as outmoded) by common lawyers what was a non-delictual claim founded in French law but not fitting the criteria of a contract claim at common law. The question was not explored in this Court.

14 Mr Zhang sought, from the Court of Appeal, leave to appeal against the decision of Smart J. That Court (Beazley, Stein and Giles JJA) held that the exercise of discretion by Smart J had miscarried. Accordingly, their Honours

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9 cf Taylor, "The Harmonisation of European Product Liability Rules: French and English Law", (1999) 48 *International and Comparative Law Quarterly* 419 at 425-428.

granted leave to appeal, allowed the appeal and re-exercised the discretion. Their Honours held that Smart J should have refused the stay on the ground that the Renault companies had not discharged the onus of showing that New South Wales was a "clearly inappropriate forum".

15 In this Court the Renault companies seek the reinstatement of the stay ordered by Smart J. The grant of special leave to the Renault companies was conditional upon them undertaking not to seek to disturb the costs order made by the Court of Appeal and paying Mr Zhang's costs in this Court in any event.

The Supreme Court Rules

16 Before turning to consider the issues which arise in this Court, it is convenient first to consider further relevant provisions of the Rules by which the discretion to which reference has been made is conferred upon the Supreme Court.

17 Part 10, r 6A provides:

> "(1) The Court may make an order of a kind referred to in Part 11 rule 8 (which relates to setting aside etc originating process) on application by a person on whom an originating process is served outside Australia.
>
> (2) Without limiting subrule (1), the Court may make an order under this rule on the ground –
>
> (a) that the service of the originating process is not authorised by these rules; or
>
> (b) *that this Court is an inappropriate forum for the trial of the proceedings*." (emphasis added)

Part 11 of the Rules is headed "APPEARANCE". Rule 8 of Pt 11, so far as presently relevant, states:

> "(1) The Court may, on application made by a defendant to any originating process on notice of motion filed within the time fixed by subrule (2), by order –
>
> (a) set aside the originating process;
>
> (b) set aside the service of the originating process on the defendant;

(c) declare that the originating process has not been duly served on the defendant;

(d) discharge any order giving leave to serve the originating process outside the State or confirming service of the originating process outside the State;

…

(g) declare that the Court has no jurisdiction over the defendant in respect of the subject matter of the proceedings;

(h) *decline in its discretion to exercise its jurisdiction in the proceedings*;

(j) grant such other relief as it thinks appropriate.

(2) Notice of a motion under subrule (1) –

(a) may be filed without entering an appearance;

…

(3) The making of an application under subrule (1) shall not be treated as a voluntary submission to the jurisdiction of the Court." (emphasis added)

18 It is necessary to say something of the provenance of these revisions of the Rules. Part 10, r 6A commenced on 1 July 1988. At that time, Pt 11, r 8 was in a different form; in particular, par (h) of r 8(1) did not appear. Part 11, r 8 assumed its present form on 19 February 1989. The New South Wales Court of Appeal determined *Voth v Manildra Flour Mills Pty Ltd*[10] shortly before that, on 13 February 1989. The matter had been dealt with at first instance by Clarke J before the decision of this Court in *Oceanic Sun Line Special Shipping Company*

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10 (1989) 15 NSWLR 513.

Inc v Fay[11] on 30 June 1988[12], that is to say, before the commencement of Pt 10, r 6A on 1 July 1988. In his judgment in the Court of Appeal in *Voth*, Gleeson CJ set out the text of Pt 10, r 6A and observed that it had not been in force at the time of the application before the Court so that there had been no occasion for argument as to its construction and application[13].

19 The significance of this chain of events is that both *Oceanic Sun* and *Voth* were decided before the making in the Rules of the present express provisions whereby the Supreme Court may decline in its discretion to exercise its jurisdiction on the ground that that Court is "an inappropriate forum for the trial of the proceedings".

20 The order made in *Voth* by this Court that the action be stayed on certain conditions[14] was upon the application made to Clarke J that the Supreme Court in its discretion should decline to exercise its jurisdiction on the basis of the doctrine identified as *forum non conveniens*. This had been applied by this Court in *Maritime Insurance Co Ltd v Geelong Harbor Trust Commissioners*[15]. What is of immediate significance is that the doctrine derives not from any written law but from judicial decisions in various jurisdictions. Earlier decisions in Scotland, England and the United States were discussed by Gleeson CJ in *Voth*[16].

21 Later, in *CSR Ltd v Cigna Insurance Australia Ltd*, it was said in the joint judgment of six members of this Court[17]:

> "It is clear from the rationale for the exercise of the power to stay proceedings and, also, from the words 'oppressive', 'vexatious' and 'abuse of

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11 (1988) 165 CLR 197.

12 See *Voth v Manildra Flour Mills Pty Ltd* (1989) 15 NSWLR 513 at 524-525.

13 (1989) 15 NSWLR 513 at 531.

14 (1990) 171 CLR 538 at 591.

15 (1908) 6 CLR 194.

16 (1989) 15 NSWLR 513 at 525-530.

17 (1997) 189 CLR 345 at 391. See also *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 393 [25].

process' in *Voth*, in *Oceanic Sun* and in the earlier cases considered in *Oceanic Sun*, including *St Pierre v South American Stores (Gath & Chaves) Ltd*[18], that the power to stay proceedings on grounds of forum non conveniens is an aspect of the inherent or implied power which, in the absence of some statutory provision to the same effect, every court must have to prevent its own processes being used to bring about injustice[19]."

22 The Rules relate to a judicial discretion to decline to exercise jurisdiction. Such a discretion is to be exercised in accordance with principle. The principles to be applied are encompassed within the doctrine developed by judicial decision. They are not extraneous to it.

23 The apparent objective of the inclusion in the Rules of provisions specifically authorising orders declining the exercise of jurisdiction on the ground that the Supreme Court is an inappropriate forum was to give explicit recognition to the judge-made doctrine in the procedures established by the Rules. It is by reference to authoritative Australian decisions from time to time expounding that doctrine that there is to be found the meaning of the expression in par (b) of Pt 10, r 6A(2):

"that this Court is an inappropriate forum for the trial of the proceedings."

"Inappropriate forum"?

24 The expression "inappropriate forum" in par (b) of Pt 10, r 6A(2) is less emphatic than the expression "clearly inappropriate forum", the latter being the term adopted in *Voth* to determine whether an Australian court should decline to exercise its jurisdiction. The formulation in *Voth*, as Spigelman CJ pointed out in *James Hardie Industries Pty Ltd v Grigor*[20], was adopted in preference to the "clearly more appropriate forum" test favoured in the United Kingdom. Thus, it should at once be noted that a court is not an inappropriate forum merely because another is more appropriate.

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18 [1936] 1 KB 382.

19 See *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 617, 639-640; *Hamilton v Oades* (1989) 166 CLR 486 at 502; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 25, 74; *Williams v Spautz* (1992) 174 CLR 509 at 518; *Walton v Gardiner* (1993) 177 CLR 378 at 392-393; *Ridgeway v The Queen* (1995) 184 CLR 19 at 60, 74-75.

20 (1998) 45 NSWLR 20 at 28.

25 Because a court's power to stay proceedings is an aspect of its inherent or implied power to prevent its own processes being used to bring about injustice, the same concepts and considerations necessarily inform the test of "inappropriate forum" in par (b) of Pt 10, r 6A(2) as inform the "clearly inappropriate forum" test adopted in *Voth*. And because the ultimate consideration is the prevention of injustice, they inform it in the same way. Thus, it is appropriate to note what was said by Dawson, Gaudron, McHugh and Gummow JJ in *Henry v Henry*[21]. Their Honours said[22]:

> "In [*Voth*][23], this Court confirmed its rejection, in [*Oceanic Sun*][24], of the forum non conveniens principle as stated by the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd*[25]. The *Spiliada* principle allows that a court may stay proceedings which are pending before it if that court is not the natural forum and there is another available forum which is clearly or distinctly more appropriate[26]. The result is that, in the United Kingdom, a stay will be granted in favour of a clearly more appropriate forum or, which is much the same thing in practice, the natural forum[27], that being the forum 'with which the action [has] the most real and substantial connection'[28]. …

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21 (1996) 185 CLR 571.

22 (1996) 185 CLR 571 at 586-587.

23 (1990) 171 CLR 538.

24 (1988) 165 CLR 197.

25 [1987] AC 460.

26 *Spiliada* [1987] AC 460 at 478 per Lord Goff of Chieveley.

27 *Spiliada* [1987] AC 460 at 477. See also [*Voth*] (1990) 171 CLR 538 at 557 where it is observed that in "the *Spiliada* formulation … the 'natural forum' and 'more appropriate forum' are treated as interchangeable expressions".

28 *Spiliada* [1987] AC 460 at 478, quoting *The Abidin Daver* [1984] AC 398 at 415.

> In *Voth*[29], this Court adopted for Australia the test propounded by Deane J in *Oceanic Sun*, namely, that a stay should be granted if the local court is a clearly inappropriate forum, which will be the case if continuation of the proceedings in that court would be oppressive, in the sense of 'seriously and unfairly burdensome, prejudicial or damaging', or, vexatious, in the sense of 'productive of serious and unjustified trouble and harassment'[30]. It was also held in *Voth* that, in determining whether the local court is a clearly inappropriate forum, 'the discussion by Lord Goff in *Spiliada*[31] of relevant "connecting factors" and "a legitimate personal or juridical advantage" provides valuable assistance'[32]. In this last regard, Lord Goff of Chieveley expressed the view that legitimate personal or juridical advantage is a relevant but not decisive consideration, the fundamental question being 'where the case may be tried "suitably for the interests of all the parties and for the ends of justice"'[33]."

26 In *Voth*[34], the majority joint judgment also identified as a material consideration whether it is fairly arguable that the substantive law of the forum is the *lex causae*.

The Court of Appeal decision

27 The Court of Appeal considered that the decisive matter which had determined the exercise of discretion by the primary judge to grant the stay was an erroneous view that it would be French law which would be the *lex causae* applied in a trial of the action in New South Wales. Stein JA, who gave the judgment with which the other members of the Court agreed, said:

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29 (1990) 171 CLR 538 at 564-565.

30 *Oceanic Sun* (1988) 165 CLR 197 at 247.

31 [1987] AC 460 at 477-478, 482-484.

32 *Voth* (1990) 171 CLR 538 at 564-565.

33 *Spiliada* [1987] AC 460 at 482, quoting *Sim v Robinow* (1892) 19 R 665 at 668 per Lord Kinnear.

34 (1990) 171 CLR 538 at 566.

> "Applying *Thompson v Hill*[35] and earlier authorities in the Court, Smart J should not have taken into account in the exercise of the discretion that a New South Wales court would apply French law as the substantive law to determine the issue of liability.
>
> It is not my understanding of *Voth* that it held that the *lex loci delicti* will be applied by the local court as the substantive law for the determination of liability of a foreign tort. …
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> It is clear from his reasoning that his Honour placed great weight upon French law being the substantive law to be applied by the New South Wales court. Indeed it seems that it was the decisive matter which determined the exercise of the discretion, his Honour having earlier said that practical considerations tended to favour a hearing in Sydney. A fair reading of his Honour's reasons reveals that he saw the question as very finely balanced. The balance was clearly tipped in favour of the opponents by the finding of the substantive law to be applied. In my opinion, the discretion miscarried.
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> …
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> Accordingly, it is appropriate to re-exercise the discretion."

28 In this Court, the Renault companies submit that, in these passages, and under the influence of its earlier decision in *Thompson v Hill*, the Court of Appeal in turn displayed a misunderstanding of the "double actionability" rule associated with what was said by Willes J in *Phillips v Eyre*[36]. In *Thompson*[37], Clarke JA had referred for support to the decision of Dawson J in *Gardner v Wallace*[38]. Dawson J had said[39] that this Court had decided in *McKain v R W Miller & Co (SA) Pty Ltd*[40]:

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35 (1995) 38 NSWLR 714.

36 (1870) LR 6 QB 1 at 28-29.

37 (1995) 38 NSWLR 714 at 741-742.

38 (1995) 184 CLR 95.

39 (1995) 184 CLR 95 at 98.

40 (1991) 174 CLR 1.

> "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."

29 However, *Pfeiffer* has since decided the contrary, namely[41]:

> "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."

The Renault companies submit that what is there said as to intranational torts applies or should apply to the common law of Australia respecting foreign torts. One response by Mr Zhang to that submission is that the rule in *Phillips v Eyre* be maintained, with the *lex fori* to supply the substantive and procedural law but with a "flexible exception" to be refined on a case by case basis.

30 Another response by Mr Zhang is that the decision of the Court of Appeal to overturn the ruling by the primary judge is to be supported on other grounds. He submits that, quite apart from the error which the Court of Appeal wrongly detected in the reasoning of the primary judge, his Honour erred in application of the governing principle respecting the *forum non conveniens* doctrine to be found in the decisions of this Court. Whilst later in his judgment Smart J said that he had had regard to the decisions in *Voth* and *Henry*, he had commenced his reasons by identifying the issue as "whether this Court is an inappropriate forum in which to try Mr Zhang's action against the Renault companies"; that placed too low a hurdle in the path of the Renault companies.

31 Mr Zhang then invites this Court to re-exercise the discretion of the primary judge and thereby to conclude that the stay sought be refused because the Renault companies have not discharged the onus of establishing that New South Wales is a clearly inappropriate forum. If this Court reached the stage in its reasoning that required the re-exercise of the discretion of the primary judge, then the respondent urged (and the appellants did not seriously dispute) that this Court itself perform that task. Were that re-exercise to produce a result favourable to the respondent, Mr Zhang, the result would be that the appeal to this Court would be dismissed.

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41 (2000) 203 CLR 503 at 544 [102].

For the reasons that follow, that re-exercise of discretion should be undertaken and, in the result, the appeal should be dismissed.

The double actionability rule

32 We turn first to consider the submissions of the Renault companies which challenge the decision of the Court of Appeal. Their primary submission is that, subject to statute, the law to be applied by an Australian court to determine the delictual liability of a defendant is the law of the place of the act or omission giving rise to the plaintiff's cause of action and that the primary judge was correct in so identifying French law. The Renault companies thereby seek to take further the holding in *Pfeiffer* that the common law of Australia now provides that the *lex loci delicti* is the governing law with respect to torts committed in Australia but which have an interstate element, to cases where the *locus delicti* is a foreign law area.

33 In *McKain v R W Miller & Co (SA) Pty Ltd*[42], the majority of the Court accepted a reformulation, for cases of Australian torts, of the rule in *Phillips v Eyre* in terms which had been formulated by Brennan J in *Breavington v Godleman*[43]. That formulation was as follows[44]:

> "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.
>
> 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." (footnote omitted)

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42 (1991) 174 CLR 1.

43 (1988) 169 CLR 41.

44 (1988) 169 CLR 41 at 110-111.

34 It may be accepted for present purposes that, after *Pfeiffer*, that reformulation at present represents the common law of Australia as it applies in respect of foreign torts. It is a question whether that formulation should now be displaced, as the Renault companies would have it, wholly in favour of the *lex loci delicti* (and without any "flexible exception") so as to bring into line the principles respecting Australian and non-Australian torts.

35 The position as established in *Pfeiffer* may be compared and contrasted with the common law in England immediately before its displacement by the *Private International Law (Miscellaneous Provisions) Act* 1995 (UK) which leaves the common law as applicable only to defamation claims[45]. In the twelfth edition of Dicey, which appeared in 1993, r 203 had stated[46]:

> "(1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both
>
> (a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and
>
> (b) actionable according to the law of the foreign country where it was done.
>
> (2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties." (footnote omitted)

Rule 203(2) reflected an understanding of what had been decided by the House of Lords in *Boys v Chaplin*[47] respecting a "flexible exception". In 1994, after the publication of the twelfth edition of *Dicey*, the Privy Council decided the Hong Kong appeal of *Red Sea Insurance Co Ltd v Bouygues SA*[48]. There, it would

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45 Briggs, "Choice of law in tort and delict", (1995) *Lloyd's Maritime and Commercial Law Quarterly* 519 at 520.

46 Collins (ed), *Dicey and Morris on The Conflict of Laws*, 12th ed (1993), vol 2 at 1487-1488.

47 [1971] AC 356.

48 [1995] 1 AC 190.

appear for the first time since *The "Halley"*[49] itself, the requirement of actionability according to the *lex fori* formed part of the *ratio decidendi* of an English decision[50].

36 It was said in *Pfeiffer* that the various possibilities for the choice of law rule in tort were the *lex fori*, the *lex loci delicti* and the proper law of the tort, in each case with or without a flexible exception[51]. The conclusion reached in the joint judgment was[52]:

> "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."

37 It should be noted immediately that, in the present case, there is no doubt that the claim by Mr Zhang arises out of circumstances of a character that, if they had occurred in New South Wales, a cause of action would have arisen entitling Mr Zhang to enforce against the Renault companies a civil liability of a kind which he claims to enforce in the action he has instituted against them. That is to say, the terms in which the first limb was expressed by Brennan J in *Breavington* are satisfied.

38 However, if this Court is to re-exercise the discretion upon the stay application, it should do so upon an understanding as to the law to be applied in deciding the rights and duties of the parties. That entails some consideration of what is involved in the "double actionability" rule.

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49 (1868) LR 2 PC 193.

50 Dickinson, "Further thoughts on foreign torts: *Boys v Chaplin* explained?", (1994) *Lloyd's Maritime and Commercial Law Quarterly* 463 at 464.

51 (2000) 203 CLR 503 at 535 [72].

52 (2000) 203 CLR 503 at 538 [80]. See also (2000) 203 CLR 503 at 562-563 [157] per Kirby J.

39 In *Anderson v Eric Anderson Radio & TV Pty Ltd*[53], Windeyer J, in a passage later referred to with approval in *Pfeiffer*[54], pointed out that to conclude from the first limb of the double actionability rule that the courts of the forum would entertain an action on a foreign tort did not necessarily mean that those courts must determine the action in accordance with the municipal law of the forum; there was a logical distinction between assumption of jurisdiction and choice of law. In *Tolofson v Jensen*[55], La Forest J later spoke to the same effect.

40 The action in *Eric Anderson* was brought in New South Wales in respect of a negligent collision occurring in the Australian Capital Territory. Under the common law in New South Wales, the contributory negligence of the plaintiff was a complete defence, whilst under statute law in force in the Territory it merely constituted a ground for reduction in damages. Windeyer J reasoned that, because the common law in New South Wales did not prevent the cause of action arising, the act of the defendant was "actionable" in that State. It followed that the first limb, as a condition of justiciability, was satisfied. So was the second limb, because there was civil liability under the law of the Territory. The result was that the action was justiciable.

41 That left for determination the choice of law and this Court held that this was the *lex fori*. The result is that, even if the first limb be taken as a rule of justiciability, whilst the *lex fori* supplies the choice of law, more than "actionability" is required for the plaintiff to succeed. There has been, accordingly, some difficulty in disentangling the two limbs and in discerning their single or consecutive operation in the process of adjudication.

42 In *Pfeiffer*, after referring to the expression "double actionability", Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ added[56]:

> "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?"

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53 (1965) 114 CLR 20 at 41.

54 (2000) 203 CLR 503 at 522 [28], 548 [115].

55 [1994] 3 SCR 1022 at 1041.

56 (2000) 203 CLR 503 at 520 [23].

The various elements and alternatives in that passage require attention. We turn to the question posed in the second sentence.

The first limb

43 In *Eric Anderson*, Windeyer J referred to academic writing which[57]:

> "suggested that actionability by English law relates only to the 'threshold' question, as it has been called, and that what *Willes* J said does not mean that English law is the substantive law to be applied."

44 Of the decision in *The "Halley"*, Professor Kahn-Freund has written of the influence of Savigny's writings upon that decision[58]:

> "His views were quoted to the court and no doubt met with a sympathetic response because the court disliked the idea that the ship-owner should be liable for a pilot whom he had not chosen and over whom he had no control. It was not only against a then existing (now repealed) English statute[59] but also in the view of the court against English *ordre public international*.[60]"

45 Writing shortly after the decision in *The "Halley"*, Westlake said of the support by Savigny for the *lex fori*[61]:

> "His reason is that all laws relating to delicts have such a close connection with public order as to be entitled to the benefit of what I have called the reservation in favour of a stringent domestic policy".

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57 (1965) 114 CLR 20 at 41.

58 "Delictual Liability and the Conflict of Laws", (1968-II) *Recueil des Cours* 1 at 13-14.

59 *Merchant Shipping Act* 1854 (UK), s 388.

60 [Hancock, "Three Approaches to the Choice of Law Problem", (1961) *20th-Century Comparative and Conflicts Law* at 86ff; Kahn-Freund, "Reflections on Public Policy in the English Conflict of Laws", (1953) 39 *Transactions of the Grotius Society* 39.]

61 Westlake, *A Treatise on Private International Law*, 2nd ed (1880) at 222.

46 What was it that encouraged Savigny and other nineteenth century German scholars to forge between delictual liability and the *lex fori* a link so obviously stronger than that which connects the *lex fori* with contracts and property rights? One answer, given by Professor Kahn-Freund, is the perception of the law of civil delict as intimately connected with the criminal law[62]. That perception has been shared by common lawyers and is exemplified in the endlessly debated decision of the English Court of Appeal in *Machado v Fontes*[63]. What is of present significance is that that decision regarded an act as "unjustifiable" as a tort if criminal liability attached to it, thereby seeing "the law of civil delict in terms of moral condemnation and not in terms of compensation"[64]. *Machado v Fontes* apart, at the present day the connection between tort law and the retributive aspect of the criminal law is drawn principally in those decisions, such as *Gray v Motor Accident Commission*[65], concerning exemplary damages. Further, the criminal law often has been said to be "local"; what that proposition presently involves in Australia was considered in *Lipohar v The Queen*[66].

47 Professor Kahn-Freund has written[67]:

> "The development of technology has transformed the nature of delictual liability. It has made short shrift of the theoretical foundation of the *lex fori* theory in so far as that theoretical foundation consisted of a policy to keep the law of civil delict in line with the criminal law. Most of the contemporary law of delict is an attempt to arrive at an expedient distribution of the risk of insurance against the inevitable dangers inherent in our social life. We think in terms of products liability of manufacturers, of the liability of those in charge of and in control of motor vehicles, of employers' liability for accidents to their workmen." (footnote omitted)

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62 "Delictual Liability and the Conflict of Laws", (1968-II) *Recueil des Cours* 1 at 20-23.

63 [1897] 2 QB 231 at 233-234, 235-236.

64 "Delictual Liability and the Conflict of Laws", (1968-II) *Recueil des Cours* 1 at 23.

65 (1998) 196 CLR 1.

66 (1999) 200 CLR 485.

67 "Delictual Liability and the Conflict of Laws", (1968-II) *Recueil des Cours* 1 at 24.

48 The learned writer continues by observing that, connection with the criminal law apart, the application of the *lex fori* to delictual liability may be seen as an expression of public policy considerations. Any treatment of Savigny as the "spiritual father" of the decision in *The "Halley"*[68] overstates the position. In particular, it gives insufficient significance to the influence of Story. As will appear, for his part, Story was well aware of what now would be described as public policy considerations in this field.

49 Against that background, one asks what is the purpose and function of the first limb as a "threshold" requirement? The decision in *The "Halley"* was given before the development of a body of case law precluding, on public policy grounds, what otherwise would be a choice of foreign law as the *lex causae*. The case law deals, of course, not only with tort.

50 In par 31 of his *Commentaries on the Conflict of Laws*[69], Story had referred to:

> "the right and duty of every nation to protect its own subjects against injuries, resulting from the unjust and prejudicial influence of foreign laws; and to refuse its aid to carry into effect any foreign laws, which are repugnant to its own interests and polity."

It is in that setting that there is to be understood the reference by Selwyn LJ in *The "Halley"* to what Story had added in par 32 of his work. Selwyn LJ said[70]:

> "As Mr Justice *Story* has observed in his Conflict of Laws, [par] 32, 'it is difficult to conceive upon what ground a claim can be rested to give to any Municipal laws an extra-territorial effect, when those laws are prejudicial to the rights of other Nations or to those of their subjects.' And even in the case of a Foreign judgment, which is usually conclusive *inter partes*, it is observed in the same work, at § 618A, that the Courts of *England* may disregard such judgment *inter partes* if it appears on the record to be manifestly contrary to public justice, or to be based on domestic legislation not recognised in *England* or other Foreign countries,

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68 Kahn-Freund, "Delictual Liability and the Conflict of Laws", (1968-II) *Recueil des Cours* 1 at 13.

69 5th ed (1857).

70 (1868) LR 2 PC 193 at 203.

or is founded upon a misapprehension of what is the law of *England*: *Simpson v Fogo*[71]."

51 The doctrine evoked in the second sentence is now encapsulated in r 44 in *Dicey*[72]. This states[73]:

> "A foreign judgment is impeachable on the ground that its enforcement or, as the case may be, recognition, would be contrary to public policy."

52 Once this reasoning is appreciated, the curiosity to modern eyes of *The "Halley"* lies in the apparent characterisation of the Belgian law respecting pilotage as "manifestly contrary to public justice" represented by what was then the English Admiralty law on the subject. In that regard, it should be noted that in the Admiralty Court Sir Robert Phillimore had advanced the opposite view to that of the Privy Council, saying[74]:

> "[T]he lex fori is founded upon special considerations of public policy applicable only to British territory, and … the admission of the foreign law, the lex loci delicti commissi, to govern this case is not prevented by reason of its repugnance to natural justice or to public policy".

53 To impose a threshold requirement that, to be justiciable, the plaintiff's claim must arise out of circumstances of such a character that had they occurred within the territory of the forum the plaintiff would have had a cause of action to enforce a civil liability of the kind the plaintiff asserts under the *lex loci delicti* is to favour, in Westlake's terms, "a stringent domestic policy". Whatever may have been said in favour of such a requirement in England a century and a half ago, it cannot be supported today as anything more than an arbitrary rule. The "experience" of the law, identified by Holmes[75], has developed. Public policy

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71 (1863) 1 H & M 195 [71 ER 85].

72 Collins (ed), *Dicey and Morris on The Conflict of Laws*, 13th ed (2000), vol 1 at 525.

73 Note that if the foreign judgment is impeachable on the ground of denial of procedural fairness, its enforcement would be contrary to public policy: *Adams v Cape Industries Plc* [1990] Ch 433 at 496; affd [1990] Ch 503 at 571-572.

74 *The "Halley"* (1867) LR 2 A & E 3 at 16.

75 *The Common Law*, (1881), Lecture 1.

reservations of their nature cannot be contained in closed categories; rather, the modern tendency is to frame them with closer attention to the respective governmental interests involved[76].

54 A reading of the first limb as imposing today in Australia a distinct "threshold" requirement, let alone as supplying the *lex causae*, takes it beyond its public policy root. The often remarked absence of authorities which in terms have relied upon the first limb of *The "Halley"* to defeat an action is more readily understandable when it is appreciated that various claims may have been rejected overtly on public policy grounds as developed in the cases since the middle of the nineteenth century without any recourse to a wider threshold requirement exemplified by the first limb.

55 The following remarks by Mr P B Carter are in point[77]:

> "[T]he rule in *The Halley* is peculiar to English law and to some, but by no means all, legal systems derived from English law; it was rejected in the United States many decades ago[78]. Moreover, it is peculiar to the English private international law of torts. For example, a plaintiff can sue in England on a foreign contract, valid by its proper law, notwithstanding its invalidity by English domestic law. … Why should the *lex fori* have a special and severely restrictive role to play in the law of torts? Of course, as elsewhere in the conflict of laws, a plaintiff will fail if to allow him to succeed would involve applying a foreign rule the content of which is contrary to the public policy of the forum. Also, to succeed a plaintiff in a tort action may (as elsewhere) have to surmount a characterization hurdle. The issues involved must be classified as tort issues, before the advantage of any tort choice of law rule will be available to him. It might well be that an English judge would refuse to entertain, say, an action for 'insult to honour', either on the grounds of public policy or because such a cause of action is so remote from English notions of tort liability that it would not be classified even for conflict of laws purposes as tort. But to give the law of

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76 *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 40-45.

77 "Torts in English Private International Law", (1981) 52 *The British Year Book of International Law* 9 at 12-13.

78 Beale, *The Conflict of Laws*, (1935), vol 2, §378.5.

> the forum greater scope would seem to be unjustifiable. In the field of torts there are no compelling policy considerations such as those operating in the criminal law field which require an exceptional role to be accorded to the substantive domestic law of the forum. As Cardozo J observed in the famous New York Court of Appeals tort case of *Loucks v Standard Oil*,[79] 'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.'"

56 In *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* ("*Spycatcher*")[80], Brennan J referred, with approval, to the statement by Professor Kahn-Freund[81]:

> "Every legal system which permits or commands its courts to apply foreign law must make reservations, reservations attaching not so much to the recognition or application of foreign institutions or rules *in abstracto* as to the effect which their application, recognition or enforcement would have in the case before the court."

57 Those reservations may be embodied in a statutory requirement that an Australian court disregard what otherwise would be the choice of law directed by common law principles. The law of the Commonwealth, the *Insurance Contracts Act* 1984 (Cth), which was applied in *Akai Pty Ltd v People's Insurance Co Ltd*[82] is an example of such legislation. The relevant public policy also may be found in the common law itself. In that regard, in *Spycatcher*, Brennan J distinguished between two bases on which the court of the forum might refuse to enforce an obligation recognised by foreign law[83]:

> "The first basis is that it would be contrary to the public policy of the forum State to enforce the obligation; the second is that the court denies the capacity in international law of the relevant provision of the foreign law to

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79 120 NE 198 at 201 (1918).

80 (1988) 165 CLR 30 at 50.

81 *Selected Writings*, (1978) at 234.

82 (1996) 188 CLR 418 at 433.

83 (1988) 165 CLR 30 at 49. See Collins, "Provisional and Protective Measures in International Litigation", (1992-III) 234 *Recueil des Cours* 9 at 160-165.

> give rise to the obligation sought to be enforced. The distinction is between a refusal to enforce what is recognized as an existing obligation and a denial of the existence of the obligation sought to be enforced."

An example of laws in the second class was to be found in cases which refuse recognition of the efficacy of foreign laws expropriating property situated outside the territory of the foreign country. Where the forum court acts on the first basis to refuse to enforce an obligation, it accepts the capacity of the foreign law to give rise to that obligation but declines to enforce it; in *Spycatcher* itself, the decision of this Court was that to apply the principles of law and equity which gave rise to the obligation of confidence owed to the Crown in right of the United Kingdom would be inconsistent with the exigencies of public policy in Australia.

58 In the joint judgment in *Pfeiffer*, it was said that the factors discussed by Cardozo J in *Loucks*[84], namely the violation of the fundamental principles of justice, prevalent conceptions of good morals and deep-rooted traditions of the common weal, were indicative of "[t]he chief consideration which invites reference to the law of the forum, by application of a double actionability rule"[85]. Their Honours in *Pfeiffer* went on to conclude that, within the Australian federal system, each State and Territory should recognise the interests of the other States and Territories in the application of their laws to events occurring in their jurisdiction; any requirement for double actionability in non-federal jurisdiction was to be discarded, subject to the selected forum being not clearly inappropriate[86]. The application of a general threshold requirement that the events be actionable according to the laws of the forum could not be justified as based on giving effect to some public policy of the forum of the kind described by Cardozo J[87].

59 In the past, the first limb of the "double actionability" rule has been characterised as a technique of *forum* control specifically applicable in tort cases[88]. In the choice of law rules applicable in Australia, in intra-Australian torts, it has

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84 120 NE 198 at 202 (1918).

85 (2000) 203 CLR 503 at 541 [91].

86 (2000) 203 CLR 503 at 542 [96].

87 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 541 [91].

88 cf Carter, "Choice of Law in Tort and Delict", (1991) 107 *Law Quarterly Review* 405 at 408.

now been put aside. *Pfeiffer* established that, in the case of intra-Australian torts, principles of public policy have no role to play in the choice of law to be applied to the *lex causae*, just as those principles have no role to play in the rules respecting recognition and enforcement in Australia of the judgments of Australian courts.

60 The "double actionability" rule should now be held to have no application in Australia in international torts. To the extent that the first limb of that rule was intended to operate as a technique of *forum* control, we should frankly recognise that the question is about public policy and confront directly the issues that this may present. It cannot be suggested, however, that such considerations were engaged in the present litigation. It is, therefore, not the occasion further to consider the content or application of the factors to which Cardozo J referred in *Loucks*[89] or to consider how those principles relate to the common law rules about recognition and enforcement of foreign judgments. It is sufficient to say that, should a question arise as to whether public policy considerations direct that an action not be maintained in Australia, that question is appropriately resolved as a preliminary issue on an application for a permanent stay of proceedings.

Choice of law

61 The question then is whether, consistently with *Pfeiffer*, and by way of extension to it, it is the *lex loci delicti* which should be applied by courts in Australia as the law governing questions of substance to be determined in a proceeding arising from a foreign tort. If so, there is a subsidiary question as to whether, as the respondent would have it, there should be appended to that choice some "flexible exception" doctrine resembling that found in *Boys v Chaplin*[90].

62 The Renault companies refer to the decision of the Supreme Court of Canada in *Tolofson v Jensen*[91] and to its acceptance of the *lex loci delicti* as the governing law both for intra-Canadian and foreign torts. They submit that this Court should take the same course.

63 It has been said of the selection in *Tolofson* of the *lex loci delicti* that it avoids "the parochialism and systematic unfairness to defendants" which has

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89 120 NE 198 at 202 (1918).

90 [1971] AC 356.

91 [1994] 3 SCR 1022.

become associated with the "interest analysis" involved in the development in the United States of the "proper law of the tort"[92]. It also should be observed that the "flexible exception" associated in English law with *Boys v Chaplin*[93] reflects influence of the American "governmental interest" analysis[94]. In *Pfeiffer*, reference was made in the joint judgment to the revival, at least in the United States literature on the subject, of support for the *lex loci delicti*[95].

64 A passage in the judgment of La Forest J in *Tolofson*[96] is of particular utility for present purposes. His Lordship observed[97]:

> "The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limit. Absent a breach of some overriding norm, other states as a matter of 'comity' will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits. Moreover, to accommodate the movement of people, wealth and skills across state lines, a byproduct of modern civilization, they 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. These are the realities that must be reflected and accommodated in private international law."

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92 Walsh, "Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Products Liability Claims", (1997) 76 *Canadian Bar Review* 91 at 110; cf Juenger, "What's Wrong with Forum Shopping?", (1994) 16 *Sydney Law Review* 5.

93 [1971] AC 356 at 391.

94 Kincaid, "*Jensen v Tolofson* and the Revolution in Tort Choice of Law", (1995) 74 *Canadian Bar Review* 537 at 547-548.

95 (2000) 203 CLR 503 at 537-538 [77]. Further references to United States writing are collected in Walsh, "Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Products Liability Claims", (1997) 76 *Canadian Bar Review* 91 at 109.

96 [1994] 3 SCR 1022.

97 [1994] 3 SCR 1022 at 1047.

65 There is force in the statement by one North American scholar[98]:

> "There is a growing consensus that the abandonment of territorial constraints on choice of law, whether constitutionally or common law ordained, rather than heralding a brave new world of communitarian values, has resulted only in a parochial and unjust emphasis on local law and the interests of local litigants. A territorial choice of law is no longer seen as inherently incompatible with the achievement of substantive justice in conflicts cases. On the contrary, because it is a forum neutral connecting factor, it contains the promise of more even-handed justice for both parties. Globalization has also influenced the change in thinking. In an age of high personal and professional mobility, the significance attached to the concept of the personal law is in decline; activity-related connections are increasingly thought to offer a more stable and predictable criterion for choice of law."

66 The selection of the *lex loci delicti* as the source of substantive law meets one of the objectives of any choice of law rule, the promotion of certainty in the law. Uncertainty as to the choice of the *lex causae* engenders doubt as to liability and impedes settlement. It is true that to undertake proof of foreign law is a different and more onerous task than, in the case of an intra-Australian tort, to establish the content of federal, State and Territory law. But proof of foreign law is concomitant of reliance upon any choice of law rule which selects a non-Australian *lex causae*.

67 When an Australian court selects a non-Australian *lex causae* it does so in the application of Australian, not foreign, law. While the content of the rights and duties of the litigants is determined according to that *lex causae*, it is necessary to recall that the selection of the *lex causae* is determined by Australian choice of law rules.

68 Once the distinction between jurisdiction as a "threshold requirement" and choice of law is appreciated, it will be seen that there is no obligation upon either party to plead foreign law in order to render a claim or cross-claim justiciable. If, however, either party seeks to rely on foreign law, rules of court and general

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98 Walsh, "Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Products Liability Claims", (1997) 76 *Canadian Bar Review* 91 at 109-110 (footnotes omitted).

principles of pleading may oblige the party to plead the relevant foreign law. As is said in *Bullen & Leake & Jacob's Precedents of Pleadings*[99]:

> "Where a party relies on foreign law to support his claim or as a ground of defence thereto, he must specially plead the foreign law relied on in his statement of claim or defence, as the case may be, and he should give full particulars of the precise statute, code, rule, regulation, ordinance or case law relied on, with the material sections, clauses or provisions thereof. A mere allegation that an instrument depending on foreign law is null and void is too vague."

In the present case, on one reading of the statement of claim, the plaintiff alleged that the *lex causae* was that applicable in New Caledonia but did so in terms which did not comply with the above principles.

69 Two particular questions arise respecting the pleading of foreign law in tort actions. They arose in the past in cases concerning the term "justifiable" in the second limb of the "double actionability" rule, but the answers are applicable to the state of doctrine as established by *Pfeiffer* and the decision on the present appeal.

70 The first question is whether it is *necessary* for the plaintiff to plead the foreign law in order to establish a cause of action. The answer preferred by Dicey[100] is in the negative. In *Walker v W A Pickles Pty Ltd*, Hutley JA explained[101]:

> "An action of tort may be brought in New South Wales courts irrespective of where the facts founding the action may have occurred, even if they occurred in a place where there may be no law at all: see *Mostyn v Fabrigas*[102]. A pleading of a cause of action in tort which did not allege that

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99 13th ed (1990) at 1170.

100 Collins (ed), *Dicey and Morris on The Conflict of Laws*, 13th ed (2000), vol 2 at 1569.

101 [1980] 2 NSWLR 281 at 284-285. See also Starke, "Pleading of the foreign law in an action for tort allegedly committed in a foreign country", (1986) 60 *Australian Law Journal* 304; *Lazarus v Deutsche Lufthansa AG* (1985) 1 NSWLR 188 at 190; cf Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law*, (1998) at 99-106.

102 (1774) 1 Cowp 161 at 181 [98 ER 1021 at 1032].

> the facts occurred in any particular law district would be formally valid. On the basis that the utmost economy is enjoined by the rules, it would seem to me that pleading of a foreign element in the initiating process in a claim in tort can never be necessary. …
>
> This approach is reinforced by the principle that foreign law, which is, except between the States and the Territories of the Commonwealth, a fact, is presumed to be the same as local law; and a fact presumed to be true does not have to be pleaded: See *Supreme Court Rules*, Pt 15, r 10(a)."

On the other hand, if the defendant seeks to rely upon a foreign *lex causae*, then, in the ordinary way, it is for the defendant to allege and prove that law as an exculpatory fact[103].

71 The second question is whether, whilst not obliged to do so, it is for a plaintiff who sees a forensic advantage in the foreign law (for example, in its provision for strict liability) to plead that law in its statement of claim or other initiating pleading. In *Walker*[104], Hutley JA concluded not only that it was *unnecessary* for the plaintiff to plead the foreign law but *wrong* to do so. However, what is involved here is the application of a choice of law rule. It cannot be beyond the competence of the plaintiff to invoke that rule and be solely for the defendant to rely upon it for any exculpation it offers. The term "justifiable" may have conveyed a suggestion of exculpation but since the reformulation of the second limb by Brennan J in *Breavington*[105], that term has not appeared and it cannot control the operation of a choice of law rule which selects the *lex loci delicti* as that to be applied in Australia to govern questions of substance in a proceeding arising from a foreign tort. It follows that the rule must be that which Dicey regards as "well established", namely that "a party" who relies on a foreign *lex loci delicti* "must allege, and, if necessary, prove it"[106].

72 Where, as here, the applicant on a stay motion seeks to rely upon a foreign *lex causae* as providing an advantage, then, at a level of specificity, the applicant

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103 *Walker v W A Pickles Pty Ltd* [1980] 2 NSWLR 281 at 285.

104 [1980] 2 NSWLR 281 at 285.

105 (1988) 169 CLR 41 at 110-111.

106 Collins (ed), *Dicey and Morris on The Conflict of Laws*, 13th ed (2000), vol 2 at 1568.

should advance appropriate evidence as to the foreign law and particular features of that law which provide that advantage to the applicant.

73 Questions which might be caught up in the application of a "flexible exception" to a choice of law rule fixing upon the *lex loci delicti* in practice may often be subsumed in the issues presented on a stay application, including one based on public policy grounds. Contemporary practice respecting transnational litigation suggests that choice of law questions tend to be decided in the course of interlocutory processes before trial. The present appeal, and *Oceanic Sun*, *Voth*, *CSR v Cigna Insurance* and *Henry*, are instances of this. Such interlocutory applications may consume what appears to be excessive time and expense but they are a consequence of the reach of the "long arm" jurisdiction enjoyed by Australian courts. This renders inevitable disputes as to where to litigate.

74 There are other issues which, if they arise, may appropriately be dealt with at the interlocutory level. Questions may appear as to the *locus* of the wrongful act of which complaint is made, particularly in a product liability case[107]. In answering those questions, it should not be assumed that authorities construing provisions for the exercise of "long arm" jurisdiction are to be used for choice of law purposes[108]. Further, particularly where the foreign law area is not one in which a common law system prevails, issues may arise as to the characterisation of the wrong complained of as a "tort"[109].

75 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.

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107 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 538-539 [81].

108 Collier, *Conflict of Laws*, 2nd ed (1994) at 230-233; Fentiman, "Tort – Jurisdiction or Choice of Law?", (1989) 48 *Cambridge Law Journal* 191; Castel, "Back to the Future! Is the 'New' Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?", (1995) 33 *Osgoode Hall Law Journal* 35 at 72-74.

109 Collins (ed), *Dicey and Morris on The Conflict of Laws*, 13th ed (2000), vol 2 at 1517-1519; Briggs, "Choice of law in tort and delict", (1995) *Lloyd's Maritime and Commercial Law Quarterly* 519 at 521-522.

76 To that outcome, several caveats should be entered. In *Pfeiffer*, reference is made to the difficulty in identifying a unifying principle which assists in making the distinction, in this universe of discourse, between questions of substance and those of procedure. The conclusion was reached that the application of limitation periods should continue to be governed by the *lex loci delicti* and, secondly, that[110]:

> "*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." (original emphasis)

We would reserve for further consideration, as the occasion arises, whether that latter proposition should be applied in cases of foreign tort. We also would reserve for further consideration in an appropriate case the *Moçambique* rule[111] and the standing of *Potter v Broken Hill Proprietary Co Ltd*[112]. Special considerations also apply to maritime torts and what Dicey calls "aerial" torts[113].

77 However, in the present appeal, the stage has been reached that the Renault companies have succeeded in establishing that the Court of Appeal erred in its concentration upon the significance of the law of New South Wales as the determinative law of the rights and liabilities of the parties. The law of New South Wales is not that determinative law, it not being the law of the place of the wrong. There remains the question whether, nevertheless, the Court of Appeal reached the right result in allowing the appeal, overruling the decision reached by the primary judge and dismissing the application for a stay sought by the Renault companies.

Should the proceedings be stayed?

78 In that regard, Mr Zhang submits that, in ordering the stay, albeit on conditions, the primary judge did not properly consider the matters required by the authorities. There is substance in that submission. It was not a question of striking a balance between competing considerations. Rather, it was the task of the Renault

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110 (2000) 203 CLR 503 at 544 [100].

111 After *British South Africa Company v Companhia de Moçambique* [1893] AC 602.

112 (1906) 3 CLR 479.

113 Collins (ed), *Dicey and Morris on The Conflict of Laws*, 13th ed (2000), vol 2 at 1541-1543.

companies as applicants on the motion to demonstrate that a trial in New South Wales would be productive of injustice, because it would be oppressive in the sense of seriously and unfairly burdensome, prejudicial or damaging, or vexatious, in the sense of productive of serious and unjustified trouble and harassment[114].

79 The primary judge did not state his conclusion in anything resembling those terms. Rather, stating that he found it a very difficult case, he ordered the stay "after weighing all the factors".

80 As foreshadowed earlier in these reasons, it then becomes a matter of re-exercising the discretion reposed in the primary judge by the relevant provisions of the Rules.

81 An Australian court cannot be a clearly inappropriate forum merely by virtue of the circumstance that the choice of law rules which apply in the forum require its courts to apply foreign law as the *lex causae*. In any event, reference has been made earlier in these reasons to the limited nature of the evidence led by the Renault companies respecting the substantive law applicable in New Caledonia to an action such as that brought by Mr Zhang.

82 Having reviewed the quite detailed evidence respecting procedural matters which was before the primary judge, we would agree with his conclusion that "[o]verall the practical considerations tend to favour a hearing in Sydney". There can be no dispute that a fair trial might be had in the courts of either of the jurisdictions concerned. However, the decisive consideration must be that the Renault companies have not established, and do not appear seriously to have sought to establish before the primary judge, that a trial in the Supreme Court of New South Wales would be oppressive or vexatious to them in any relevant sense.

Conclusion

83 The appeal should be dismissed with costs.

84 The effect of that order will be to leave standing the whole of the order of the Court of Appeal, including order 3. This preserved the order made by the primary judge staying Mr Zhang's claim in quasi-contract. As indicated earlier in these reasons, the primary judge took that course on the footing that Mr Zhang had consented to a stay of the cause of action in quasi-contract until further order.

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114 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 564-565.

85 In his written submissions to this Court, Mr Zhang proffers an explanation for that course having been taken and seeks an order varying order 3 so as to permit him to pursue that claim as well as the claim in negligence. This Court itself should not take any further steps with respect to order 3. If he is so advised, then Mr Zhang may institute a fresh application to a judge of the Supreme Court seeking a further order to remove the stay in question.

86 KIRBY J. This appeal[115] concerns the rules of private international law. Dean Prosser described that subject as a "dismal swamp"[116]. Professor Cheshire praised it as the topic offering "the freest scope to the mere jurist", even if he or she could "seldom rest content with the solution" provided[117]. For Cardozo J, it was "one of the most baffling subjects of legal science"[118].

87 The appeal requires the Court to address two questions reserved in recent decisions: *John Pfeiffer Pty Ltd v Rogerson*[119] and *Agar v Hyde*[120]. In *Pfeiffer*, the Court postponed determination of whether the reformulated rule, stated there for choice of law in torts, was confined to intra-national torts or applied equally to torts having international features. In *Agar*, the Court withheld its opinion on whether the Rules of Court there in issue (also applicable in this case) prescribed a test for determining questions of inappropriate forum different from the common law test expressed in *Voth v Manildra Flour Mills Pty Ltd*[121]. Those questions must now be answered.

The facts and common ground

88 *The background facts:* Mr Fuzu Zhang ("the respondent"), now an Australian citizen, was injured in February 1991 whilst driving a motor vehicle near Noumea in New Caledonia, an overseas department of the French Republic. He alleges that his injuries were caused by the defective design and manufacture of the Renault vehicle that he was driving at the time. He sued the Renault companies ("the appellants") in the Supreme Court of New South Wales ("the Supreme Court"). He did so on the basis that his proceedings were for the recovery of damages suffered in the State of New South Wales "caused by a tortious act or

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115 From a judgment of the New South Wales Court of Appeal: *Zhang v Regie National des Usines Renault SA & Anor* [2000] NSWCA 188.

116 Prosser, "Interstate Publication", (1953) 51 *Michigan Law Review* 959 at 971.

117 Cheshire, *Private International Law* (1935) at vii in North, "Private International Law: Change or Decay?", (2001) 50 *International and Comparative Law Quarterly* 477.

118 Cardozo, *The Paradoxes of Legal Science* (1928) at 67.

119 (2000) 203 CLR 503 at 538 [80], 561 [150.10], 561-562 [153].

120 (2000) 201 CLR 552 at 575 [55]. See also *Voth v Manildra Flour Mills Pty Ltd* (1989) 15 NSWLR 513 at 531 per Gleeson CJ.

121 (1990) 171 CLR 538. See also *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 391.

omission wherever occurring"[122]. He does not contend that the subject vehicle was designed, manufactured, sold, leased or used in New South Wales or any other part of Australia. Neither of the appellants is present in Australia. Neither conducts operation here. Having received the respondent's statement of claim, the appellants moved the Supreme Court, pursuant to the *Supreme Court Rules* 1970 (NSW) ("the Rules"), to be relieved from the proceedings[123].

89 The primary judge upheld the appellants' application. He stayed the proceedings upon terms[124]. The Court of Appeal reversed that decision, found that the primary judge's discretion had miscarried and decided to re-exercise the discretion for itself. It then declined to stay the respondent's proceedings or otherwise to provide any relief[125].

90 The notion that two French corporations, sued in respect of the allegedly negligent design and manufacture of a vehicle which crashed in French territory under conditions amenable to French law before French judges, should be made answerable to proceedings in such a case to a court of New South Wales, Australia, seems intuitively objectionable. Intuition appears to be confirmed when the legal foundation for asserting local jurisdiction is given as no more than the fact that part of the respondent's damage, following his accident, occurred in New South Wales. Such a link has rightly been described as an element of the tort of negligence ordinarily deserving little weight in this context[126]. The question for decision in this Court, in light of the division of opinion in the courts below, is whether law accords with intuition.

91 *Choice of law rules:* Despite some earlier suggestions[127] that the true source of choice of law rules within Australia was to be found in the

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122 *Supreme Court Rules* (1970) NSW, Pt 10, r 1A. See reasons of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ ("the joint reasons") at [9]; reasons of Callinan J at [179].

123 The Rules, Pt 10, r 2A. See joint reasons at [11]; reasons of Callinan J at [187].

124 *Zhang v Regie National des Usines Renault SA and Anor*, unreported decision of Smart J, Supreme Court of New South Wales, 16 October 1998 ("Reasons of the primary judge"). The terms are set out in the joint reasons at [13].

125 *Zhang* [2000] NSWCA 188.

126 *Voth* (1990) 171 CLR 538 at 571.

127 *Thompson v Hill* (1995) 38 NSWLR 714 at 716-718; cf Gummow, "Full Faith and Credit in Three Federations", (1995) 46 *South Carolina Law Review* 979 at 987.

Constitution[128], that notion has not so far gathered support[129]. It would, in any case, be of little or no relevance to a tort having international features. No party suggested that the Constitution controlled the outcome of this case.

92 Nor has this Court itself previously decided the issues argued in this appeal. In the past, it has assumed that the governing rule for choice of law in cases of tort generally - whether intra-national or international in character - was that expressed in *Phillips v Eyre*[130]. However, that decision is not binding on this Court. Its authority was rejected in *Pfeiffer* in respect of intra-national torts[131]. The appellants urged that the application of the same logic led to its rejection in the case of international torts and hence in this case.

93 *Stay of proceedings*: For some time in Australian courts there was doubt as to the test to be applied when an application was made, in reliance on the common law, to stay proceedings in which a party lawfully invoked a court's jurisdiction. Initially, borrowing from English decisions, this Court required that a very strong case be proved, virtually of oppression of a party, to warrant a court's refusal to exercise a jurisdiction that had been lawfully invoked[132]. The objecting party had to show that the continuance of the action would be vexatious and oppressive to them. Those are strong words, in ordinary parlance. In the context, they were meant to be.

94 Subsequently, following abandonment of that rule in England[133], a criterion somewhat more respectful of the claims of foreign jurisdictions and litigants was adopted. After the English courts endorsed the rule in *Spiliada Maritime Corporation v Cansulex Ltd*[134], it was thought, for a time, that Australian courts might follow. According to *Spiliada*, the search in each case is for the "… forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the

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128 s 118. See *Pfeiffer* (2000) 203 CLR 503 at 532-535 [59]-[71], 555-556 [137]-[138].

129 cf *Pfeiffer* (2000) 203 CLR 503 at 534-535 [65]-[70], 556-558 [138]-[143].

130 (1870) LR 6 QB 1 at 28-29; cf Pryles, "Forum Non Conveniens – the Next Chapter", (1991) 65 *Australian Law Journal* 442 at 447-448.

131 *Pfeiffer* (2000) 203 CLR 503 at 542 [95]-[96], 546-547 [109]-[113].

132 *Maritime Insurance Co Ltd v Geelong Harbor Trust Commissioners* (1908) 6 CLR 194 at 198.

133 *MacShannon v Rockware Glass Ltd* [1978] AC 795 at 812.

134 [1987] AC 460 at 476.

parties and the ends of justice". In the New South Wales Court of Appeal, I favoured following *Spiliada*[135]. So, in this Court in *Oceanic Sun Line Special Shipping Company Inc v Fay*[136], did Wilson and Toohey JJ. I still favour the *Spiliada* principle. I regard it as one more appropriate to contemporary circumstances. It has been followed in many common law jurisdictions[137]. It is a principle that is harmonious with the rules of public international law as well as with comity and mutual respect ordinarily observed between the courts of different nations[138].

95 However, the common law rule for Australia is different. It was settled for the time being in *Voth*[139]. According to that decision, the test is not to identify the appropriate forum for the trial of the action. It is to ascertain whether the objecting party has demonstrated that the Australian court, whose jurisdiction is properly invoked, is a "clearly inappropriate forum"[140]. Since *Voth*, the foregoing test has been reaffirmed by this Court as expressing the Australian common law[141]. Despite continuing reservations about the test, and the "increased forum shopping and jurisdictional conflict" to which it can lead[142] (especially in proceedings involving parties resident in jurisdictions which apply the comity principle of *Spiliada* or rules like it) the *Voth* rule is binding on Australian courts as a statement of the common law.

96 In this appeal, no party sought to reargue the correctness of *Voth*. I must therefore accept *Voth* as stating the common law, to the extent that such law governs this case. Like the Pilgrim I have not lost faith. One day *Voth* may be

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135 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1987) 8 NSWLR 242 at 258; *Reese Bros Plastics Ltd v Hamon-Sobelco*, unreported, Supreme Court of New South Wales, 23 December 1988; *Voth* (1989) 15 NSWLR 513 at 533.

136 (1988) 165 CLR 197 at 217-218.

137 *Aldington (The "Waylink") Shipping Ltd v Bradstock Shipping Corp* [1988] 1 Lloyd's Rep 475; *The "Adhiguna Meranti"* [1988] 1 Lloyd's Rep 384.

138 cf *Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon* [1994] 3 SCR 1022 at 1047; cf the joint reasons at [39].

139 (1990) 171 CLR 538.

140 (1990) 171 CLR 538 at 564-565.

141 *Henry v Henry* (1996) 185 CLR 571 at 586-587. See joint reasons at [25]; cf *Agar v Hyde* (2000) 201 CLR 552 at 591-592 [112]-[115].

142 *In Marriage of Gilmore* (1993) 110 FLR 311 at 319-320.

overruled and a principle of the common law may be established more appropriate to the contemporary circumstances of global and regional disputes in which Australian courts, like those of every country, must now operate. But until overruled by this Court or replaced by valid legislation[143], *Voth* must be applied.

The issues

97 Four issues arise in the appeal:

(1) What is the primary choice of law rule applicable in Australian courts in respect of proceedings that are based on a tort that occurred wholly or partly in the jurisdiction of another country?

(2) Did the Court of Appeal err in holding that the primary judge's discretion to grant relief to the appellants had miscarried (a) because he had found that the substantive law to be applied was French law or (b) because he regarded the issue before him to be whether, within the Rules, the Supreme Court was "an inappropriate forum" in which to try the respondent's action against the appellants?

(3) If the Court of Appeal erred in either, or both, of the foregoing respects, should this Court in this appeal (a) set aside the Court of Appeal's order and restore the discretionary order of the primary judge; or (b) proceed in the circumstances to exercise its own discretion in respect of the relief sought?

(4) If this Court should proceed to determine for itself the appellants' application for relief, according to the applicable criteria should the respondent's action be stayed or other relief granted to the appellants? Or should the appellants' application be dismissed?

Jurisdiction and choice of law

98 *Where the tort occurred:* The first requirement for any court, invited to exercise jurisdiction and power over parties, is to establish (at least where there is contest or doubt) that according to its own law it has jurisdiction and power over the matter brought before it.

99 In Australia, in respect of this Court and other federal and territory courts, such laws must ultimately trace their source to the Constitution. In the case of a State court, such as the Supreme Court of New South Wales, the source may be found in a statute constituting, or continuing the existence of, the court[144], any

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143 cf *James Hardie Industries Pty Ltd v Grigor* (1998) 45 NSWLR 20 at 28.

144 *Supreme Court Act* 1970 (NSW), s 22.

original Charter of Justice[145] or Imperial legislation pursuant to which the court was first established[146], subordinate legislation made pursuant to statute[147], the common law and (possibly) in the case of some State Supreme Courts, formerly colonial courts, a residuum of the royal prerogative[148]. The Supreme Court of a State having a constitutional status, any such law must also be consonant with the federal Constitution[149].

100 Often, to establish jurisdiction in a court in a case involving an alleged tort, it is necessary to decide where the tort "occurred". In most cases, that is a relatively straightforward question to answer. If all of the allegedly wrongful acts, all of the damage and all of the actors, things and places involved exist in the one jurisdiction or law area, there is no difficulty. However, in other cases (of which the present is one) there may be facts that connect the wrong alleged to two or more law areas. Here, those involved are arguably:

- New Caledonia (where the accident occurred in which the respondent was injured) and initially suffered damage;
- France and possibly other places in Europe (where the motor vehicle involved was manufactured and designed); and
- Australia (where the respondent lives and suffers continuing damage and where his lawyers and many of his witnesses are).

101 Determination of where the tort occurred in a particular case may (depending on the applicable test) be relevant for choice of law purposes[150]. The

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145 *Charter of Justice* (2 April 1787); the *New South Wales Act* 1823 (Imp) (4 Geo IV c 96); *The Charter of Justice*, 17 May 1824. See Meagher, Gummow and Lehane, *Equity Doctrines and Remedies*, 3rd ed (1992) at 10-11 [123]-[124].

146 The *New South Wales Act* 1823 (Imp), s 1 (4 Geo IV c 96) as continued by 8 Geo IV c 73 (1827).

147 The Rules are made pursuant to *Supreme Court Act* 1970 (NSW), s 124. The original Rules were contained in the Fourth Schedule to the Act of 1970.

148 Campbell, "The Royal Prerogative to Create Colonial Courts" (1964) 4 *Sydney Law Review* 343.

149 *Yougarla v Western Australia* (2001) 75 ALJR 1316 at 1335-1336 [94]-[99]; 181 ALR 371 at 396-398.

150 Thus it will be relevant if the applicable test is the place where the wrong occurred (*lex loci delicti*).

classification in that context may still be controversial[151]. But before that issue arises, it may present itself in a different guise as relevant to the assumption by the court, whose powers have been invoked, of jurisdiction over the matter. If, as is often the case, the law establishing the jurisdiction of the court limits the exercise of such jurisdiction to the place where the "cause of action arose within the jurisdiction of the Court"[152], the determination of the place of the wrong may effectively decide both the jurisdiction and choice of law questions.

102 More recently, following controversial assertions of jurisdiction in United States legislation[153], legislatures in different countries, including Australia, have enacted or authorised so-called "long arm" laws. These laws purport to confer jurisdiction on their courts not by reference to the traditional criteria (the presence or service of the defendant or the happening of the cause of action alleged)[154], but by reliance on more remote and controversial criteria, engaging that attribute of sovereignty which manifests itself in the exercise of judicial power.

103 So far as municipal law is concerned, courts must (subject to any local disqualifying considerations present in the Constitution[155] or in any binding human rights law[156]) obey their local law. However, so far as public international law is concerned, extra territorial acts can only be the subject of the jurisdiction of a

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151 Briggs, *"The Halley*: Holed, but Still Afloat?", (1995) 111 *Law Quarterly Review* 18 at 19 criticising *Red Sea Insurance Co Ltd v Bouygues SA* [1994] 3 WLR 926; [1994] 3 All ER 749.

152 As did the *Common Law Procedure Act* 1899 (NSW), s 188(1)(b).

153 Brownlie, *Principles of Public International Law*, 5th ed (1998) at 313. See also Carter, "Torts in English Private International Law", (1982) 52 *British Year Book of International Law* 9 at 10, makes the point that jurisdiction and choice of law cannot be considered in complete isolation from each other.

154 *Berkley v Thompson* (1884) 10 App Cas 45 at 49; *John Russell and Co Ltd v Cayzer, Irvine and Co Ltd* [1916] 2 AC 298 at 302; cf Brownlie, *Principles of Public International Law*, 5th ed (1998) at 313; Shearer, *Starke's International Law*, 11th ed (1994) at 184.

155 *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367; *Hughes v Munro* (1909) 9 CLR 289; *Mynott v Barnard* (1939) 62 CLR 68 at 91; *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1980) 168 CLR 340 at 369-370.

156 *Lubbe v Cape Plc* [2000] 1 WLR 1545 at 1561-1562; [2000] 4 All ER 268 at 281-282, referring to the European Convention on Human Rights, Art 6 and the Brussels Convention, Art 2.

national court if certain general principles are observed. One of these is that there should be a substantial and bona fide connection between the subject matter and the source of jurisdiction relied on[157].

104 In New South Wales, under the *Supreme Court Act* 1970 (NSW), the State Parliament has conferred on the Rule Committee of the Supreme Court the power to make rules "for the purpose of carrying this Act into effect"[158]. Pursuant to that power, Pt 10, r 1A(e) of the Rules was made. That is the subrule relied on by the respondent in these proceedings. It permits the originating process of the Supreme Court to be served outside Australia based on damage suffered inside the State caused by a tortious act or omission wherever occurring. Despite a constitutional objection, the validity of that Rule was upheld by the Court of Appeal of the State[159]. This Court affirmed that decision[160]. Since then, the rule has been invoked on many occasions to ground the jurisdiction of the Supreme Court and not only in personal injury cases[161]. No party to these proceedings sought to reopen a challenge to the validity of the Rule, whether on constitutional or other grounds. Being part of Australian law, it is therefore the duty of Australian courts, including this Court, to give effect to it.

105 *Public international law and territoriality:* I agree with the joint reasons of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ ("the joint reasons") that the issues of jurisdiction and choice of law are separate and distinct[162]. I said as much in *Pfeiffer*[163]. However, enough has been stated in this case to indicate that the two concepts are closely related. At the foundation of each is a principle that courts ordinarily confine the assertion and exercise of their jurisdiction to matters arising in relation to the territory over which the polity that has established the court enjoys legal authority. The principle of public international law requiring a

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157 Brownlie, *Principles of Public International Law*, 5th ed (1998) at 313.

158 *Supreme Court Act* 1970 (NSW), s 124(1).

159 *Flaherty v Girgis* (1985) 4 NSWLR 248 (Kirby P and Samuels JA; McHugh JA dissenting).

160 *Flaherty v Girgis* (1987) 162 CLR 574. See Phegan, "Conflict of laws - Rules for service out of jurisdiction - Damage suffered in Jurisdiction", (1983) 57 *Australian Law Journal* 471.

161 See eg *Darrell Lea Chocolate Shops Pty Ltd v Spanish-Polish Shipping Co Inc* (1990) 25 NSWLR 568.

162 Joint reasons at [10].

163 (2000) 203 CLR 503 at 562 [154].

substantial and bona fide connection between the subject matter and the source of jurisdiction[164] affords a reason for restraint in the exercise of judicial power beyond that territory. That reason is ultimately based upon notions of comity, reciprocity, and mutual respect between different legal jurisdictions. Those considerations tend to advance the just and efficient administration of the law and the avoidance of conflict caused by excessive assertions of jurisdiction.

106 The rule of public international law, so expressed, will not necessarily deprive a court, afforded it by clear municipal law, of a basis for the engagement of its jurisdiction. But it does provide a reason, jurisdiction being engaged, for the exercise of such jurisdiction with a measure of restraint in a particular case where to do so occasions inconvenience and injustice to a party. It provides a reason for reading, or applying, the exceptional legislative grant of "long arm" jurisdiction with a degree of strictness, on the basis that to do otherwise will involve the application of municipal law in a way that would breach the principles of international law. In the contemporary world, no country's legal system can ignore the influence of public international law[165]. To the extent that it does so, the result tends either to anarchy or ineffectualness.

107 A recent decision of the International Court of Justice illustrates the strength of the rule of public international law that "a State may not exercise its authority on the territory of another State"[166]. It reflects the "principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations"[167]. The case concerned the Democratic Republic of the Congo and Belgium in a matter involving municipal judicial procedure and court process. The case arose out of an international arrest warrant issued *in absentia* in Belgium against an accused who, at the time of the warrant but not thereafter, was the Minister for Foreign Affairs of the Congo[168]. The warrant's validity was based on the allegation that the accused was a perpetrator of crimes against the Geneva Convention of 1949 and crimes against

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164 *Compania Naviera Vascongado v S S Cristina* [1938] AC 485 at 496-497; *Tolofson v Jensen* [1994] 3 SCR 1022 at 1047.

165 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-419 [166]-[167].

166 *Democratic Republic of the Congo v Belgium*, unreported, International Court of Justice, 14 February 2002 at [1].

167 *Democratic Republic of the Congo v Belgium* at [1].

168 *Democratic Republic of the Congo v Belgium* at [13].

humanity[169]. It relied on a provision of Belgian law affording the courts of that country jurisdiction in respect of such offences "wheresoever they may have been committed"[170].

108 The International Court of Justice concluded that "the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo …"[171]. The Court obliged Belgium "by means of its own choosing [to] cancel the warrant in question and so inform the authorities to whom it was circulated[172]." Although the facts are special and involved issues quite different from those of the present appeal (most especially the immunity of high officers of state), the decision represents a re-affirmation of the limits that public international law places upon the attempts of municipal law to expand the jurisdiction of municipal courts over persons, events and things having no relevant territorial connection with the municipal jurisdiction. The decision is the more striking because it was delivered in the context of allegations of crimes of "universal jurisdiction"[173].

The choice of law rule for international torts

109 *Importance of the issue:* The primary judge in the present case concluded that the substantive law to be applied to the parties' dispute would be French law. He said[174]:

> "On any reasonable view the tort alleged, whether negligent design or negligent manufacture, is French … This case has a much closer connection with New Caledonia and France than with New South Wales. The case concerns a sedan allegedly defectively designed and manufactured in France by a French company, hired in a French territory and involved in an accident in that same French territory. France and New Caledonia have

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169 *Democratic Republic of the Congo v Belgium* at [15]. The warrant was issued in April 2000 by an investigating Judge of the Tribunal de prèmiere instance, noted at [67].

170 Belgium, Law of 16 June 1993, as amended by the Law of 19 February 1999, "concerning the Punishment of Serious Violations of International Humanitarian Law"; see *Democratic Republic of the Congo v Belgium* at [15].

171 *Democratic Republic of the Congo v Belgium* at [70].

172 *Democratic Republic of the Congo v Belgium* at [76].

173 cf *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 3]* [2000] 1 AC 147 at 274-275, per Lord Millett.

174 Reasons of the primary judge cited [2000] NSWCA 188 at [22].

courts and procedures suited to this case and a judicial system of considerable standing which is internationally recognised and accepted."

110 In the Court of Appeal, it was correctly recognised that the decision of the primary judge involved the exercise of a discretion, invoked by the appellants' application to the Supreme Court for relief. This being the case, the only warrant for disturbance of the primary judge's orders was, relevantly, a miscarriage of the judge's discretion, including by the exercise of that discretion on a ground that was legally erroneous[175].

111 The Court of Appeal latched onto the foregoing finding about the applicable law. Because the primary judge had stated that the competing factors were otherwise very finely balanced, the detection of a supposed error as to the applicable law would make intervention for a "discretion miscarried"[176] virtually inevitable. It was this that the Court of Appeal considered authorised it to re-exercise the discretion that it held had failed at first instance. This, in turn, led to a result different from that reached by the primary judge. Accordingly, the finding on the applicable law was the key that unlocked the door of the Court of Appeal to afford it the authority to intervene. It therefore becomes necessary to decide whether the reason given by the Court of Appeal for doing so was justified or not.

112 *Applying forum law:* The respondent urged this Court, in relation to an international tort such as the present, not to follow the principle adopted for intra-national torts in *Pfeiffer* but to adhere to the pre-existing law as stated in *The "Halley"*[177] and in *Phillips v Eyre*[178]. In an action framed in tort, those decisions

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175 *House v The King* (1936) 55 CLR 499 at 504-505. For recent consideration of this principle in New Zealand see *Alex Harvey Industries Ltd v CIR*, unreported, Court of Appeal of New Zealand, 30 July 2001 noted (2001) *New Zealand Law Journal* 331.

176 The words used by Stein JA in *Zhang* [2000] NSWCA 188 at [43]. The Court of Appeal followed its own authority in *Thompson v Hill* (1995) 38 NSWLR 714. That decision, in turn, sought to apply the decision of this Court in *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1. *McKain* was overruled in *Pfeiffer* (2000) 203 CLR 503. Although the decision in *Pfeiffer* was noticed by the Court of Appeal, it remarked that the decision had left unaffected the law governing international torts. Accordingly, the court applied *McKain*: *Zhang* [2000] NSWCA 188 at [52].

177 *The Liverpool, Brazil and River Plate Steam Navigation Company, Ltd v Benham (The "Halley")* (1868) LR 2 PC 193 at 203.

178 (1870) LR 6 QB 1. The rule in *Phillips v Eyre* was not expressed as a choice of law rule but as imposing restrictions on subject matter jurisdiction, leaving open the choice of law. This helps to explain the unfortunate history of the decision as one on choice of law. The reference by Willes J to *The "Halley"* was to that case as an

(Footnote continues on next page)

were understood to give the predominant role in the choice of law rule to the law of the forum[179]. This was the law that the Court of Appeal thought was applicable in deciding the respondent's substantive claim in the present case.

113 In part, the approach in *The "Halley"* and in *Phillips v Eyre* rested on the fact that, initially, the common law courts in England could not entertain proceedings founded on foreign torts. This rule had led to the invention of a fiction that treated the foreign tort as if it had occurred in England and thus attracted the law of the forum[180]. In part, the principle was a natural response of English judges when the jurisdiction of their courts was invoked, to give judgment according to their own ideas of justice and the law with which they were familiar[181]. In part, in its origins it doubtless reflected the satisfaction felt at that time, in most jurisdictions of the common law, that the law administered in those jurisdictions was superior to that of any other place, including a place where the tort may have "occurred". These were times before widespread disparity entered into the rules of the common law and before statutes intruded in great number to replace the common law's erstwhile uniform rules[182]. Finally, the rules that required the pleading of foreign law may sometimes have encouraged parties to avoid the trouble, expense and uncertainty of proving foreign law by mutually assuming that it was the same as the law of England.

114 The application of the law of the forum has had its defenders. It was the choice of law rule for torts favoured by Savigny, the founder of modern legal doctrine applicable to multilateral claims[183]. Such defenders cautioned against the

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instance in which the first limb of the rule was not satisfied, without suggesting that the law of the forum was the applicable rule.

179 Law Commission No 193; Scottish Law Commission No 129, *Private International Law - Choice of Law in Tort and Delict* (1990) § 2.6.

180 Law Commission No 193; Scottish Law Commission No 129, *Private International Law - Choice of Law in Tort and Delict* (1990) § 2.6.

181 cf *Boys v Chaplin* [1971] AC 356 at 400 per Lord Pearson.

182 Hancock, "Torts in the Conflict of Laws" (1982) cited Morse, "Torts in Private International Law" (1978) at 11 in *Problems in Private International Law*, vol 2.

183 Savigny, *System des heutigen roemischen Rechts* (1849) noted *Pfeiffer* (2000) 203 CLR 503 at 536 [74]. Contrast Symeonides, "Choice of Law in the American Courts in 1997", (1998) 46 *American Journal of Comparative Law* 233 at 242 where resort to the law of the place of the wrong is described, in a United States context, as "turning the clock back". See joint reasons at [44]-[45].

"wholesale abrogation" of the law of the forum[184] because of its supposed provincialism and inadequacies. Some of the arguments in defence of the law of the forum have been based on the perceived defects in the principal alternative choice of law rules for torts, such as the rule of the place of the wrong[185]; the rule respecting the last event in completing the wrong[186]; the rule obliging application of the law having "the closest connection" with the wrong[187]; or the composite and somewhat unrevealing "proper law of a tort" favoured by Dr Morris[188].

115 This Court cannot decide amongst these various options for the choice of law rule by reference solely to legal authority. Questions of legal principle and legal policy must also be considered, as Deane J explained in *Oceanic*[189]. On the one hand, the "mechanistic" application of the law of the place of the wrong has been described as "absurd"[190]. It is said to reflect the thinking of those who "hanker after certainty in their rules of law" without considering the adequacy of the resulting rules from the social and economic point of view[191]. On the other hand, criteria such as "closest connection", "the balance of interests" and "the proper law of a tort" are acknowledged, even by critics of the rule of the place of the wrong, as "flabby" and overly dependent on judicial discretions[192].

116 *Waiting for legislation:* In circumstances revealing such strongly differing opinions on the part of judges and scholars about what the choice of law rule

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184 Juenger, "Tort Choice of Law in a Federal System", (1997) 19 *Sydney Law Review* 529 at 538 ("Juenger").

185 *"Lex loci delicti"*. See *Pfeiffer* (2000) 203 CLR 503 at 539-540 [83]-[87], 562-563 [157]-[158].

186 Morris, "The Proper Law of a Tort", (1951) 64 *Harvard Law Review* 881 at 887 described this doctrine in the [first] *Restatement, Conflict of Laws* as "mechanistic".

187 Juenger at 543.

188 Morris, "The Proper Law of a Tort", (1951) 64 *Harvard Law Review* 881 at 881. He drew on the "proper law" of contract which he claimed to be among the outstanding contributions of English learning to private international law.

189 *Oceanic* (1988) 165 CLR 197 at 252; cf *Northern Territory v Mengel* (1995) 185 CLR 307 at 347.

190 Morris, "The Proper Law of a Tort", (1951) 64 *Harvard Law Review* 881 at 894.

191 Morris, "The Proper Law of a Tort", (1951) 64 *Harvard Law Review* 881 at 882.

192 Juenger at 545.

should be, the respondent submitted that it was premature for this Court to adopt any rule for international torts different from that long assumed to be the law in Australia, as stated in *Phillips v Eyre*. The respondent argued that restraint was specially appropriate because the subject had been considered by the Australian Law Reform Commission and its report was still before the Parliament[193]. Legislative amendment had been adopted in England to abolish and replace the rule in *Phillips v Eyre*[194]. Although such legislation had initially been opposed in England on the basis that it would result in "freezing" the development of the law in terms of the statute[195], an Act was eventually passed. This, it was argued, represented the proper delineation between the functions of a court and those of the Parliament.

117 The respondent submitted that whilst the clarification and expression of the common law for intra-national torts within Australia might be justified on the footing that the Court's previous attempts to state the law had been sharply divided (and even more sharply criticised[196]) and involved the Court's view of what was required by the constitutional context in which the common law had to be expressed[197], such considerations played no part in the choice of law rule applicable to an international tort such as his was said to be. The re-expression of

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193 The Law Reform Commission, *Choice of Law* (Report No 58, 1992), 44-45.

194 *Private International Law (Miscellaneous Provisions) Act* 1995 (UK). The applicable section, as relevant to a case such as the present, reads: "11(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur. (2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being - (a) for a cause of action in respect of personal injury caused to an individual … the law of the country where the individual was when he sustained the injury …".

195 Carter, "Choice of Law in Tort and Delict", (1991) 107 *Law Quarterly Review* 405 at 418.

196 *Koop v Bebb* (1951) 84 CLR 629; *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20; *Breavington v Godleman* (1988) 169 CLR 41; *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; *Stevens v Head* (1993) 176 CLR 433. See Pryles, "Of Limitations and Torts and the Logic of Courts", (1992) 18 *Melbourne University Law Review* 676; Nygh, "The Miraculous Raising of Lazarus: *McCain v R W Miller and Co (South Australia) Pty Ltd*", (1992) 22 *University of Western Australia Law Review* 386.

197 *Pfeiffer* (2000) 203 CLR 503 at 532-538 [59]-[80], 549-551 [119]-[124]; 555-557 [137]-[143].

the choice of law rule with respect to international torts should therefore be left to the legislature. In the meantime, the rule in *Phillips v Eyre* should be followed[198].

118 *Response to forum shopping:* One complaint about departure from the law of the place where the wrong occurred is that every other choice of law rule inevitably leads to forum shopping. However, critics of observance of the law of the place of wrong have replied that forum shopping is not necessarily to be condemned[199]. According to this opinion there may be no unfairness in allowing an injured plaintiff to enjoy the advantage of the provisions of any law with which it would be reasonable to hold that a defendant ought to have complied and to which the defendant is amenable[200]. The logic of this opinion involves subjecting a defendant to litigation in a place with little or no natural connection with the alleged cause of action and possibly at much inconvenience[201].

119 Some legal systems have favoured a choice of law rule giving priority to the connecting factors most favourable to the plaintiff[202]. Even if such a rule ought to be rejected in Australia because it lacks even-handedness[203], the entitlement to invoke a court with clear jurisdiction and with some connection with the legal wrong, where the alternative might be to deny a party any practical chance of redress[204], is not, in the view of some commentators, so offensive to notions of justice as to warrant rejection out of hand.

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198 The second part of the rule in *Phillips v Eyre* ("the act must not have been justifiable by the law of the place where it was done") is obviously a reflection of the law of the place of the wrong. However, the first part of the rule ("the wrong must be of such a character that it would have been actionable in England") gives priority of attention to the law of the forum.

199 Juenger at 540. See also the defence of it expressed by Lord Denning MR in *The Atlantic Star* [1973] QB 364 at 382 cited in the reasons of Callinan J at [194]; cf *Pfeiffer* (2000) 203 CLR 503 at 552-553 [128]-[130].

200 cf Carter, "Torts in English Private International Law", (1982) 52 *British Year Book of International Law* 9 at 16.

201 cf reasons of Callinan J at [196]-[200].

202 Morris, "The Proper Law of a Tort", (1951), 64 *Harvard Law Review* 881 at 888 by reference to the German Civil Code Arts 932-935. More recently the German law of conflicts of laws has been reformed introducing a considerable degree of flexibility.

203 *Agar v Hyde* (2000) 201 CLR 552 at 601-602 [131]; See reasons of Callinan J at [200] with which, in this respect, I agree.

204 *Lubbe v Cape Plc* [2000] 1 WLR 1545; [2000] 4 All ER 268.

120 Especially if the courts of the forum reserved to themselves (as this Court has to the courts of Australia) a right or obligation to refuse to implement foreign laws that conflict with important principles of law[205] or public policy[206], no harm would be done (so the respondent argued) by adhering, as a primary rule, to the settled law, knowing that exceptions (perhaps "flexible exceptions")[207] would exist to modify the application of the primary rule in the case of international torts.

121 *Law of the place of the wrong:* Despite these arguments, I have concluded, alike with the joint reasons,[208] and with the same caveats as they express[209], that the rule adopted in *Pfeiffer* for the determination of the rights and liabilities in respect of intra-national torts extends to international torts. I agree generally with the joint reasons and with their explanation of the grounds for reaching this conclusion.

122 My own inclination is to reserve the question whether there is a need to recognise, in the case of international torts, a general ("flexible") exception where the law of the foreign jurisdiction is such as to justify an Australian court's declining to recognise or enforce the law of that place[210]. Because of the Constitution, and the federal nation that it creates, that need does not arise in intra-national torts within this country. Nor, on any view does it arise in the present case. The respondent did not suggest otherwise. Any such exception, as a specific qualification of the primary rule, would therefore better be considered in a case where it was essential for the decision. So far as the supposed "public policy" grounds favoured by the joint reasons are concerned, it is there accepted that in practice they may often be subsumed in the issues presented by the application of a

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205 *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418.

206 *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.

207 *Boys v Chaplin* [1971] AC 356 at 390; cf *Pfeiffer* (2000) 203 CLR 503 at 538 [80]; James, "*John Pfeiffer v Rogerson*: The Certainty of 'Federal' Choice of Law Rules for Intranational Torts: Limitations, Implications and a Few Complications", (2001) 23 *Sydney Law Review* 145 at 162.

208 Joint reasons at [66].

209 Joint reasons at [67].

210 See *Breavington v Godleman* (1988) 169 CLR 41 at 77, 147, 163; cf Collins, "Choice of law in defamation after *John Pfeiffer Pty Ltd v Rogerson*", (2001) 6 *Media and Arts Law Review* 171 at 175-176; James, "*John Pfeiffer v Rogerson*: The Certainty of 'Federal' Choice of Law Rules for Intranational Torts: Limitations, Implications and a Few Complications", (2001) 23 *Sydney Law Review* 145 at 157.

"flexible exception"[211]. However, it need not be so. In a case such as *Boys v Chaplin*[212], where the "flexible exception" was developed for English law, public policy was not the criterion. Nor could it have been. Applying the law of Malta in that case would not have been contrary to the public policy of the English forum. The "flexible exception" was postulated because it was thought inappropriate to apply Maltese law because Malta had an insubstantial connection with the parties or the proceedings.

123 However, this said, I would not press my preference to a dissent from the joint reasons in this respect. For most cases, the outcome will be the same. The general rule is that stated in *Pfeiffer*. In international torts there is an exception to the application of that general rule. That exception may be invoked by reference to public policy considerations that would make the enforcement by the forum of the law of the place of the wrong contrary to the public policy of the forum.

124 I wish to add some further considerations to those mentioned in the joint reasons in support of adopting the *Pfeiffer* rule in the case of international torts. I do so because I consider that principle and policy, as well as legal authority, favour the course preferred.

125 *Desirability of a single rule:* The starting point for a principled analysis is the acceptance in *Pfeiffer* of the primary principle of the rule of the law of the place of the wrong[213]. However, the acceptance of that choice of law rule for intra-national courts was influenced (as it had earlier been in Canada[214]) by federal considerations grounded in the Constitution. Although these factors are not, as such, applicable to an international tort, many other considerations support a common rule. Conceptual simplicity certainly favours a single rule.

126 So far as possible, it is desirable that there should be uniformity in the principles of private international law applied by Australian courts, not only in relation to torts of an intra and international character but also in relation to our treatment of international torts when compared with that of the other countries with which Australians have most connection.

127 *The predominant choice of law rule for torts:* The predominant international principle for the choice of law in respect of wrongs (torts or delicts)

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211 Joint reasons at [75].

212 [1971] AC 356.

213 *Pfeiffer* (2000) 203 CLR 503 at 540 [87]; 562-563 [157]-[158].

214 *Tolofson v Jensen* [1994] 3 SCR 1022 noted in this regard *Pfeiffer* (2000) 203 CLR 503 at 540 [87].

has long been that the applicable law is that of the place where the wrong was committed (*lex loci delicti*). One analysis suggests that this principle was established in Europe as long ago as the thirteenth century[215]. At the latest, it was firmly entrenched there by the end of the eighteenth century[216]. It was by direct borrowing from the civilians in Europe that the rule initially became that observed in the United States of America. *Phillips v Eyre* never gained acceptance in that country[217]. The rule of the place of the wrong was also the rule reflected in the First Restatement on Conflicts of Laws published by the American Law Institute in 1934[218]. Some jurisdictions that previously adhered to applying the law of the place of the wrong have tended more recently towards introducing greater flexibility in these rules. However, this has usually been a result of legislative changes after careful consideration of the issues relating to different types of tort actions with specific rules developed to deal with particular situations. In the United States, where the flexibility has been the result of a judicial revolution which resulted in the widespread abandonment of the rule of the place of the wrong, it has led to considerable uncertainty and difficulty of application. Indeed, the outcome has been described as "hopelessly confused, chaotic, unpredictable, and - despite all laudable efforts to explain it - incomprehensible"[219]. Australian law should resist all such temptations[220].

128 When advocating the legislation later enacted, the English and Scottish Law Commissions placed evidence before the United Kingdom Parliament concerning the choice of law rules applicable in the jurisdictions of Europe and beyond, in respect of torts or delicts. Their analysis indicated that the rule upholding the law of the place of the wrong is that which commands almost

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215 Rabel, *The Conflict of Laws - A Comparative Study*, 2nd ed (1961).

216 Morse, "Torts in Private International Law", (1978) at 9 in *Problems in Private International Law*, vol 2; Kahn-Freund, "Delictual Liability and the Conflict of Laws", (1968) II *Recueil des Cours* 1 at 36-37.

217 *Dicey and Morris on the Conflict of Laws*, 13th ed (2000), vol 2 at 1507-1511.

218 Carter, "Choice of Law in Tort and Delict", (1991) 106 *Law Quarterly Review* 405 at 409.

219 Kahn-Freund, reviewing Morse, *Torts in Private International Law*, (1979) 50 *British Year Book of International Law* 200 at 201.

220 cf James, "*John Pfeiffer Pty Ltd v Rogerson*: The Certainty of 'Federal' Choice of Law Rules for Intranational Torts: Limitations, Implications and a Few Complications", (2001) 23 *Sydney Law Review* 145 at 157.

universal contemporary allegiance[221]. It is the rule observed by most jurisdictions of the world: common law, civil law and otherwise[222]. The Supreme Court of Canada regarded its adoption as "axiomatic"[223]. In a matter of international law, whatever may be the criticisms that can be levied at the rule, there is a strong premium in Australia's observing the rule upheld by so many and diverse legal systems.

129 In further support of the foregoing propositions it may be recognised that the rules of private international law exist to fulfil foreign rights and duties, not to destroy them[224]. After a brief flirtation with a different rule for intra-national torts[225], this Court has now accepted the rule that enjoys overwhelming international observance[226]. There are powerful, perhaps even greater, reasons following that logic into cases involving international torts.

130 Supporting the preferred rule involves more than adherence to legal symmetry or majority legal opinion. It represents a reflection of the time-honoured maxim *locus regit actum*[227]. Apart from everything else, this rule has "sure foundations in human psychology"[228]. A person will ordinarily assume

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221 United Kingdom, House of Lords, Private International Law (Miscellaneous Provisions) Bill, Proceedings of the Special Public Bill Committee (1 March 1995) at 18-20.

222 Briggs and Rees, *Civil Jurisdiction and Judgments*, 2nd ed, (1997) at 198, fn 63; Carter, "Choice of Law in Tort and Delict", (1991) 107 *Law Quarterly Review* 405 at 409; Pryles, "Of Limitations and Torts and the Logic of Courts", (1992) 18 *Melbourne University Law Review* 676 at 682.

223 *Tolofson v Jensen* [1994] 3 SCR 1022; cf Juenger at 540.

224 *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 50 per Deane J; cf Pryles, "Of Limitations and Torts and the Logic of Courts", (1992) 18 *Melbourne University Law Review* 676 at 678.

225 *McKain* (1991) 174 CLR 1; cf Pryles, "Of Limitations and Torts and the Logic of Courts", (1992) 18 *Melbourne University Law Review* 676 at 682.

226 From which, for a long time, the United Kingdom and countries of the British Empire and Commonwealth were perceived as having diverged: Rheinstein, "The Place of Wrong: A Study in the Method of Case Law", (1944) 19 *Tulane Law Review* 4 at 23.

227 The act is governed by the law of the place where it is done.

228 Carter, "Torts in English Private International Law", (1982) 52 *British Year Book of International Law* 9 at 16.

that he or she is governed by the law of the law area in which the event, critical to legal liability, happens. Admittedly, there may be exceptions. Analysis may confound ordinary expectations. In a particular case, exceptionally, the presence of a long term pre-existing relationship of the parties in the forum may make it unreasonable to attribute to them an ordinary expectation according primacy to the law of the place of the wrong. However, normally it is otherwise. The ordinary expectations of most parties are, I would suggest, that the law of the place of the wrong will govern the rights and duties of the parties. Such expectations are based on notions connected with the usual territorial reach of law. They are usually resistant to its over-reach. Generally speaking, the law should not be applied in a way that takes ordinary expectations by surprise[229]. The normal rule should not be distorted just because, in a particular case, its outcome imposes a burden to a particular plaintiff[230]. The law must be just to defendants as well as plaintiffs[231]. The right to a judicial decision-maker who is impartial as between the parties is expressed in international law, probably implicit in the Constitution and certainly upheld by the Australian common law[232]. The clearer and simpler the applicable rule, the less difficult will it be to advise parties on their rights[233]; the less temptation will there be to shop around for a judicial forum advantageous to one but disadvantageous to another party[234]; and the more even-handed and certain will the law be, and appear to be, to the parties and to society.

131 The law of tort, although now chiefly compensatory in purpose, has additional objectives of establishing standards of reasonable civic conduct, promoting prevention of wrongs and distributing costs amongst the community concerned. A choice of law rule that permits a plaintiff to pick and choose,

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229 Rheinstein, "The Place of Wrong: A Study in the Method of Case Law", (1944) 19 *Tulane Law Review* 4 at 24.

230 Rheinstein, "The Place of Wrong: A Study in the Method of Case Law", (1944) 19 *Tulane Law Review* 4 at 30.

231 cf reasons of Callinan J at [200] with which in this respect as well I agree.

232 cf *Ebner v Official Trustee in Bankruptcy* (2000) 75 ALJR 277 at 289-290 [80], 295-296 [116]; 176 ALR 644 at 662, 670-671.

233 Briggs, "*The Halley*: Holed, but Still Afloat?", (1995) 111 *Law Quarterly Review* 18 at 22; cf Juenger at 531, 537.

234 *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 23 per Mason CJ (diss). See also the speech of Lord Hoffmann in *Connelly v RTZ Corp* [1998] AC 854 at 876 cited in the reasons of Callinan J at [209]; cf Nygh, "The Miraculous Raising of Lazarus: *McCain v R W Miller and Co (South Australia) Pty Ltd*", (1992) 22 *University of Western Australia Law Review* 386 at 395.

according to the forum it selects, the law that would be applied, would derogate from the effective control of a given law area over those aspects of its law[235]. Applying the law of the place of the wrong tends to help defendants to minimise their exposure to risk by accident prevention, to insure effectively and allocate appropriately for potential costs. All of these are reasons for adopting, as the applicable law of an international tort, the law of the place which is classified as the place where the wrong was committed.

132 *Conclusion: applicable law was French:* Viewed in the light of all these reasons, the rule in *Phillips v Eyre*, as it came to be applied, now appears as a "breath from a bygone age"[236]. It is left over from an earlier phase of private international law, that never gained acceptance beyond the United Kingdom and its dominions and colonies. It is a rule inappropriate to a time of global and regional dealings[237], technological advances that increase international conflictual situations[238] and attitudinal changes that reject, or at least reduce, xenophobic opinions about the worth and applicability of the law of other jurisdictions[239].

133 I am not blind to the defects of the law of the place of the wrong. It has persuasive critics[240]. Sometimes, for example, it may be debatable as to where precisely the "wrong" occurred. However, when the arguments for and against the competing rules are weighed and the inadequacies of the competing rules are evaluated, the preferable course is to adopt a common Australian standard. For torts, the applicable primary law is that of the place where the tort was committed (*lex loci delicti*). Accordingly, in the present appeal whether that place was

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235 English Law Commission Working Paper No 87, *Private International Law - Choice of Law in Tort and Delict* (1984), §§ 2.7-2.11.

236 Hancock, "Torts in the Conflict of Laws", (1982) at 87 in *Problems in Private International Law*, vol 2.

237 Morse, "Torts in Private International Law", (1978) at 10 in *Problems in Private International Law*, vol 2. I regard the decision in *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 as a reflection of these considerations. It was there held by six judges that the trial judge had erred in granting an anti-suit injunction and in failing to order a stay of proceedings in the Supreme Court of New South Wales. This Court should avoid conflicting signals.

238 Pryles, "Tort and Related Obligations in Private International Law", 1991 II *Recueil des Cours* 1 at 21-23.

239 Morse, "Torts in Private International Law", (1978) at 10 in *Problems in Private International Law*, vol 2.

240 cf Juenger at 531-532.

metropolitan France (where the vehicle driven by the respondent was principally designed and manufactured) or New Caledonia (where the alleged defect led to damage to the respondent) the applicable law was in either case, the law of France. The primary judge was correct to so conclude.

The Court of Appeal erred

134 *Specification of the applicable law:* It follows that the reason nominated by the Court of Appeal to justify its disturbance of the discretionary decision of the primary judge was legally incorrect. Because this was the only ground assigned for the suggested miscarriage of the discretion at first instance[241], the Court of Appeal's judgment cannot survive the attack on it in this appeal. In the ordinary course, the success of that attack would require the restoration of the primary judge's orders. However, because the respondent filed a notice of contention, seeking to support the judgment of the Court of Appeal upon other grounds, it is necessary to deal with those arguments. But first I must call attention to what I regard as a second error in the Court of Appeal's reasoning. It is relevant for what follows.

135 *Requirements of Pt 10 r 6A(2)(b):* The Court of Appeal noted that the primary judge had, throughout his reasons, referred to whether New South Wales was an "inappropriate forum". At the outset of its reasons, the Court of Appeal stated that the true issue before his Honour had been whether that State was a "*clearly* inappropriate forum"[242]. Subsequently, the Court of Appeal remarked that his Honour had not used the adjective "clearly". It was acknowledged that that word did not appear in the language of the applicable Rule. However, by reference to the opinions of single judges, the Court of Appeal concluded that the absence from the Rule of the word "clearly" did not "relax the common law test"[243].

136 In this Court, the appellants contested that opinion. The sequence of events concerning the applicable Rule of Court is not disputed. The original Pt 10 of the Rules was contained in Sched 4 to the *Supreme Court Act* 1970 (NSW) at the time that it was enacted. That Act came into force in October 1970. The original Rules included par (e) in terms of the language still appearing. However, in 1970, Pt 10 r 1 was expressed to be "subject to rule 2". That rule provided[244] that service of originating process outside the State was not valid unless it was in accordance with

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241 *Zhang* [2000] NSWCA 188 at [39].

242 *Zhang* [2000] NSWCA 188 at [3].

243 *Zhang* [2000] NSWCA 188 at [27] referring to *W F Motors v Maydwell*, unreported, Supreme Court of New South Wales, 23 April 1993.

244 The Rules, Pt 10 r 2(1).

the prior leave of the Court[245]; the Court confirmed the service[246]; or the person served waived objection to entering an appearance.

137 In order to secure the prior leave of the Court, it was necessary for the applicant to prove that he had "a prima facie case for the relief which he seeks"[247]. Where this procedure was followed, it was still open to a defendant, served outside the State and hence outside Australia, to apply for the setting aside of the originating process (or service thereof) or to obtain a declaration that it had not been duly served or a discharge of any order giving leave for service of process outside the State[248].

138 Subsequently, in June 1988, the Rule Committee of the Supreme Court amended Pt 10 by the adoption of Pt 10 r 6A of the Rules[249]. This Rule abolished the requirement for prior leave. It shifted the initiative to the defendant. Only if the defendant did not enter an appearance within the time limited for appearance was the plaintiff obliged to seek the prior leave of the Court to maintain the proceedings[250]. The new r 6A inserted in Pt 10 of the Rules afforded the Court a discretion ("may") to make an order "of a kind referred to in Part 11 rule 8 (which relates to setting aside etc originating process) on application by a person on whom an originating process is served outside Australia". Without limiting that sub-rule, the Court's discretion ("may") was to apply "on the ground … (b) that this Court is an inappropriate forum for the trial of the proceedings".

139 This Court's decision in *Oceanic* was given in June 1988, a few days after Rule 6A was inserted into Pt 10 of the Rules. Needless to say, no reference was made to the terms of the new rule in the decision in that case. It would not then have been known to this Court. In December 1988 further amendments to Pt 11 r 8(1) of the Rules, approved by the Rule Committee, were gazetted[251]. These

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245 The Rules, Pt 10 r 2(2).

246 The Rules, Pt 10 r 2(4).

247 The Rules, Pt 10 r 2(2)(b).

248 The Rules, Pt 11 r 8(1)(a), (b), (c) and (d).

249 The rule was published in the New South Wales *Government Gazette*, 17 June 1988 as Supreme Court Rules (Amendment No 209), 1988. See the Rules, reprint number 6.

250 The Rules, Pt 10 r 2(1).

251 Published in the New South Wales *Government Gazette*, 23 December 1988 as Supreme Court Rules (Amendment No 217), 1988.

amendments added five new orders which the Court could, in the exercise of its discretion ("may"), grant on the application of a defendant objecting to proceedings. The new orders included ones that:

> "(g) declare that the Court has no jurisdiction over the defendant in respect of the subject matter of the proceedings; [and]
>
> (h) decline in its discretion to exercise its jurisdiction in the proceedings".

140 The decision of the Court of Appeal of New South Wales in *Voth*[252] was given in February 1989. In his reasons in that Court, Gleeson CJ referred to the making of the new Pt 10 r 6A of the Rules which, he said[253], "was not in force at the time of the present application". His Honour remarked that "[t]here was no occasion for argument before us as to the construction and application of the rule in the light of *Oceanic Sun Line* and I express no view on the matter. The present case concerns the position as it stood prior to amendment of the rules."[254]

141 When, however, *Voth* reached this Court, the amendment to the Rules became the subject of submissions by the parties. The respondent argued that it should be left to the States and Territories "to decide their own test for staying proceedings". It pointed out that "[t]his has been done in New South Wales (Rules of the Supreme Court, Pt 10.6A(2)(b)) and Victoria (Rules of the Supreme Court, r 7.05(2)(b))[255]."

142 The decision of this Court in *Voth* was published in December 1990. The joint reasons in that case noted the variety of rules that by then provided for proceedings in Australia against a party outside the jurisdiction[256]. In his minority opinion, Toohey J drew attention to the terms of Pt 10 r 6A of the Rules. His Honour pointed out that what a defendant had to show was that the Supreme Court "is an inappropriate forum for the trial of the proceedings"[257]. Referring to the additional change that had come about, by which a party proceeding against a

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252 (1989) 15 NSWLR 513.

253 (1989) 15 NSWLR 513 at 531.

254 I made no reference to the rule: (1989) 15 NSWLR 513 at 533-539. McHugh JA agreed in the reasons of Gleeson CJ at 539.

255 (1990) 171 CLR 538 at 543 (Record of Argument).

256 (1990) 171 CLR 538 at 564 per Mason CJ, Deane, Dawson and Gaudron JJ.

257 (1990) 171 CLR 538 at 589 quoting the Rules, Pt 10 r 6A.

foreign defendant no longer needed to obtain prior leave of the Court, Toohey J said[258]:

> "Such rules represent a departure from the traditional approach to interference with the jurisdiction of a foreign country mentioned earlier in these reasons. It would be anomalous if a defendant served out of the jurisdiction without leave bore the onus of setting aside service but a plaintiff who had obtained leave to serve out of the jurisdiction continued to carry the onus if service was challenged. The notion that, unless the onus remains on the plaintiff who has obtained an ex parte order for service out of the jurisdiction, the plaintiff will have an 'enduring advantage' sits rather uncomfortably with the onus placed by the rules of court referred to in this paragraph. That may say no more than that this area of the law has not been noted for its clarity or certainty."

143 *Duty to obey legislative texts:* In the joint reasons in this appeal the opinion has been expressed that, notwithstanding the language of Pt 10 r 6A[259], the meaning of the applicable rule was to be found "in authoritative Australian decisions … construing" the "judge-made doctrine". That doctrine applied to "procedures established by the Rules"[260]. The joint reasons state that the Rules now in force do not "displace and provide a substitute for that doctrine"[261].

144 With all respect, I regard this view as fundamentally mistaken. I dissent from the notion that judges are authorised to adhere to their "doctrine" where a superior law making power, whether in the form of the Constitution or legislation or rules validly made under legislation, has entered the field. In such cases, "judge-made doctrine" yields. It then becomes impermissible for judges to adhere to their "doctrine" if the written law is in any way different. Their duty is to obey the written law[262].

145 In more than one recent decision, this Court has had occasion to refer to an unfortunate tendency of courts and lawyers in Australia to ignore legislation and instead to analyse legal problems by reference to judicial exposition. In one case this tendency was described as involving an inclination to "concentrate on judicial

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258 (1990) 171 CLR 538 at 589-590.

259 Set out in the joint reasons at [17] and reasons of Callinan J at [187].

260 Joint reasons at [23].

261 Joint reasons at [23].

262 *Brodie v Singleton Shire Council* (2001) 75 ALJR 992 at 1038 [231]-[232]; 180 ALR 145 at 209-210; cf *Conway v The Queen* [2002] HCA 2 at [65].

exposition of legal concepts in preference to analysis of statutory provisions that contain the applicable law"[263]. It is my view that "[t]his tendency should be resisted[264]." Not occasionally or selectively. Always.

146 In these opinions, I believed that I was reflecting a unanimous opinion of this Court amounting, in effect, to a correction to those lawyers who adhered to judicial authority when it had been overtaken by law bearing the imprimatur of legislation and the superior authority that legislation carries with it. For example, in *The Commonwealth v Yarmirr*[265] the joint reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ responded to an attempt to divert this Court's attention from the applicable statute to the pre-existing common law. "It is of the first importance", their Honours said, "to recognise that it is in the Act that the rights and interests which are claimed by the claimants must find reflection. The relevant starting point for determining the controversies in the present matters is the Act". In precisely the same way, and for the same reasons, the starting point for analysis in this case is the provisions of the Rules. It is of the first importance that the language of the Rule, and not the common law that it replaced, should govern the rights and interests of the present parties. With due deference, I regard the dismissal of the actual text of the Rule applicable in the present case as a classic instance of the very error which this Court has repeatedly condemned in its recent instruction of others. The rule that is appropriate to others should be observed, as an example, by ourselves.

147 Where a rule-maker, validly acting under statutory power, has spoken, the law appears in that text, not in prior judicial utterances. To the extent that there is a difference between the text and those utterances, it is a rudimentary mistake for the decision-maker to start from the presumption that the difference is unintended or mistaken: indeed to start the task of expounding the applicable law anywhere else than in the text. Unless judges insist on this principle, the dead hand of "judge-made doctrine" will hang forever above legislation. Lawyers and others

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263 *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 75 ALJR 1513 at 1526-1527 [63]; 182 ALR 321 at 339.

264 *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 75 ALJR 1513 at 1526-1527 [63]; 182 ALR 321 at 339. See also *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 75 ALJR 1342 at 1351 [46]-[47], 1352 [52]; 181 ALR 307 at 319, 320; *Allan v Transurban City Link Ltd* (2001) 75 ALJR 1551 at 1561 [54], 1563 [63]; 183 ALR 380 at 392-393, 395; *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at 1643 [259]; 184 ALR 113 at 184; cf *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5 at [70].

265 (2001) 75 ALJR 1582 at 1585 [7]; 184 ALR 113 at 119.

will continue to cherish judicial language instead of applying legislative language. The error must be stopped because it is basic. It must be stopped by this Court.

148 The primary judge did not fall into this error. He addressed his attention, correctly and consistently, to the language of the applicable rule. For this, the respondent charged him in the Court of Appeal with legal error[266]. The Court of Appeal presumed that the primary judge had erred but had actually intended to add the word "clearly" to his explanation. In my view, correctly, he did not. That word is not in the language of the applicable Rule.

149 Whether or not, subjectively, the Rule Committee of the Supreme Court of New South Wales in 1988 intended to modify the previous common law is irrelevant. Until Pt 10 r 6A of the Rules was introduced, the language of the Rules committed a discretion to the Supreme Court in general terms ("may"). Such language was apt to invite incorporation of the common law elaboration as expounded by this Court. It was in this circumstance that the "clearly inappropriate forum" found its way into Australian law. But rule-makers had already begun introducing their own particular standards. Those standards now govern the field. The "clearly inappropriate forum" test had to give way to the applicable Rule. The specificity of statutory language expels the generality of the common law.

150 *Conformity with international law:* If there were any doubt about what the express language of the Rule required (and I think there is none), a further reason supports giving effect to Pt 10 r 6A of the Rules in the terms in which it appears and not in the more ample terms urged by the respondent by reference to the common law as applied in New South Wales by the Court of Appeal. The "long arm law" in which the relevant Rule appears may, in some cases, challenge the general principles of international law that ordinarily limit territorially the exercise of the judicial power of the courts of a particular law area[267]. In most circumstances, the language of the rule adopted by the Rule Committee of the

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266 *Zhang* [2000] NSWCA 188 at [27].

267 In Australia, the Federal Parliament has enacted a law empowering the Attorney-General to declare that certain foreign judgments based on long arm legislation of other countries are not enforceable in Australia. See *Foreign Proceedings (Excess of Jurisdiction) Act* 1984 (Cth), s 9; Senz and Charlesworth, "Building Blocks: Australia's Response to Foreign Extraterritorial Legislation", (2001) 2 *Melbourne Journal of International Law* 69; cf Jennings, "Extraterritorial Jurisdiction and the United States Antitrust Laws", (1957) 33 *British Year Book of International Law* 146 at 161, 164 where the "local effects" doctrine expounded in cases such as *United States v Aluminum Co of America* 148 F 2d 416 at 423 (1945) is criticised.

Supreme Court, and thus made part of the written law of the State, is more closely conformable with the principle of international law than the "clearly inappropriate forum" rule. In the case of ambiguity as to what the local Rule of Court means, this Court should prefer the exposition of Australian law that conforms to public international law rather than one that may be inconsistent[268].

151 It follows that the Court of Appeal also erred in its reasoning when it came to re-exercise the discretion which it incorrectly found had miscarried before the primary judge. It applied a "*clearly* inappropriate forum" test in refusing relief to the appellants[269]. That was wrong. It went beyond the test stated in the governing Rule. This is a further reason why the judgment of the Court of Appeal must be set aside by this Court.

Correcting the Court of Appeal's error

152 *A discretionary decision:* Subject to three matters the respondent's submissions in his notice of contention amounted to no more than an attempt to recanvass the discretionary considerations that were weighed by the primary judge and resolved in favour of the provision of a stay of the proceedings in the Supreme Court.

153 The primary judge accepted that the decision was "very difficult" and "troubling"[270]. Far from warranting intervention, to substitute the opinion of other judicial decision-makers, these considerations are normally reasons for appellate restraint. Restraint is observed unless one of the established grounds is made out for disturbing the primary judge's exercise of discretion[271]. As the ground nominated by the Court of Appeal was erroneous, it is necessary for the respondent to demonstrate another, and different, ground to unlock the barrier to appellate review. Otherwise, the primary decision will stand. The mere fact that appellate judges might themselves have come to a different conclusion is not enough. Otherwise, few if any such applications would ever conclude at first instance.

154 *Considering the competing factors:* The primary judge said that he had "weigh[ed] all the factors"[272]. He approached his task in the manner established by this Court in *Voth.* He exercised his discretion "based upon the competing

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268 cf *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-419 [166]-[167].

269 *Zhang* [2000] NSWCA 188 at [49].

270 Reasons of the primary judge at 16.

271 *House v The King* (1936) 55 CLR 499 at 504-505.

272 Reasons of the primary judge at 17.

connexions of the respective forums with the subject-matter of the proceedings"[273]. Within the context of the factors mentioned, I see no error that permits disturbance of his conclusion by this Court. On the contrary, his analysis was painstaking, thoughtful and correct.

155 In favour of "a hearing in Sydney" the primary judge nominated "practical considerations"[274], including the presence of the respondent, his son who was with him in Noumea when he was injured, three expert engineering witnesses, medical witnesses who would depose to his injuries, other witnesses as to future care, the modest resources of his family, his access in Australia to experienced legal advisers prepared to act for him on the basis of contingency fees and the fact that the issue likely to consume most of the time in any trial (namely the adequacy of the design and manufacture of the roof and supporting structures of the vehicle in question) would involve a conflict between experts who, inferentially, could give their testimony anywhere.

156 Another consideration which the primary judge took into account was the absence of the procedures of discovery and interrogatories in a product liability case under French law and the tendency of that law's procedures to resolve disputes, to a large extent, on written materials without cross-examination, which is not usually permitted[275].

157 On the other hand, the judge also took into account the fact that witnesses, other than the respondent and his son, who either saw the accident or the pre- or post-accident circumstances in Noumea included three residents in Noumea and one, a police officer, formerly of Noumea, who now resides in metropolitan France. This evidence, according to its written form, "points to the substantial cause of the accident being the negligent driving of the [respondent]"[276].

158 The doubt that the respondent could secure "quality and experienced representation" in New Caledonia or France in such a difficult case without making some payments towards legal fees was given weight. So were the far greater resources of the appellants. But the primary judge concluded that the case had a "close connection with France and New Caledonia". The allegedly defective design and manufacture probably took place in France. The accident happened in New Caledonia. That was the place of the applicable law, a consideration often

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273 *Voth* (1990) 171 CLR 538 at 571.

274 Reasons of the primary judge at 11.

275 Reasons of the primary judge at 8.

276 Reasons of the primary judge at 8.

telling in such decisions[277]. Any failure to warn the respondent about alleged risks occurred in New Caledonia where the vehicle was hired. The absence of legal aid there, although not irrelevant, was not itself a basis for refusing a stay[278]. Nor was the absence of a jury; the need to conduct the proceedings in the French language; or the fact that French civil procedure is different from that of Australia. The primary judge recognised that the French legal system, of which that of New Caledonia is part, was, and is, one of sophistication and integrity meriting international recognition and acceptance. Its procedures were "well suited to the resolution of the major issues"[279] of the case. Its judges are part of the French judicial system.

159 I see no error in the primary judge's nomination of the respective connecting factors. Nor, subject to what follows, were there any significant omissions. The approach taken by the primary judge, although founded in the language of the applicable new Rule, was similar to that observed by the Justices of this Court in *Voth*. There, this Court reversed the judgment of the Court of Appeal and provided the stay of the action which the appellant had urged in that case should be more conveniently brought in the United States[280]. Where the primary judge has proceeded as this Court did in *Voth*, and where the Court of Appeal's intervention has been shown to have been unwarranted, in terms of the reasons it advanced, the proper course is to restore the original discretionary order.

160 *The burden of proof:* The respondent, however, suggested that another, and different, error on the part of the primary judge had been shown. This was his failure to approach his discretion with the presumption that, the respondent having lawfully invoked the jurisdiction of the Supreme Court, the appellants bore an onus, suggested to be a heavy one, to displace the legal right thereby engaged under a valid local Rule.

161 This point has no validity in this case. The joint reasons in *Voth* emphasised that it would not ordinarily be necessary to give detailed reasons as to "the presence or absence of particular connecting factors"[281]. The way in which, in this Court, the joint reasons approached the "factors" relevant to *Voth* is precisely the

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277 *Voth* (1990) 197 CLR 538 at 566 citing Gaudron J in *Oceanic* (1988) 165 CLR 197 at 266.

278 Reasons of the primary judge at 13 referring to *Connelly v RTZ Corp* [1998] AC 854 at 866-869.

279 Reasons of the primary judge at 15.

280 *Voth* (1990) 171 CLR 538 at 570-571.

281 *Voth* (1990) 171 CLR 538 at 565.

way observed by the primary judge here. The Justices of this Court in *Voth* did not feel it necessary to spell out the obvious fact that a stay is an exceptional intervention that accepts the validity of the invocation of the Court's jurisdiction in the first place. If that validity had been questioned, the proper relief would not have been a stay[282] but some other relief[283]. A stay of proceedings being the realm of discourse, and the location of the burden of persuasion being incontestably upon the appellants[284], there was no need for the primary judge (any more than for the joint reasons in *Voth*) to belabour the point of burden of proof. Why should we assume that the primary judge ignored these elementary considerations when they were equally not mentioned in this Court's exposition?

162 What is important about the burden of proof is a clear understanding of the test to be applied. The respondent, and the Court of Appeal, considered that it was the "clearly inappropriate forum" test. As I have shown, that was legally erroneous. The deletion of the adjective "clearly" makes the burden carried by the appellants commensurately lighter. The word "clearly" in the common law rule adds to the difficulties faced by any applicant for a stay. But under the Rule, the necessity to prove that the forum was "obviously" or "clearly" inappropriate - and to that extent that continuation in the forum would be vexatious and oppressive for the appellants - was removed. As strangers to the jurisdiction, the appellants had simply to demonstrate (the onus being on them) that the forum of the Supreme Court was "inappropriate". To decide whether that demonstration had been made out it was necessary, as *Voth* established and illustrated, to weigh the competing "connecting factors". As this is what the primary judge did, no basis exists for disturbing his judgment.

163 *The competing forum:* The respondent also relied on the fact that, during argument in the Court of Appeal, counsel then appearing for the appellants had conceded that the forum, alternative to New South Wales, which was to be considered, was New Caledonia, not France. It was suggested by the Court of Appeal that "neither party has any particular connection with New Caledonia" and that the respondent "had only a transitory and accidental connection", and that "the alleged tort did not occur there"[285]. On that footing, the Court of Appeal concluded that New Caledonia could not be seen as an "appropriate forum", "except as some sort of geographic compromise"[286].

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282 The Rules, Pt 11 r 8(1)(h) by which the Court may "decline in its discretion to exercise its jurisdiction in the proceedings": see joint reasons at [17].

283 The Rules, Pt 11 r 8(1)(a) or (g).

284 *Voth* (1990) 171 CLR 538 at 587-589 per Toohey J.

285 *Zhang* [2000] NSWCA 188 at [47].

286 *Zhang* [2000] NSWCA 188 at [47].

164 It is important to recall that the primary judge did not select between France or New Caledonia as the venue for the trial if the proceedings in New South Wales were stayed. In this, he was also correct. His attention was addressed to whether the initiated proceedings should be stopped by the Court's declining, in terms of its rule, "in its discretion to exercise its jurisdiction"[287]. He expressly left it to the respondent to decide whether to proceed in the courts of France or New Caledonia[288].

165 The primary judge reflected this facility in his second order. Before the Court of Appeal, counsel indicated that the appellants' "actual" view was that the case should be fought in France. New Caledonia had been put forward as "in some way meeting the convenience of the plaintiff" yet maintaining the appellants' insistence on the primacy of a jurisdiction in which the law of the place of the wrong (France) would apply. It is not correct to say, as the Court of Appeal did, that "the alleged tort did not occur" in New Caledonia. It did. Even gross defects in the design and manufacture of a vehicle in France, would not amount to a tort of negligence under the common law, or a civil wrong under French law, unless they occasioned damage to the respondent[289]. This did not occur until the accident happened in New Caledonia. But it did happen then. That, therefore, is the place where the alleged wrong was committed[290].

166 The respondent asserted that the appellants had conceded in the Court of Appeal that it would be "oppressive to the respondent to require him to conduct proceedings in France". No such concession was made. Quite properly, the

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287 The Rules, Pt 11 r 8(1)(h).

288 Reasons of the primary judge at 17.

289 The *French Civil Code*, in Ch II, "Delicts and Quasi-Delicts" provides: Art 1382 "Any act whatever of man which *causes damage* to another obliges him by whose fault it occurred to make reparation". Art 1383 provides: "Each one is *liable for the damage* which he causes not only by his own act but also by his negligence or imprudence". See Crabb (trans), *The French Civil Code* (rev ed July 1994) (1995) Bk 3 (emphasis added).

290 Moreover, in the language of the authorities, it is New Caledonia with which, looking back and reviewing the facts, the wrong has most connection: *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 at 468 (a jurisdiction case); cf *Voth* (1990) 171 CLR 538 at 567; *Agar* (2000) 201 CLR 552 at 591 [111]. It is worth noting that New Caledonia would be the place whose law applied both under the *Private International Law (Miscellaneous Provisions) Act* 1995 (UK), s 11(1) and under the Choice of Law Bill 1992 (Cth), cl 6(3) annexed to the report of the Australian Law Reform Commission, *Choice of Law*, Report No 58 (1992) at 174.

appellants left the alternative venue to the respondent, whilst endeavouring, so far as possible, to meet his convenience. No error has been shown in the way the primary judge proceeded in this regard[291]. I would dismiss the respondent's contentions to the contrary.

167 *Legal aid and assistance:* As the primary judge recognised, the major disadvantage which the respondent would face, were he required by a stay to bring his proceedings in France or New Caledonia, involved the unavailability of legal aid and the loss of immediate control of the proceedings by his present solicitors and counsel. The importance of such facilities has been emphasised by the House of Lords[292]. The primary judge did not overlook this consideration. Nor do I. It must be given due weight.

168 On the other hand, because under French civil procedure, much of the evidence would be reduced to documentary form, there is no reason to suppose that the continuing involvement of the respondent's Australian lawyers, including on the contingency basis to which they have agreed, would terminate with a change of venue for the trial of the proceedings. In any case, the crucial evidence in this case (and the only apparent way of overcoming the eyewitness accounts of the accident that tend to lay the blame squarely upon the respondent's driving) is expert evidence about safe car manufacture and design. Such testimony would be available in detailed written form, as much as in France or New Caledonia as in Australia. If oral evidence were permitted, it would be available in any of the venues and, presumably, a filmed presentation of evidence or videolink could be arranged in any of the venues postulated.

169 The availability of legal aid, or of lawyers willing to appear for a plaintiff on a contingency, cannot be determinative of applications such as the present. The logic of that proposition would suggest that, in every case in which an Australian, or person resorting to an Australian court, suffered damage from a tort occasioned overseas and continued to suffer some damage in Australia, where that person could secure legal assistance in Australia, he or she could effectively elect for trial in an Australian court and no relief on the ground of inconvenient forum could be given to a foreign defendant, not otherwise present in the jurisdiction. Such a consequence would not only be unjust to such defendants. It involves public costs inherent in the provision of court services in this country effectively for the trial of torts having only the most trifling legal connection with an Australian jurisdiction.

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291 There may have been a slip in condition (a) which required that "the defendants submit to the jurisdiction of the courts of New Caledonia". However, if the parties agreed, this could doubtless have been varied and the proceedings remitted for trial in France. No contrary submission was made.

292 *Lubbe v Cape Plc* [2000] 1 WLR 1545; [2000] 4 All ER 268.

There is of course the legal connection afforded by the "long arm" Rule. But the existence of such a foundation for jurisdiction is assumed. When it comes to the application to this case of Pt 10 r 6A of the Rules, the considerations of convenience favoured the conclusion which the primary judge reached.

170 To the extent that it was proper, the primary judge took the practical consideration of the availability of lawyers to help the respondent "obtain justice" into account. He acknowledged that the final decision was finely balanced. There is no proper basis for disturbance of the conclusion that he reached. What weighs most heavily in the scales for the respondent is either natural sympathy for his predicament or a return to the chauvinistic attitudes of *Phillips v Eyre* as it was interpreted. Each of those considerations is legally illegitimate. This Court should not give way to them. In this age, such parochialism has no place in the law of inconvenient forum.

Conclusion: restore the primary judge's judgment

171 It should not be thought that the problems presented by the present appeal are unique to the Australian legal system. In France, subordinate courts have, from time to time, declined to provide what is, in effect a stay against proceedings instituted by French nationals in French courts in respect of torts (usually motor vehicle accidents) occurring in other jurisdictions. Sometimes such litigants have asked for the enforcement of French law, rather than the law of the place where the tort occurred. However, the Cour de Cassation of France has insisted on the principle that the law of the place of the wrong is "la loi étrangère normalement applicable"[293].

172 In a case such as the present, this Court should be no less principled. Having, at last, rejected *Phillips v Eyre*, as the applicable principle for choice of law in Australian courts, this Court should not succumb to a new provincialism in the guise of exercising the discretion to stay proceedings commenced in an inappropriate forum[294]. Having established the applicable rule (with which I agree), this Court should follow its logic. It should certainly do so in this case, where no basis exists for upsetting the discretionary decision of the primary judge.

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293 "The law primarily to be applied". See Kahn-Freund, "Delictual Liability and the Conflict of Laws", (1968) II *Recueil des Cours* 1 at 18.

294 cf *DP v Commonwealth Central Authority* (2001) 75 ALJR 1257 at 1284-1285 [155]-[156]; 180 ALR 402 at 441; Twining, "Globalization and Legal Theory: Some Local Implications", (1996) 49(2) *Current Legal Problems* 1 at 7.

Orders

173 The appeal should be allowed. In accordance with the conditions accepted by the appellants on the grant of special leave to appeal, there should be no order for costs in this Court. The orders of the Court of Appeal should be set aside, except as to costs. In place of those orders, it should be ordered that the appeal to that Court be dismissed.

CALLINAN J.

The facts

174 On 6 February 1991, the respondent, a resident of Australia, was driving a hired Renault sedan motor vehicle near Touho in New Caledonia, a French territory subject to French law. The vehicle travelled across the roadway, hit a 40 cm high earth embankment, somersaulted twice, stopped on its roof, rolled over again, and slid down a 30 metre high ravine towards the sea, coming to rest at the bottom of the ravine. The roof of the car was crushed and folded into the passenger compartment. The respondent suffered injuries. After a fortnight in hospital in Noumea, severely and permanently disabled, he returned to Australia.

175 The respondent sued the appellants, French corporations, as the manufacturer and distributor respectively of the vehicle, in proceedings brought in the Supreme Court of New South Wales. Neither of the appellants has an office nor carries on business in Australia, although vehicles which it manufactures outside this country are sold within it by motor vehicle dealers here. The appellants made application for the setting aside of the statement of claim and for the stay of those proceedings on the ground, relevantly in this Court, that New South Wales was an inappropriate forum. Smart J, at first instance, granted the stay upon conditions. The Court of Appeal of New South Wales (Beazley, Stein and Giles JJA) unanimously upheld an appeal against the decision of Smart J. The question in this Court is whether their Honours were right to do so.

176 The respondent's statement of claim contained the following allegations which, for the purposes of the current application should be taken to be true:

> "1. The Plaintiff is and was at all material times domiciled in New South Wales and has resided continuously in Sydney since 1986.
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> 2. The First Defendant and/or the Second Defendant designed and/or manufactured and/or distributed or caused or permitted to be distributed the Renault series of motor vehicles, directly or by its servants or agents.
>
> 3. In the course of such distribution the First Defendant and/or the Second Defendant caused or permitted such motor vehicles to enter and/or be sold and used in Australia and in particular, New South Wales and in the South Pacific region and in particular New Caledonia.
>
> 4. The First Defendant for the purposes set forth in paragraph 3 hereof applied for registration in Australia of the name 'Renault' and its accompanying logo as a trade mark and was granted renewals of that registration, inter alia, pursuant to applications lodged by it in Australia in 1974, 1984 and 1992.

5. The First Defendant and/or the Second Defendant at all material times advertised and promoted or caused or permitted to be advertised and promoted the Renault series motor cars, inter alia, in New South Wales and in New Caledonia as reasonably safe for motoring purposes and for use as a motor vehicle generally and, inter alia, in New South Wales and New Caledonia.

6. As a result of the matters set forth in paragraphs 2, 3, 4 and 5, the Renault series of motor vehicles entered into circulation in New South Wales and elsewhere on the Australian market.

7. On diverse occasions between 1986 and 1991 in Sydney the Plaintiff was a passenger in a Renault motor vehicle and thus became familiar with the Renault car as a motor vehicle and its use and acceptance in New South Wales, inter alia as the result of the actions of the Defendants set out in paragraph 5 hereof.

8. At all material times the First Defendant and/or the Second Defendant and each of them:

(a) was duly incorporated and liable to be sued in its corporate name;

(b) carried on business involving the design and/or manufacture and/or distribution of motor vehicles for use, inter alia, by members of the public;

(c) knew or ought to have known that vehicles manufactured and/or designed and/or distributed by it or caused or permitted to be distributed by it would or might be involved in road accidents;

(d) knew or ought to have known that vehicles manufactured and/or designed and/or distributed by it or caused or permitted to be distributed by it would or might be involved in road accidents in which those vehicles would or might roll-over;

(e) knew or ought to have known that in the event of an accident, the risk of injury and/or aggravation of injury to the occupants, particularly those occupants restrained by seatbelts, would be significantly increased if the roof of the vehicle crushed into the passenger compartment;

(f) knew or ought to have known or foreseen that the likelihood of the roof of the vehicle crushing into the passenger compartment could be substantially decreased or eliminated if the roof, roof pillars and connecting structures and supports of the vehicles were of sufficient strength and structural integrity;

(g) knew or ought to have known or foreseen that, in the event of an accident involving one of the vehicles designed and/or manufactured and/or

distributed, by it there was significant risk that occupants of the vehicle would be injured, or would have their injuries aggravated and made more severe, as a result of the roof crushing into the passenger compartment;

(h) knew or ought to have known or foreseen that the roof, roof pillars and connecting structures and supports of the vehicles were at risk of or likely to or susceptible to crushing into the passenger compartment on roll-over of any such vehicle by reason of their design;

(i) knew or ought to have known or foreseen that the defective design referred to in subparagraph (h) hereof could be remedied by design changes which it ought to have made in the interests of the safety of passengers in its motor vehicles.

9. On or about the 1st February 1991 the Plaintiff travelled with his son from Sydney to New Caledonia, intending to return to Sydney on the 8th February 1991.

10.

(a) On or about 5th February 1991, the Plaintiff hired a motor vehicle (hereinafter referred to as "the Vehicle") manufactured and/or designed and/or distributed by the First Defendant and/or the Second Defendant.

PARTICULARS

Renault L53H05 Sedan registered in the name of Laubreaux AutomobiIe Company Pty Ltd.

(b) At all material times the Defendants and each of them knew or ought to have known or foreseen that the motor vehicles designed and/or manufactured and/or distributed in the course of its business might be hired and used by persons in circumstances like those pleaded in subparagraph (a) of this paragraph.

11. Immediately prior to hiring the Vehicle as aforesaid the Plaintiff was offered a choice between the Vehicle and other vehicles and selected the Vehicle because of the matters set forth in paragraphs 3, 6 and 7 hereof.

12. On or about 6 February 1991, while driving the Vehicle near Touho, New Caledonia, the Plaintiff was involved in an accident in which the Vehicle rolled over.

PARTICULARS

At or about 12:00 p.m. on the road between Touho and Poindimie near Ponandou.

13. During the accident and roll-over and as a result of it, the Vehicle's roof was crushed into the passenger compartment such that it struck the Plaintiff on the head and caused the Plaintiff to sustain injury.

14. The injuries suffered by the Plaintiff occurred as a result of the negligence of the First Defendant and/or the Second Defendant.

PARTICULARS OF NEGLIGENCE

(a) Manufacturing and/or designing and/or distributing and/or supplying and/or causing or permitting to be distributed or supplied a vehicle the design and/or manufacture which was defective in that:

(i) the pillars and associated supports were of insufficient strength to prevent or substantially reduce the likelihood of the roof of the Vehicle being crushed into the passenger compartment in an accident and/or roll-over;

(ii) the roof of the Vehicle was of insufficient strength to prevent it being crushed into the passenger compartment in an accident and/or roll-over;

(iii) the design and/or manufacture of the Vehicle were inadequate to prevent or reduce the risk of the roof being crushed into the passenger compartment in an accident and/or roll-over.

(b) The First Defendant and/or the Second Defendant failed to warn the Plaintiff or cause him to be warned of the risk of roof crush to occupants of the Vehicle, especially those wearing seatbelts.

(c) The First Defendant and/or the Second Defendant failed to warn the Plaintiff or cause him to be warned of the substantial risk in driving a vehicle designed and/or manufactured in the manner particularised in paragraph (a) above.

(d) The First Defendant and/or the Second Defendant failed to warn the Plaintiff or cause him to be warned of the substantial risk in driving a vehicle designed and/or manufactured in the manner particularised above whilst wearing a seatbelt.

(e) The First Defendant and/or the Second Defendant failed to take the remedial action referred to in paragraph 8(i).

15. As a result of negligence of the Defendants and each of them the Plaintiff has suffered and continues to suffer injury, loss and damage.

16. Further or in the alternative, at all material times the governing law was the law applicable in New Caledonia.

17. By reasons of the matters hereinbefore pleaded, the Plaintiff and the First Defendant and/or the Second Defendant were in a quasi-contractual relationship and/or a relationship which, as a consequence of the operation of the governing law, gave rise to obligations owed by the Defendants and each of them to individuals including the Plaintiff who might drive the vehicles designed and/or manufactured and/or distributed by the First and/or the Second Defendants or caused or permitted to be distributed by them or either of them.

18. By reason of that quasi-contractual relationship:

(a) the First Defendant and/or the Second Defendant owed the Plaintiff an obligation and/or duty to take care in the design and/or manufacture of the Vehicle;

(b) the First Defendant and/or the Second Defendant represented and/or warranted to members of the public including the Plaintiff that the Vehicle was designed and/or manufactured so as to afford adequate protection to the occupants in the event of an accident and/or roll-over.

19. The Plaintiff relied on the representation pleaded in paragraph 18(b).

20. By reason of the matters hereinbefore pleaded:

(a) the First Defendant and/or the Second Defendant has breached its said obligation and/or duty;

(b) the said representation was false and/or the said warranty has been breached.

21. By reason of the matters pleaded in paragraph 20, the Plaintiff has suffered injury, loss and damage.

PARTICULARS THEREOF

The Plaintiff repeats the particulars set forth in paragraph 14 hereof.

PARTICULARS OF INJURIES

Spinal injury, concussion and loss of consciousness, shock and sequelae.

PARTICULARS OF DAMAGES

(a) The Plaintiff has as a result of his injuries lost monies and continues to lose monies that he otherwise could and would have earned in Sydney, details of which will be furnished in due course.

(b) The Plaintiff has incurred and continues to incur in Sydney medical, hospital and equipment expenses details of which will be provided when they have been ascertained.

PARTICULARS OF OUT-OF-POCKET EXPENSES

…

(i) Damages including exemplary damages.

PARTICULARS OF CLAIM FOR EXEMPLARY DAMAGES

The Plaintiff relies on the matters set forth in paragraphs 8 and 14 hereof and the gravity of the danger thereby created and the minimal cost of its rectification.

(ii) Interest thereon.

(iii) Costs.

(iv) Such further or other relief as the nature of the case may require."

177 The evidence before the Court of substantive French law, the law applicable in New Caledonia, was as follows:

"6. The relevant provisions in this case include articles 1382, 1383, 1384 which enable an action for damages to be taken against the manufacturer of a product by a person injured by the product. In such an action, it is necessary to prove negligence or a design defect on the part of the manufacturer.

7. In relation to liability, statements of independent witnesses are prepared and submitted to the court. Oral testimony is rarely given unless a direction is made by the Judge due to a conflict of evidence contained in the written statement.

8. A Judge would assess damages once liability is proven under the following heads of damage.

(a) General damages to cover bodily injury, pain and suffering and loss of amenities;

(b) Out-of-pocket expenses which would include past and future medical treatment expenses, including domestic and nursing care at home;

(c) Past and future wage loss;

(d) Home modification to cope with wheelchair access and other comforts.

9. In cases of this nature, the assessment of damages is based upon the reports of a court appointed expert. In circumstances where the plaintiff resides out of New Caledonia, the court would appoint a medical expert from the place of the plaintiff's residence.

10. The court appointed doctor would examine the plaintiff and make a determination as to diagnosis of injuries, disabilities and prognosis. An assessment would then be made as to percentage incapacity. A report would be prepared and submitted to the Court of First Instance in Noumea.

11. General damages are assessed by the Judge after careful consideration of all the medical evidence adduced. Permanent physical and intellectual impairment, pain and suffering, permanent disfigurement, loss of amenities of life are all factors considered when making the determination as to general damages."

178 It is not a contention of the appellants that the apparent unavailability of exemplary damages under French law is a factor relevant to the matter that the Court has to decide.

The proceedings at first instance

179 In his reasons for judgment at first instance, Smart J accepted that because the respondent had suffered damage in New South Wales and will continue to do so, the Supreme Court of New South Wales was capable of exercising jurisdiction in the case[295]. His Honour gave consideration, however, to the law which would have to be applied if the case were to be heard and determined in New South Wales with respect to the issue whether the Supreme Court of New South Wales was an inappropriate forum. His Honour held that because the events causing the

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295 Supreme Court Rules 1970 (NSW), Pt 10, r 1A(e) provides:

> "[W]here the proceedings, wholly or partly, are founded on, or are for the recovery of damages in respect of, damage suffered in the State caused by a tortious act or omission wherever occurring;"

respondent's injuries occurred in Noumea, a French territory, and that the vehicle was manufactured by a French company, the law to be applied was French law. His Honour referred in detail to some of the evidence which had been placed before him[296]:

> "Associate Professor J D Yeo has stated that the plaintiff has had a complete loss of motor power and sensation below T5 spinal level (nipple line) and will remain permanently paraplegic following the serious spinal injury sustained in the accident. He has received a lot of care in the past and will need a lot of care in the future and special provision will have to be made for him.
>
> It was common ground that the plaintiff had suffered damage in New South Wales and will continue to do so and that this Court had jurisdiction. See SCR Part 10 Rule IA(e).
>
> The plaintiff proposes to lead evidence from three expert witnesses of considerable experience and standing, resident in Australia, to the effect that the car 'roll over' phenomenon is well known and accounts for an appreciable percentage of accidents involving serious injuries or fatalities (5 to 10 per cent), that the Renault 19 sedan had a roof which was not of sufficient strength to withstand roll over damage and crushed too easily, that the cost per vehicle to provide a car roof of sufficient strength is comparatively small with estimates ranging from $20 to $300 and that if a roof of sufficient strength had been provided the plaintiff would probably not have been seriously injured. It has been assessed, with reasons in justification, that the Renault 19 sedan did not drop onto its roof from a height in excess of 0.5 metres.
>
> The plaintiff's experts desired to obtain details of roof crush tests carried out by the defendants and others and the relevant design and manufacturing papers. These have not been produced. There is also material relating to some American tests and standards.
>
> Both the defendants are French companies, have no presence in Australia, maintain no office in Australia, employ no one in Australia and are not registered to do business in Australia pursuant to the Corporations Law or at all. Renault Australia Pty Ltd was de-registered in Australia in 1992. Since 1984 the first defendant has held registration of its trade mark comprising 'Renault' and accompanying logo in Australia in relation to a wide range of vehicles. Renault sedans are seen on the streets of Australia but since about June or July or possibly September 1991 this is because

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296 *Zhang v Regie National des Usines Renault SA & Anor* unreported, Supreme Court of New South Wales, 16 October 1998 at 5-7 per Smart J.

Volvo Car Australia Pty Ltd distributes them in Australia. About that time the first defendant entered into an agreement with Volvo Australia Pty Ltd (now Volvo Car Australia Pty Ltd) whereby the latter purchases vehicles from the first defendant in France and sells them to various car dealerships throughout Australia.

In his report of 29 November 1996 Mr N Gillies states that versions of the Renault 19 four door sedan have been sold in Australia since 1991.

A Press Release of 11 September 1991 of Volvo Australia Pty Ltd announces the decision of Volvo to become the Australian importer of Renault cars. It refers to a 1990 agreement under which the first defendant and Volvo acquired shares in each other. It extols the virtues of the Renault 19 four door sedan. In a further Press Release of that day the safety features of the Renault 19 are stressed and it is asserted that the Renault 19 has passed all European safety tests. An undated 'Renault 19' pamphlet believed to be issued after July 1991 states 'The roof beam, rear pillar and guard designed to offer roll over as well as side and rear impact strength and absorption.'

At the present time there is limited information about the roof strengths of Renault 19 sedans used in New Caledonia. The materials reveal that the Renault 19 involved in the accident was registered on 21 August 1990 and had done 13265 km at the time of the accident."

180 His Honour next referred to several practical considerations, some of which may be in contention in varying degrees: the prospect that the majority of witnesses at trial would be witnesses as to damages and living in Australia, although their evidence might, in many instances, be reduced to, and received in writing; experts not confined to Australian residents would be required to give evidence; witnesses who actually observed the accident live in New Caledonia; pre-trial discovery and interrogatories are not available in French proceedings; the respondent and his family are in modest circumstances, and his lawyers in Australia are acting on a contingency basis; the appellants have considerable resources; proceedings in New Caledonia would probably cost much less than proceedings in New South Wales; and, the real and major contest at trial would be between the experts called on each side. His Honour did not think that linguistic differences and the absence of a jury were factors of significance. It was also his opinion that there was no arguable case of a failure, on the part of the appellants, to warn in New South Wales.

181 Smart J then said that the case had a close connexion with France and New Caledonia and, that, in reliance on *Voth v Manildra Flour Mills Pty Ltd*[297], he

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297 (1990) 171 CLR 538 at 571.

would regard the residence and the continued suffering of damages in New South Wales as factors of relatively little weight.

182 I set out some passages from his Honour's reasons which were the subject of some submissions in this Court by the respondent[298]:

> "As the defendants carry out their design and manufacture work in France and the relevant acts or omissions took place there, the design and manufacturing standards for car roofs in France and probably also in Europe will be relevant to their liability, if any. That is better determined by a French Court administering French law.
>
> …
>
> This case has a much closer connection with New Caledonia and France than with New South Wales. The case concerns a sedan allegedly defectively designed and manufactured in France by a French company, hired in a French Territory and involved in an accident in that same French Territory. France and New Caledonia have courts and procedures suited to this case and a judicial system of considerable standing which is internationally recognised and accepted. The troubling problem is the plaintiff's lack of funds and need for financial assistance to obtain justice. I have found this a very difficult case. After weighing all the factors I have concluded that I should grant a stay of both causes of action until further order."

183 And, for completeness, I repeat the conditions upon which his Honour was prepared to grant the stay[299]:

> "(a) The defendants submit to the jurisdiction of the Courts of New Caledonia;
>
> (b) The defendants not raise and waive any defence based on a time limitation provision;
>
> (c) The defendants not apply for security for costs or similar relief in respect of any action commenced by the plaintiff arising out of the accident and the design and manufacture of the car;

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298 *Zhang v Regie National des Usines Renault SA & Anor* unreported, Supreme Court of New South Wales, 16 October 1998 at 13, 16-17 per Smart J.

299 *Zhang v Regie National des Usines Renault SA & Anor* unreported, Supreme Court of New South Wales, 16 October 1998 at 17 per Smart J.

(d) The defendants meet the costs of any independent Court appointed expert."

The appeal to the Court of Appeal

184 Stein JA (with whom Beazley and Giles JJA agreed) did not think that anything turned upon the reference by Smart J to an "inappropriate forum" rather than to a "clearly inappropriate forum" which, Stein JA thought was the expression that posed the proper test[300]: that already his Honour was conscious of and had sought to apply, "correctly", the latter as the test.

185 The conclusion of Stein JA is to be found in the following paragraphs:

> "As I have said, Smart J found that '[t]he substantive law to be applied is French law'. This finding was not merely for the purpose of the second limb, justiciability, in the *McKain*[301] test (since justiciability was not in issue). It was a finding that French law would determine liability as the substantive law to be applied. I am satisfied that the succeeding paragraph of the judgment confirms this to be so. The finding was an unnecessary and arguably premature ruling, if not incorrect. As has been discussed, it is arguable, applying *Thompson v Hill*[302], that the substantive law to be applied would be that of New South Wales.
>
> In these circumstances, did his Honour's finding on the substantive law to be applied infect his discretion causing it to miscarry? It is clear from his reasoning that his Honour placed great weight upon French law being the substantive law to be applied by the New South Wales court. Indeed it seems that it was the decisive matter which determined the exercise of the discretion, his Honour having earlier said that practical considerations tended to favour a hearing in Sydney. A fair reading of his Honour's reasons reveals that he saw the question as very finely balanced. The balance was clearly tipped in favour of the opponents by the finding of the substantive law to be applied. In my opinion, the discretion miscarried."

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300 This was consistent with the approach of Bryson J in *WFM Motors Pty Ltd v Maydwell* unreported, Supreme Court of New South Wales, 23 April 1993, which was cited in *Ritchie's Supreme Court Procedure NSW* at 2290 [11.8.1].

301 *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1.

302 (1995) 38 NSWLR 714.

186 Having held that his Honour's discretion miscarried, Stein JA then re-exercised the discretion of the Court, this time in favour of the respondent, on the basis of the matters referred to in this passage:

> "In a product liability case in NSW the claimant would have a legitimate juridical advantage in the ability to cross-examine expert witnesses, not available under the civil law system in France or New Caledonia. Equally important is the juridical advantage of the availability of discovery, inspection and interrogatories in NSW, not available in France or New Caledonia."

The appeal to this Court

187 Before discussing the arguments of the parties it is convenient to set out the rules applicable to this appeal[303]:

> "**10.6A Setting aside service outside Australia**
>
> (1) The Court may make an order of a kind referred to in Part 11 rule 8 (which relates to setting aside etc. originating process) on application by a person on whom an originating process is served outside Australia.
>
> (2) Without limiting subrule (1), the Court may make an order under this rule on the ground:
>
> (a) that the service of the originating process is not authorised by these rules; or
>
> (b) that this Court is an *inappropriate* forum for the trial of the proceedings.
>
> …
>
> **11.8 Setting aside originating process, etc**
>
> (1) The Court may, on application made by a defendant to any originating on notice of motion filed within the time fixed by subrule (2), by order:
>
> (a) set aside the originating process;
>
> (b) set aside the service of the originating process on the defendant;

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303 Supreme Court Rules 1970 (NSW).

(c) declare that the originating process has not been duly served on the defendant;

(d) discharge any order giving leave to serve the originating process outside the State or confirming service of the originating process outside the State;

(e) discharge any order extending the validity for service of the originating process;

(f) protect or release:

(i) property seized, or threatened with seizure, in the proceedings; or

(ii) property subject to an order restraining its disposition or disposal or in relation to which such an order is sought;

(g) declare that the Court has no jurisdiction over the defendant in respect of the subject matter of the proceedings;

(h) decline in its discretion to exercise its jurisdiction in the proceedings;

(i) grant such other relief as it thinks appropriate.

…

(3) The making of an application under subrule (1) shall not be treated as a voluntary submission to the jurisdiction of the Court." (emphasis added)

The history of the Rules is traced by Kirby J in his Honour's reasons for judgment.

188 At the outset, it is important to notice that Pt 10 r 6A does not use the expression "clearly inappropriate", which had been used in common law cases[304] in relation to this kind of issue, particularly those cases in which the doctrine, forum non conveniens has been invoked, an expression which the Court of Appeal, in the passage to which I have referred seemed to think governed this case. Indeed, neither at first instance nor in the Court of Appeal does any detailed consideration

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304 See *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538. *Oceanic* was not decided by reference to any rules of court. *Voth* was decided at first instance before the current Rules were introduced, and no reference to them was necessary.

appear to have been given to the history of the current rules and their meaning. It should also be noted that Pt 10 r 6A commenced on 1 July 1988, that is after the hearing of argument in *Oceanic Sun Line Special Shipping Company Inc v Fay*[305] and one day after the pronouncement of judgment in that case. Before the current rule was introduced, Pt 11 r 8 entitled "Setting Aside Originating Process"[306] was in force and conferred a broad and non-specific jurisdiction upon the Court to set aside process or to discharge and grant an order for leave to serve, or confirming service of an originating process outside the state.

189 It is right to say, as the appellants submit, that the only error of law that the Court of Appeal held that the primary judge had made was to find, arguably wrongly, and prematurely, that French law as the substantive law to be applied, would be the law to determine the rights and obligations of the parties on trial. And it was on the basis of that finding only that the Court of Appeal decided to re-exercise its discretion.

190 For reasons which will appear, it is, with respect, not right to say that Smart J fell into error in deciding which law should apply, and in further deciding that matter in the way in which his Honour did. But before stating those reasons, I would emphasise that it is the language of the Rules that has to be construed and applied, and not principles of the common law, encrustations upon them or earlier Rules, not using the same language as the Rules in their current form. That does

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305 (1988) 165 CLR 197.

306 Pt 11 r 8 of the Supreme Court Rules 1970 (NSW) provided:

> "(1) The Court may, on application made by a defendant to any originating process on notice of motion filed within the time fixed by subrule (2), by order
>
> (a) set aside the originating process;
>
> (b) set aside the service of the originating process on the defendant;
>
> (c) declare that the originating process has not been duly served on the defendant;
>
> (d) discharge any order giving leave to serve the originating process outside the State or confirming service of the originating process outside the State.
>
> (2) Notice of a motion under subrule (1) may be filed by a defendant before he enters an appearance or within fourteen days after the date of entry of a conditional appearance by him."

not mean that common law principles which have been developed in this area would offer no guidance in construing ambiguities (if any). Reference to those not in conflict with the Rules may also be helpful, to the extent that they may provide examples of how the discretion has been exercised when the occasion for doing so has arisen in the past.

191 A holding that a forum is an inappropriate forum will not necessarily resolve the issue whether a proceeding in it should be stayed, although, in many, if not most cases, it is likely to do so. The Court will still have a discretion to stay or not to stay with respect to which, without attempting to state an exhaustive list of them, such considerations as delay, the conduct of the parties, the usual domicile or residence of the parties, and various matters of convenience may be relevant.

192 I cannot accept, however, as the Court of Appeal did, that a judgment that a particular foreign law should be the law to determine the parties' rights and obligations is irrelevant to the question of appropriateness, particularly in a case such as this one, in which the respondent defendants are foreign corporations, they have no legal presence or address in New South Wales, and the alleged events giving rise to liability occurred out of the jurisdiction. As four Justices of this Court (Mason CJ, Deane, Dawson and Gaudron JJ) made plain in *Voth*[307]:

> "[I]n deciding whether it has been established that the chosen forum is clearly inappropriate, the extent to which the law of the forum is applicable in resolving the rights and liabilities of the parties *is a material consideration.*" (emphasis added)

With respect, it is difficult to see how it could be otherwise. No doubt, courts in Australia can and do regularly apply foreign law, but it would be vain to claim that they can, or would do it with the same familiarity and certainty as the courts of the jurisdiction in which it was created.

193 In my opinion the word "inappropriate" which appears in the relevant rule should not be burdened with the encrustations of "oppressiveness" and "vexatiousness" that have been attached to it in cases in which courts have decided an issue of forum non conveniens. The history of these encrustations and the gradual realization in the United Kingdom that a rule requiring a defendant to establish oppression or vexation in the *forum legis causae* was unreasonable is traced in the joint dissenting judgment of Wilson and Toohey JJ in *Oceanic*[308]. There their Honours stated their conclusions in these passages with which I would respectfully agree and am free to apply here, because, neither in *Oceanic* nor *Voth*

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307 (1990) 171 CLR 538 at 566.

308 (1988) 165 CLR 197.

did the Court have to consider or apply the new Rule in its current form in which the use of the word "clearly" must deliberately have been omitted by the authors of the Rules, and a decision made not to use the words "oppressive" or "vexatious"[309]:

> "We agree with Lord Goff's approach in *Spiliada*[310]. In our view the evolution of English law since *The 'Atlantic Star'* cannot be ascribed to local considerations such as the incorporation of the United Kingdom into the European Economic Community. Rather, this century has witnessed such a transformation in communications and travel, coupled with a greater importance attaching to considerations of international comity as the nations of the world become more closely related to each other as to render the *St Pierre* principle, fashioned as it was in the nineteenth century, inappropriate to modern conditions. In this regard we agree with the views expressed by Kirby P in the Court of Appeal. The *St Pierre* principle places such a tight rein on the discretion of a court as to render it unable to deal justly with the problem of forum shopping, even in blatant cases … And there is force in the comment of Pryles[311]:
>
> > 'The common law jurisdictional rules [ie, the sufficiency of personal service within the jurisdiction] are not entirely satisfactory and can lead to the assumption of jurisdiction in the most tenuous circumstances where there is really no significant connection between the litigation and the forum … In these circumstances a liberal rule as to the staying of actions is required. It cuts down local parochialism as regards judicial adjudication, and is consistent with a spirit of international legal cohesion and integration.'
>
> Furthermore, in an area of the law involving the courts of other countries it is expedient to preserve as much consistency as possible between the common law countries. The doctrine of forum non conveniens has long formed part of the law of Scotland and of the United States of America. It is now the law of England. It would seem to be the law of Canada … We are unaware of any recent consideration of the question in the courts of New Zealand. In our view, the *Spiliada* approach should henceforth chart the course for the common law of Australia in relation to the inherent jurisdiction of a court to stay proceedings when there is a more appropriate forum in a foreign country.

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309 (1988) 165 CLR 197 at 212-213.

310 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

311 Pryles, "Liberalising the Rule on Staying Actions – Towards the Doctrine of Forum Non Conveniens", (1978) 52 *Australian Law Journal* 678 at 684.

> Likewise, we think that the reasoning of Lord Goff in *Spiliada* in drawing attention to a marked resemblance between the principles applicable in forum non conveniens cases and those which govern the discretionary power of a court to permit service of proceedings on a defendant outside the jurisdiction, is relevant and applicable in Australia." (footnotes omitted)

194 In short, it seems to me with respect, that so called globalisation, the deterrence of forum shopping, comity between nations with established judicial systems (both subjects about which I will say more shortly), taken with the other factors to which their Honours referred, require that, in general, suits should not be determined in a jurisdiction which has, with respect to the relevant events, no real connexion with the defendant. The days have passed since a judge of a common law country, however eminent, could say, categorically and uncontroversially of English courts, in defence of forum shopping, as Lord Denning MR did[312], "[England] is a good place to shop in, both for the quality of the goods and the speed of service."

195 It is true that in *Oceanic*, Brennan J preferred the older English test which required proof by a defendant of oppression or vexatiousness because, his Honour thought, it offered a greater degree of certainty[313]; Deane J reached a similar conclusion but did so by having regard to the interests almost exclusively of plaintiffs, whose "legitimate and substantial advantage" in the local forum should be definitive[314]. Gaudron J, the other member of the majority, largely agreed with Deane J.

196 I do not think that the majority opinion in *Oceanic* should be applied in this case. It is not binding on me because it was not decided by reference to the Rule which falls for application here. Secondly, it is not easily reconcilable with the passage from the joint judgment in *Voth* that I have already quoted and which was decided a little later than *Oceanic* and which stressed the materiality of the applicable law to a consideration of the question whether a forum was a clearly inappropriate one. Thirdly, the word "inappropriate" must have been deliberately chosen by the rule-makers in 1988. And had they intended a test of vexatiousness or oppression then they could and should have said so. Fourthly, "inappropriate" is hardly a synonym for "vexatious" or "oppressive". Fifthly, the test adopted in the older English cases and preferred by the majority in *Oceanic* was seen by the English courts, and Wilson and Toohey JJ in *Oceanic*, to be so disconcordant with modern notions of comity that a new and fairer test should be adopted. With

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312 *The Atlantic Star* [1973] QB 364 at 382.

313 (1988) 165 CLR 197 at 238-240.

314 (1988) 165 CLR 197 at 245-246.

respect, I think this is so and should be a relevant consideration in deciding inappropriateness under the current rule. "Forum shopping" has a capacity to affect all nations, including Australia, with established and fair judicial systems. If persons injured or damaged elsewhere are free to pursue their claims in this country because they think that they will enjoy greater prospects of success here than in the jurisdiction in which the damage was inflicted, then it is only to be expected that other nations, whose curial proceedings provide more generous results for plaintiffs, whether by way of huge awards of exemplary damages or otherwise, will be receptive to forum shopping in those nations' courts by their nationals and others who have been damaged or injured in this country. The consequences in these circumstances for people and corporations in this country who have complied with all relevant laws and standards, have paid their taxes and insured against risks on the basis of the law applying where they live or operate in this country, could be grave and unpredictable and, ultimately devastating.

197 As I have said, I do not consider the test to be one of vexatiousness or oppressiveness. If however I am wrong about that, I am of the opinion that for the respondent to be permitted to import his cause of action into, and to pursue it in New South Wales where the appellants have no presence, with which they have no other relevant connexion, and where the respondent was not injured would be oppressive to the appellants.

198 *Henry v Henry* [315], in which *Voth* was discussed and applied, is distinguishable. It was a matrimonial case in which a party invoked the jurisdiction of the Family Court of Australia pursuant to s 39(3) of the *Family Law Act* 1975 (Cth)[316], to seek to argue that he was domiciled in Australia. No rule of the kind which has to be applied here was involved. It is interesting to note, however, that the majority (Dawson, Gaudron, McHugh and Gummow JJ) said this in their joint judgment[317]:

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315 (1996) 185 CLR 571.

316 The section provides:

> "Proceedings for a decree of dissolution of marriage may be instituted under this Act if, at the date on which the application for the decree is filed in a court, either party to the marriage:
>
> (a) is an Australian citizen;
>
> (b) is domiciled in Australia; or
>
> (c) is ordinarily resident in Australia and has been so resident for 1 year immediately preceding that date."

317 (1996) 185 CLR 571 at 593.

> "[T]he question whether Australia is a clearly inappropriate forum is one that depends on the general circumstances of the case, taking into account the true nature and full extent of the issues involved."

199 That language does not suggest that any narrow view should be taken by a court in deciding inappropriateness or otherwise that would exclude a consideration, and a finding of the law to be applied, and circumstances such as the place of the injury, the absence of the defendant from the jurisdiction, and the position of, and possible prejudice to a defendant, and any other features connecting the case to the jurisdiction in which the relevant events occurred.

200 There is, in a sense, a measure of potential unfairness to defendants implicit already in a rule which allows, as this one does, the initiation of proceedings locally on the basis that they are founded *in part* upon damage being suffered locally, as this one does. In ordinary discourse, if one were to be asked "where was the damage done?", the answer would surely be "New Caledonia", that what happened thereafter, wherever it occurred, were consequences of the traumatic event which was complete in that place: that the respondent, by suing in New South Wales seeks to import his injuries, damages and cause of action into that jurisdiction. Be that as it may, that is a result that the Rule contemplates and to which effect must be given, absent inappropriateness. It must also be appreciated that the Court is not engaged, under the Rule, in making a choice as to which forum is the more appropriate. The Rule does not, however, provide any warrant for looking to a plaintiff's interests only. Reference has been made in the cases to a plaintiff's "legitimate" juridical advantage[318]. One person's legitimacy may, in some circumstances, be another's illegitimate disadvantage.

201 The law to be applied under the Rule is a matter which should be decided at the earliest possible stage of the action. How otherwise can the parties prepare for trial? Among other things, the way in which the parties may choose to avail themselves of the various interlocutory steps which they may take, is likely to be influenced by the law which is to be applied at the trial. And it is desirable that the parties not wear the costs of attempting to prove foreign law unless it is clear that it will be necessary for them to do so.

202 Every rational consideration points in my opinion to French law as the law to be applied in this case: the vehicle was a French vehicle; the injury was sustained in a "French place", the vehicle was hired in that place, and the terms and conditions of the hire of the vehicle would be governed by the law of that place. The "wrong", if any, had no relevant connexion with New South Wales.

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318 eg the discussion in *Oceanic* (1988) 165 CLR 197 at 244-246 per Deane J.

203 It follows that Smart J was not in error in having regard to, and making a finding as to the application of French law for the purposes of deciding whether the Supreme Court of New South Wales was an inappropriate forum.

204 I have said that in making such a decision matters referred to in the cases at common law may be relevant, particularly by way of informing the exercise of a judicial discretion when the foundation for its exercise has been laid. Any cases that could have a relevance to the discretion were carefully considered by Smart J when his Honour came to exercise his discretion. His Honour, to use the language of the joint judgment in *Henry*, did have regard to the general circumstances of the case and the full extent and nature of the issues involved. The Court of Appeal accepted that all of the matters to which Smart J referred were relevant.

205 Stein JA did, however, give a different emphasis to some of the matters to which Smart J referred. In so doing, that is in effectively reviewing an exercise of a discretion, the Court of Appeal again fell into error. Stein JA was also perhaps too categorical in saying that the primary judge "conclud[ed] that the practical considerations favoured New South Wales". Smart J was somewhat more tentative than that, and, it may be seen, anxiously weighed the competing considerations[319]:

> "Overall the practical considerations tend to favour a hearing in Sydney but if the case were to be determined by a French or New Caledonian Court mainly on documentary materials this would not preclude a fair hearing. The problem would lie in obtaining adequate legal representation in a difficult case. To the extent that it was needed, an enquiry as to damages would take place in New South Wales. This is a case where it would be appropriate for a Court to determine liability first and subsequently deal with the assessment of damages if that arises."

The question of inappropriateness in this context will always involve the weighing of considerations of the kind to which his Honour referred.

206 I have already stated my view that it is erroneous to give, as the Court of Appeal did, undue weight to a perception of advantage to the respondent by allowing the proceedings in New South Wales to continue, rather than to assess the advantages and disadvantages accruing to both sides in each jurisdiction in considering whether New South Wales was an inappropriate one. Stein JA said this:

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319 *Zhang v Regie National des Usines Renault SA & Anor* unreported, Supreme Court of New South Wales, 16 October 1998 at 11 per Smart J.

> "In a product liability case in NSW the claimant would have a legitimate juridical advantage in the ability to cross-examine expert witnesses, not available under the civil law system in France or New Caledonia. Equally important is the juridical advantage of the availability of discovery, inspection and interrogatories in NSW, not available in France or New Caledonia."

207 In *Agar v Hyde*[320] I expressed reservations about a disposition on the part of the Court of Appeal there to find in favour of a plaintiff on a not dissimilar application because, in New South Wales, the provisions for allowing extensions of periods of limitation were more generous than in the competing jurisdictions. In any event, no matter what opinion a judge may hold as to a superiority, actual or not, of our system of law over that of another jurisdiction, it will often be presumptuous and sometimes impossible to demonstrate that a superiority in fact exists, or that, having regard to all aspects of the foreign law in question, it is incapable of achieving a just result[321]. Indeed, the relevant provision of the French law likely to govern this case would appear to operate no less generously to a plaintiff on the issue of liability than Australian law[322].

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320 (2000) 201 CLR 552 at 601 [130]-[131].

321 It may be that French law would be more favourable on the issue of liability to a plaintiff in this class of case, a matter on which I make no finding as there was no sufficient proof of this at first instance. See David, *English Law and French Law : a comparison in substance*, Tagore Law Lectures (1980) at 150-151:

> "A second principle was implicit in the civil code of France. Except perhaps in the case of the employer, whose liability was irrefutably engaged if damage was caused by a fault of his employee, there was no place in the civil code for a tortious liability independent of fault. This principle has ceased to be true today: through a most audacious interpretation – amounting to a distortion – of the civil code, the French Courts have laid down a new principle: tortious liability is incurred nowadays independently of any fault, if the damage has been inflicted on B by a thing which is under A's custody or control.
>
> In all cases the tortious liability supposes that some damage has been suffered by the plaintiff, and that some chain of causation can be established between the faulty conduct (or the thing under the defendant's control) and the damage suffered by the plaintiff."

322 Article 1382 of the French Civil Code states this:

> "Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation."

208 The reasoning of the Court of Appeal on the discretionary issue suffers from the further defect that it looks to some aspects of French procedural law only. It overlooks that French law charges French courts with the obligation of discovering the truth, and confers on them interventionist powers of a kind not generally available to judges in common law jurisdictions. It should not be too readily assumed that the exercise of these powers would result in unfairness to either side[323].

209 Stein JA took a different view of the relevance and significance of the disparity in resources between the parties from that of Smart J. This was a matter of relevance, but it is important that its relevance not be overstated. It was, however, given the fullest and most careful consideration by his Honour at first instance. The latter's view on it accorded with what Lord Goff of Chieveley said in *Connelly v RTZ Corp*[324]:

> "I therefore start from the position that, at least as a general rule, the court will not refuse to grant a stay simply because the plaintiff has shown that no financial assistance, for example in the form of legal aid, will be available to him in the appropriate forum, whereas such financial assistance will be available to him in England. Many smaller jurisdictions cannot afford a system of legal aid. Suppose that the plaintiff has been injured in a motor accident in such a country, and succeeds in establishing English jurisdiction on the defendant by service on him in this country where the plaintiff is eligible for legal aid, I cannot think that the absence of legal aid in the appropriate jurisdiction would of itself justify the refusal of a stay on the ground of forum non conveniens. In this connection it should not be forgotten that financial assistance for litigation is not necessarily regarded as essential, even in sophisticated legal systems. It was not widely available in this country until 1949; and even since that date it has been only available for persons with limited means. People above that limit may well lack the means to litigate, which provides one reason for the recent legalisation of conditional fee agreements."

The opinion of Smart J was in conformity with some observations of Lord Hoffmann (dissenting, but for other reasons) in *Connelly*[325]:

> "But I do not think that the refusal a stay on this ground can be based upon any defensible principle. It means that the action of a rich plaintiff will be stayed while the action of a poor plaintiff in respect of precisely the same

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323 Dadomo, *The French Legal System* (1996) at 173-191.

324 [1998] AC 854 at 873.

325 [1998] AC 854 at 876.

transaction will not. It means that the more speculative and difficult the action, the more likely it is to be allowed to proceed in this country with the support of public funds. Such distinctions will do the law no credit. For my part, I prefer the eminently rational principle stated by Sopinka J in *Amchem Products Inc v (British Columbia) Workers' Compensation Board*[326]:

> 'The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.'"

210 I would also regard one other of the reasons of Stein JA as erroneous in two respects: that the respondent "had only a transitory and accidental connection" with New Caledonia. First, the fact that the respondent was in New Caledonia, and that he suffered injury there in an accident in respect of which some of its residents will be important witnesses, does give the respondent more than an accidental connexion with New Caledonia. Secondly, his Honour's statement discloses an erroneous approach to the relevant issues by looking exclusively to the respondent's position and to the proposed alternative forum, rather than to the position of the parties on both sides of the record and the appellants' connexion or otherwise with New South Wales. As to the latter, the appellants have no connexion. That others choose to import and sell their cars in that State is of no relevance. It is not established that the cars sold in New South Wales are the same as those distributed where the respondent was injured. Indeed, as different countries frequently have different standards of design and safety, there must be a real prospect that a Renault vehicle sold in Australia would differ from a Renault vehicle sold in another country. So, too, different countries may impose different standards of manufacture and the compulsory change-over of vehicles once they reach a certain age. These are matters going beyond a search for and application of the law to govern this case if it were to be litigated in New South Wales. That such differences are likely to exist highlights the need to look to the appellants' as well as the respondent's position.

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326 (1993) 102 DLR (4th) 96 at 110-111.

211 To say, as his Honour did, that he was "unable to see how New Caledonia can be seen as an appropriate forum" was also erroneous. The sorts of matters to which I have referred make New Caledonia an entirely appropriate forum. Finally, in saying as his Honour did, that "[I]t ought not be concluded that NSW is a *clearly* inappropriate forum", Stein JA did not apply the less emphatic test for which the Rules now make provision. (emphasis added)

212 It is unnecessary to have regard to policy considerations to decide this appeal. Often, as I have elsewhere pointed out[327], there are policy considerations pointing in different directions. But it does seem to me that there are some of relevance here suggestive of the inappropriateness of the domestic forum. People today travel much more extensively than in the past. They are much better informed about distant, as well as near places, than was the case in the past. People who travel to different jurisdictions would understand that those jurisdictions have different systems of law, taxation and social security from ours. In principle, they should also be aware that in travel and in some places, they may encounter more and different hazards from those they may ordinarily meet in their own countries. They should also appreciate that, in distant places and in unfamiliar circumstances they may be more vulnerable than they are at home. There is little reason to distinguish the civil from the criminal law. Travellers and residents in, and visitors to other jurisdictions know that they are bound by the criminal law of those jurisdictions which, if they break it, will make them answerable in the courts of those jurisdictions. It is by no means unreasonable or inappropriate that they should also be bound by the civil law of, and the remedies provided by, and to be pursued in, the courts of the jurisdictions in which they have suffered injuries. Travellers generally can and should obtain insurance to protect themselves against the consequences of accidents in voyage and against the hazards of other places.

213 The appellant submitted that the holding of the majority in *John Pfeiffer Pty Ltd v Rogerson*[328] that the lex delicti should govern all questions of substance to be determined by all Australian courts in cases of torts committed in Australia, should be applied equally in respect of acts or omissions committed outside Australia, and that the double actionability rule in *Phillips v Eyre*[329] should be overruled. Whether the principle should be taken to be as stated in *Phillips v Eyre* or in terms of the modification formulated by Brennan J in *Breavington v Godleman*[330], does not matter in this case because the conditions for its application on either view are

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327 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 104-105 [164], 160 [168].

328 (2000) 203 CLR 503 at 538-540 [81]-[87].

329 (1870) LR 6 QB 1.

330 (1988) 169 CLR 41 at 110-111.

satisfied here: the respondent would have a cause of action, on the facts pleaded in New South Wales and in New Caledonia, and the defendant's conduct was not therefore justifiable in that latter place[331]. In *Voth*, which raised the same question as here, but which fell to be considered in relation to events occurring before the commencement of the current Rules, Mason CJ, Deane, Dawson and Gaudron JJ said this of *Phillips v Eyre*:[332]

> "The act of the appellant giving the respondents their cause of complaint was committed in Missouri and thus the tort, if there was one, was committed in Missouri. Accordingly, even if the matter were to be litigated in this country, the appellant is liable to the respondents only if he is liable under the law of Missouri: see *Phillips v Eyre*[333], where it is said that 'the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law'. The precise role of local law under the double actionability rule laid down in *Phillips v Eyre* need not be explored, but it has no direct bearing on the question whether the act of which the respondents complain was wrong for that must depend on Missouri law. The question whether it would have been wrong if committed in Australia, as is asked under the double actionability rule, merely brings local law to bear on that question hypothetically. Even though Australian revenue law features significantly in the respondents' damages claim, it is merely a circumstance bearing on the question whether damage was suffered and, if so, its quantum. It does not, in any relevant sense, determine the liability of the appellant for that damage or the quantum of recoverable damage. The proceedings have been conducted on the basis that the law of the place where the tort was committed has a significant bearing upon the determination of the dispute between the parties. In the light of what has been said it is more accurate to say that it is fundamental."

Their Honours did not express any opinion as to the continued binding effect of *Phillips v Eyre* or the impact that their decision and reasons might have on that case or any particular aspect of it.

214 I do not propose, therefore, to say anything about the application (subject to a flexible exception or otherwise) of *Pfeiffer* to foreign wrongs, the subject of proceedings to be litigated to finality in this country, or about the extent of the application, or continued application of *Phillips v Eyre* to such proceedings. The conclusions of the majority in *Pfeiffer*, do however seem to me, with respect, to

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

332 (1990) 171 CLR 538 at 569-570.

333 (1870) LR 6 QB 1 at 28.

depend very much upon the nature of the federal structure of this country[334] and its courts, and the respect owed by its component states and their courts to one another, as well as the desirability that there be one common law for the whole of the nation[335], features which are self-evidently not present in international situations.

215 The respondent has filed a notice of contention. Only one of the matters it raises needs any separate consideration. In par 7 of it, the respondent submits that the primary judge erred in concluding that the conditions included in his orders would be effective to remove unfairness to the plaintiff as a result of the advantages he would lose, and the disadvantages he would suffer if he were required to litigate in France or New Caledonia. The contention overlooks the primary judge's specific and careful consideration of this matter.

Orders

216 I would allow the appeal and order that the judgment of Smart J be restored. The appellants' grant of special leave was conditional upon, first, their agreement that the order for costs in the New South Wales Court of Appeal not be disturbed and, secondly, their paying the respondent's costs in this Court which I would order accordingly.

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334 (2000) 203 CLR 503 at 540-541 [86]-[91].

335 (2000) 203 CLR 503 at 542 [95]-[96].