What's Wrong with Forum Shopping?†

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1. *A Difference of Opinion*

Perusing Australian conflicts cases and literature, I was struck by how preoccupied courts and scholars are with the phenomenon of forum shopping. In the last of the recent series of tort choice-of-law-decisions, *Stevens v Head*,[1] several High Court Justices deplored what they apparently perceived to be a highly questionable litigation strategy. Criticising the majority judgment, which had characterised the statutory limitation on damages imposed by the New South Wales *Motor Accidents Act* as "procedural", Mason CJ said that "expanding the concept of what is procedural .... is nothing less than an invitation to Australian forum shoppers".[2] Deane J scolded the majority's approach on the ground that it "goes a long way towards converting the Australian legal system into a national market in which forum shoppers are encouraged to select between competing laws ....".[3] Gaudron J maintained that "it is worse than absurd that the law should allow that the consequences attaching to an act or event in this country ... can vary according to the State in which they are litigated".[4] Even Brennan J, who co-authored the judgment that was the target of this critique, acknowledged, in *Breavington v Godleman*,[5] what he termed "the problem of forum shopping".[6]

The Australian Law Reform Commission echoes these concerns. In its Report on *Choice of Law*,[7] one reads that forum shopping "is inappropriate within Australia"[8] and that "it seems unacceptable that the result of a particular case would depend on venue ... ".[9] Australian scholars agree. If anything they are more censorious than the courts and the Law Reform Commission. Thus in the second edition of their conflicts treatise Sykes and Pryles condemn counsel for an astute choice of a sympathetic jurisdiction by means of a strong epithet, decrying the Victoria Supreme Court's choice-of-law decision in *Breavington* as a "blatant example of forum shopping".[10]

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1 (1993) 112 ALR 7.

2 Id at 19.

3 Id at 27.

4 Id at 31.

5 (1988) 169 CLR 41.

6 Id at 76. See also id at 46, 74-75.

7 Law Reform Commission, *Choice of Law* Report No 58 (1992).

8 Id at 44.

9 Id at 21.

10 Sykes, E I and Pryles, M C, *Australian Private International Law* (2nd edn, 1987) at 517.

The Australian attitude toward counsel's jockeying for position markedly contrasts with that which prevails in the United States. In *Keeton v Hustler Magazine*,[11] for instance, the US Supreme Court unanimously reversed the First Circuit Court of Appeals' dismissal of a defamation action Ms Keeton brought in a New Hampshire federal court after her earlier suit had been dismissed as time-barred in Ohio, the defendant's place of incorporation. Whereas the federal appellate court believed that "the New Hampshire tail is too small to wag so large an out-of-state dog",[12] the highest American bench saw nothing wrong in the New York plaintiff's choice of a small state with a long statute of limitations. It condoned the plaintiff's choice of a New Hampshire forum even though few of the defendant's publications were sold there and the alleged injury to her reputation in that state could be considered de minimis considering the size of its population. Instead of casting aspersions on Ms Keeton's machinations, Rehnquist CJ noted that her

> successful search for a state with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favourable substantive or procedural rules or sympathetic populations.[13]

In a similarly relaxed vein, the eminent federal court of appeals judge J Skelly Wright once spoke of forum shopping as "a national legal pastime".[14]

2. *"Decisional Harmony"*

What, then, explains the striking disparity between American and Australian attitudes? In my opinion, the differing views are rooted in assumptions about the manner in which courts ought to deal with choice-of-law problems. According to Sykes and Pryles, "Anglo-Australian methodology in choice of law has remained the same since Story wrote".[15] But methodology was not Joseph Story's strong suit. Rather, the American Supreme Court Justice left it to the German academic Savigny to articulate what Story's *Commentaries*[16] merely adumbrated, that is to say a choice-of-law system premised on the idea that the outcome of litigation ought not to vary with the forum or, as Savigny put it, the applicable law should not depend on the "unilateral discretion of one party".[17]

This fundamental postulate of uniformity, in civilian parlance "decisional harmony",[18] forms the cornerstone of Savigny's system, which has since been widely accepted in both civil law and common law countries. In Cheshire and North,[19] for instance, one reads that "although it is true that the basis of the common law is not logic but experience, it is submitted that the method adopted in practice by English courts corresponds in general with that sug-

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11 465 US 770 (1984).
12 682 F2d 33 at 36 (lst Cir 1982).
13 Above n11 at 779.
14 Wright, J S, "The Federal Courts and the Nature and Quality of State Law" (1967) 13 *Wayne LR* 317 at 333.
15 Sykes, E I and Pryles, M C, Australian Private International Law (3rd edn, 1991) at 13.
16 Story, J, *Commentaries on the Conflict of Law* (2nd edn, 1841).
17 Von Savigny, F K, *System des heutigen Römischen Rechts*, Vol 8 (1849) at 129.
18 See, eg, Keller, M and Siehr, K, *Allgemeine Lehren des internationalen Privatrechts* (1986) 57; Mayer, P, *Droit international privé* (4th edn, 1991) at 55.
19 North, P M and Fawcett, JJ, *Cheshire and North's Private International Law* (12th edn, 1992).

gested by Savigny".[20] Anyone who subscribes to the tenet that the raison d'être of choice-of-law is uniformity must, of necessity, disapprove of attempts to vary the outcome of litigation by selecting that forum which is most favourable to the plaintiff's prospects of success.

Savigny of course realised that decisional harmony is attainable only if all states and nations of this world adopt his system of classifying legal relationships, as well as the connecting factors by means of which he linked these relationships with one jurisdiction or another.[21] In retrospect, one wonders how Savigny could expect, for example, common law courts and legislatures to adopt the rule that the law of decedent's last domicile, rather than the *lex rei sitae*, determines the succession to immovables. And how should it be possible to achieve universal agreement on the manner in which the interests of surviving spouses are protected? Who is to say that marital property laws can do a better job than succession rules?[22] The lack of agreement on this point poses insoluble characterisation problems that will forever frustrate the quest for uniformity. To cite one more example, Mancini's advocacy of the *lex patriae* as a personal connecting factor, which was successful in several countries, is unacceptable to common lawyers who prefer the domiciliary nexus. Thus, a rift opened, which has not been bridged to this day, and never will be bridged.[23]

Moreover, recent years have witnessed much legislative activity in the field of conflicts. From Portugal to Hungary, European nations have codified or recodified their choice-of-law provisions, as have several Latin American countries. Since no two of these codifications are identical, Savigny's ideal of decisional harmony has become impossible to implement. The resulting conflict of conflicts, prompted by the divergence of statutory choice-of-law rules, dramatically illustrates the unworkability of the classical system as a means to achieve uniformity. Characterisation problems caused by differences in the classification of substantive rules, and renvoi caused by differences in connecting factors, highlight the illusory nature of Savigny's hope for a worldwide agreement on choice-of-law rules. Thus, the evolution of positive conflicts law around the world has exposed the quixotic notion of the traditional system's quest for uniformity.

3. *The American Experience*

Even within a single nation uniformity may be unattainable, as the American experience shows. Once upon a time, certainty, predictability and uniformity of result were the cardinal virtues American courts and scholars pursued. Joseph Beale's Conflict of Laws Restatement[24] was well within the classical tradition founded by Savigny.[25] Put to the test, however, the hard and fast rules he had concocted proved to be a resounding failure. Mass phenomena,

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20 Id at 22-23. See also Sykes, E I and Pryles, M C, above n15 at 10.

21 See generally Juenger, F K, *Choice of Law and Multistate Justice* (1993) at 35-40, 71, 79.

22 See Juenger, F K, "Marital Property and the Conflict of Laws: A Tale of Two Countries" (1981) 81 *Colum LR* 1061.

23 See Juenger, above n21 at 41-42.

24 *Restatement of Conflict of Laws* (1934).

25 See Juenger, above n21 at 88-92.

such as interstate traffic accidents and air crashes, dramatically demonstrated a crucial defect inherent in the First Restatement's approach to choice-of-law problems. Inevitably, the *lex loci delicti* rule led to a massive importation of substandard foreign law, such as guest statutes, interspousal immunity and arbitrary caps on wrongful death recovery,[26] which were unpalatable to those judges whose own law did not contain such "drags on the coattails of civilisation".[27] To escape the dire consequences that would ensue from applying Beale's tort choice-of-law rule, American judges, after paying lip service to his oeuvre, evaded its tenets by invoking characterisation, renvoi and the public policy reservation to reach results more in line with their sense of justice than those that the Restatement's hard and fast rules would have compelled.[28]

Dissatisfied with such gimmickry, most American state courts have by now abandoned the First Restatement's simplistic rules for novel approaches to choice of law that, as a rule, produce desirable results. Whilst the so-called American "conflicts revolution" has thrown the entire field into disarray, in the United States the victims of interstate and international accidents now enjoy a far better measure of protection than they would receive if the *lex loci delicti* rule still prevailed.[29] The reason for the novel theories' benign effect is the forum bias that characterises the conflicts nouvelle vague. The homing trend they promote allows tort victims to forum shop for the most favourable substantive law, thereby circumventing the substandard tort rules that used to bar or curtail recovery.

The substantive provisions primarily responsible for the reorientation in American conflicts law were the so-called guest statutes.[30] Enacted during the 1920s and 1930s in more than half of the American states,[31] they barred injured passengers of motor cars from suing the driver or owner unless the plaintiffs could show some aggravated form of negligence. As Prosser observed sarcastically:

> The statutes are generally acknowledged to have been the result of persistent and effective lobbying on the part of liability insurance companies ... The typical guest act case is that of the driver who offers his friend a lift to the office or invites the friend out to dinner, negligently drives him into a collision, and fractures his skull — after which the driver and his insurance company take refuge in the statute, step out of the picture, and leave the guest to bear his own loss. If this is good social policy, it at least appears under a novel front.[32]

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26 Id at 117-8.

27 *Clark v Clark* (1966) 222 A2d 205 at 209 (per Kenison J).

28 See Juenger, above n21 at 96.

29 Id at 147-9.

30 See Juenger, above n21 at 107, 117-118, 146.

31 See Keeton, S P, Dobbs, D B, Keeton, R E and Owen, D G, *Prosser and Keeton on the Law of Torts* (5th edn, 1984) at 215.

32 Id at 215-6. Guest statutes have since largely disappeared from the American conflicts scene, most of them having been repealed or held unconstitutional by state supreme courts. See id at 216 and 1984 Supp at 35. However, in the 1970s and 1980s many states enacted numerous other *statuta odiosa* that unreasonably curtail the rights of accident victims tort plaintiffs in a vain and misguided attempt to cope with the so-called "insurance crisis". See id 1984 Supp at 1-3. The fact that legislatures are far more responsive to a well organised insurance lobby than to the plight of a hapless group formed by fate and fortuity as-

The modern approaches enabled plaintiffs to evade such *statuta odiosa* by choosing to sue in a state that never had a guest statute or had abolished it. Forum shopping thus came to serve the important substantive policy of affording the victims of interstate torts a fairer measure of redress. Far from interfering with this practice, the US Supreme Court actively promoted the reorientation of American conflicts law away from hard and fast rules toward soft, forum biased approaches.[33] The only constraints the highest bench imposes on state choice-of-law rules is that of requiring some nexus between the forum and the transaction at bar.[34] Thus, in the United States, a country with much greater diversity amongst state laws than Australia — and a country devoid of an overarching general federal common law — forum shopping is not considered unacceptable. But even if the Supreme Court of the United States were to impose stringent limitations on choice-of-law and jurisdiction — which it has unquestionably power to do under our Full Faith and Credit Clause — this would hardly put an end to our "national legal pastime".

4. *The Reasons for Forum Shopping*

Lord Denning once explained America's attraction to foreign tort plaintiffs as follows:

> As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself, and at no risk of having to pay anything to the other side. The lawyers there will conduct the case 'on spec' as we say, or on a 'contingency fee' as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40% of the damages, if they win .... If they lose, the litigant will have nothing to pay to the other side. The courts in the United States have no such costs deterrent as we have. There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic and know that the lawyers will take their 40% before the plaintiff gets anything. All this means that the defendant can be readily forced into a settlement. The plaintiff holds all the cards.[35]

This quotation is a good, albeit incomplete,[36] listing of the advantages American courts offer to tort plaintiffs. All of them are of a procedural nature; Lord Denning did not say a word about either choice-of-law or substantive rules. Indeed, as the editor of Dicey and Morris' conflict of laws treatise observed:

> [I]t is likely that the true causes of forum shopping are to be found elsewhere than in the divergencies of the rules of private international law. The plaintiff usually shops in the forum with which he is most familiar or in

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sures the continuous importance of forum shopping as a means of law reform.

33 See, eg, *Van Dusen v Barrack* (1964) 376 US 612 (countenancing the emergence of novel state choice-of-law approaches); *Richards v United States* (1962) 369 US 1 at 15 (same); *Lauritzen v Larsen* (1953) 345 US 571 (open ended admiralty choice-of-law approach).

34 See *Sun Oil Co v Wortman* (1988) 486 US 717; *Phillips Petroleum Co v Shutts* (1985) 472 US 797. For a fuller discussion see Opeskin, B, "Constitutional Dimensions of Choice of Law in Australia" (1992) *Public LR* 152 at 173-7.

35 *Smith Kline & French Laboratories Ltd v Bloch* [1983] 2 All ER 72 at 74 (CA).

36 It does not mention the generous discovery American law allows, which is of particular importance in products liability cases.

> which he gains the greatest procedural advantage or puts the defendant to the greatest procedural disadvantage.[37]

Well-known reported cases support this conclusion. In the *Paris Air Crash*[38] litigation, for instance, choice of law played no role whatsoever in counsel's decision to vindicate, in California, the rights of relatives of passengers who had perished when a Turkish airliner bound for London plunged into a forest near Paris shortly after take-off. They chose this forum in spite of the fact that the *lex loci delicti* was more favourable to the plaintiffs' causes than the law of California: whereas French law permitted recovery for grief, the California wrongful death act, at the time, only allowed for pecuniary damages.[39] Similarly, in the celebrated Rhine River pollution case decided by the European Union's Court of Justice[40] Dutch vegetable growers chose to sue in the Netherlands rather than in France. Their choice was not motivated by the fact that Dutch tort law deals with polluters more harshly than French law. Rather, for good reason they expected the *favor judicis* not to be the same in the depressed Alsacian region of France, where the defendant potassium mines dumped ten thousand tonnes of salt per day, as at the river's mouth.[41]

This is not to say that choice of law never plays a role in forum shopping. The *Hustler* case,[42] as well as *Stevens*[43] and *McKain v R W Miller & Co (SA) Pty Ltd*,[44] exemplify that sometimes the plaintiff's litigation strategy is motivated by the quest for favourable substantive law (to characterise statutes of limitations, which effectively bar a cause of action, as "procedural" is of course wholly unconvincing). But it would be wrong to suppose that hard and fast choice-of-law rules, or even a uniform substantive law — for example, the enactment of an American or Australian civil code — would extirpate forum shopping. Procedural differences, such as the availability of a jury trial, discovery, rules concerning costs and attorneys fees, as well as the availability of injunctive relief, ensure the continued attraction of this practice even if all conflict of laws problems were to evaporate.

5. *The Futile Quest for Uniformity*

In light of the foregoing considerations, it should be obvious that conflicts rules will never guarantee uniform results; Savigny's quest was doomed from the outset. Nor can such rules guarantee good results. Quite on the contrary, the massive influx of substandard foreign substantive rules, which inevitably results from the application of choice-of-law rules that are blind to substantive values, explains the demise of the classical choice-of-law system in the United

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37 Collins, L, "Contractual Obligations — The EEC Preliminary Draft Convention on Private International Law" (1976) 25 *ICLQ* 35 at 36. See also Nygh, P E, *Conflict of Laws in Australia* (5th edn, 1991) at 78.

38 *In re Paris Air Crash of March 3 1974*, 399 F Supp 732 (CD Cal 1975).

39 See Juenger, above n21 at 49, 208-9.

40 *Handelskwekerij G J Bier BV v Mines de Potasse d'Alsace SA* [1976] ECR 1735.

41 See Juenger, F K, "Forum Shopping, Domestic and International" (1989) 63 *Tulane LR* 553 at 569.

42 Above n11.

43 Above n1.

44 (1991) 174 CLR 1.

States and, I suspect, the landmark English case of *Chaplin v Boys*.[45]

From this perspective, the Australian judiciary's preoccupation with forum shopping seems misdirected. It proceeds from three questionable premises, namely that uniformity is attainable, that it is desirable, and that uniformity will assure that counsel curb their natural inclination to improve their clients' prospects by selecting a favourable jurisdiction. But, as reported cases show, even within Australia — a country with fairly homogeneous state legislation and an overarching common law — forum shopping pays off (for defendants as well as for plaintiffs)[46] and its condemnation has done little to improve Australian tort choice of law, a field in which — as the authors of a standard treatise remark with commendable understatement — the "cases cannot all be fitted into coherent pattern".[47]

The Australian judges' and scholars' single-minded focus on certainty, predictability and uniformity of result inevitably distracts attention from other considerations that may be of importance in the conflict of laws. Specifically, the preoccupation with decisional harmony blinds them to an issue that looms large in current conflicts doctrine, namely to what extent that discipline ought to further the ends of material justice.[48] Indeed, it is truly astonishing that courts and legal writers should believe that the conflict of laws bears no responsibility for the outcome it produces in particular cases. There is no other field of law in which one could respectably argue that substantive results are irrelevant, that what matters is doctrine, and that this doctrine cannot be evaluated by how it works in practice.

In Australia, however, it is still assumed that judges in multistate cases are required to put on a blindfold that disables them from taking into account the content of competing substantive laws. And yet, even paying the high price of sacrificing justice for uniformity has failed to realise the ever elusive goal of decisional harmony. *Stevens* and *McKain* show that forum shopping is alive and well in this country, and that much can be gained from a wise selection among competing jurisdictions. Indeed, in *Stevens* the plaintiff's litigation strategy would have paid off even if the majority had shared the Chief Justice's concern about her suing in Queensland: being from New Zealand, she recovered more in Australia than she could have hoped for to collect pursuant to her native country's no-fault scheme.

Moreover, as noted earlier, the escape devices that form an intrinsic part of the classical conflicts methodology, such as characterisation, renvoi and public policy, will in any event frustrate the quest for decisional harmony. Long before the American "conflicts revolution", astute counsel and fair-minded judges seized upon the "general part" of conflicts law to reach just decisions,[49] and in that minority of American states which still profess allegiance to the First Conflicts Restatement, courts continue to invoke the classical es-

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45 [1971] AC 356.

46 Defendants can of course engage in what Marshall J once called "reverse forum shopping". See *Piper Aircraft Co v Reyno* (1981) 454 US 235 at 252 n19. For an Australian example see *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

47 Sykes, E I and Pryles, M C, above n15 at 547.

48 See Juenger, above n21 at 169-90.

49 See text accompanying n28 above.

cape devices. Nor, as *Stevens* and *McKain* show, does a majority of Australia's High Court have any difficulty labelling statutes of limitations and caps on liability as "procedural", although their judgments fail to reveal whether the justices desired the effect their characterisation inevitably produced, namely to maximise the tort victim's recovery.

6. *Does Forum Shopping Merit Censure?*

The condemnation of forum shopping by judges and legal writers attaches opprobrium to counsel's efforts to improve their clients' position by means of a judicious choice among existing fora. It seems that the glib phrase — one of the many Americanisms the modern world is so eager to embrace — rolls off the tongue much too easily. Like other metaphors, this one must "be narrowly watched, for starting out as devices to liberate thought, they end often by enslaving it".[50] Regrettably, in the law of conflicts metaphors abound. One reads, for instance, about the "seat" of legal relationships, the "vesting" of rights and the "interests" governments supposedly have in the application of their states' laws. These and similar turns of phrase have a strong propensity to befog the minds of those who utter or who hear them. That is true, in particular, of the "forum shopping" metaphor. Counsel reproached for having engaged in it are apt to feel that they have done something reprehensible, instead of having served their clients well. Law students may believe that wisely choosing the forum that best serves a client's interest amounts to breach of etiquette, if not of ethics.

To put things in their proper perspective it may be appropriate to quote what Lord Simon Glaisdale had to say about the matter :

> "Forum-shopping" is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented : this should be a matter neither for surprise nor for indignation.[51]

Even Lord Denning, who bemoaned the penchant of tort victims to take their cases to America,[52] had something good to say about forum shopping, at least as long as the chosen forum is an English one:

> No one who comes to these courts asking for justice should come in vain ... . This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this "forum-shopping" if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.[53]

Judicial disparagement of forum shopping merely diverts attention from the realities of interstate and international litigation. It confuses counsel, who

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50 *Berkey v Third Ave Ry Co* (NY 1926) 155 NE 58 at 61 (per Cardozo J). For a discussion of the problems metaphors have caused in the conflict of laws see Maier, H G, "Finding the Trees in Spite of the Metaphorist: The Problem of State Interests in Choice of Law" (1993) 56 *Albany LR* 753.

51 *The Atlantic Star* [1974] AC 436 at 471.

52 See text accompanying n35 above.

53 *The Atlantic Star* [1973] 1 QB 364 at 381-2.

are, after all, duty-bound to enhance their clients' prospects by adroitly selecting, from among all available fora, that which best accommodates their objectives. In egregious cases, when lawyers truly "seek not simply justice but perhaps justice blended with some harassment"[54] the *forum non conveniens* doctrine or injunctions to restrain foreign proceedings offer redress to those seriously inconvenienced by reprehensible machinations.[55] But these remedies against abuse ought to be the exception rather than the rule. At the very least, judges should consider that a motion to stay on *forum non conveniens* grounds, or an application for an antisuit injunction, amounts to forum shopping in reverse. Routinely to dismiss actions brought by aliens, for instance, as many American judges do following the rather questionable reasoning of a well-known US Supreme Court case,[56] may well violate comity or even treaty obligations. There is an even more basic, but perhaps not altogether base, consideration to caution against the judicial penchant to dismiss cases with alien elements. As one reads in Cheshire and North,

> there is a public interest in allowing trial in England of what are, in essence, foreign actions. When foreigners litigate in England this forms a valuable invisible export, and confirms judicial pride in the English legal system.[57]

As regards injunctions to restrain foreign proceedings, the House of Lords was surely right in lifting the one that deprived Sir Freddy Laker of his day in an American court.[58] It seems eminently fair and sensible to allow an entrepreneur, who had done the entire flying public a great and lasting service, to vindicate claims against an airline cartel that had driven him out of business in a foreign forum as long as English law failed to provide a remedy against those using raw tactics against price cutters.

7. *Conclusion*

As this paper argues, there must be a stop put to the customary, almost ritualistic, condemnation of forum shopping. Instead of uncritically disparaging counsel's efforts to better their clients' prospects, courts and legal writers ought to face the important question of what function the conflict of laws should serve. Reported as well as unreported cases in which forum shoppers were successful demonstrate that this field of law cannot possibly guarantee certainty, predictability and uniformity of result. Accordingly, the time has come to ponder what purposes it can possibly have. Instead of casting aspersions on forum shoppers, we should applaud them for putting this important question into stark relief.

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54 *Gulf Oil Corp v Gilbert* (1947) 330 US 501 at 507.

55 See generally Nygh, P E, above n37 at 78-88.

56 See *Piper Aircraft* above n46.

57 North, P M and Fawcett, JJ, above n19 at 230.

58 See *British Airways Board v Laker Airways Ltd* [1985] AC 58; see also *Laker Airways Ltd v Sabena, Belgian World Airlines* (DC Cir 1984) 731 F2d 909; *Laker Airways Ltd v Pan American World Airways Inc* (DDC 1984) 604 F Supp 280.