

# Case Note

## *John Pfeiffer Pty Ltd v Rogerson*: The Certainty of ‘Federal’ Choice of Law Rules for Intranational Torts: Limitations, Implications and a Few Complications

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### 1. Introduction

Lord Wilberforce identified two conflicting pressures in choice of law: the need for flexibility in the interests of natural justice and the countervailing need for certainty,<sup>1</sup> with the latter becoming more compelling in the contentious area of interjurisdictional tort. It is against this background that the simplicity and apparent certainty of the High Court’s recent decision in *John Pfeiffer Pty Ltd v Rogerson (Pfeiffer)*<sup>2</sup> will be welcome.<sup>3</sup> It jettisons controversial distinctions between substance and procedure<sup>4</sup> and formulates a universal *lex loci delicti* rule<sup>5</sup> for intrajurisdictional torts within Australia.<sup>6</sup> But in seeking ease of application, the majority has rejected any flexible application of the new rule. In doing so, it is in danger of losing sight of the recognised purposes of choice of law, such as doing justice to individuals<sup>7</sup> and meeting ‘reasonable and legitimate’ expectations.<sup>8</sup> The following paper attempts to identify some limitations and complications arising from the decision. It concludes that its simple solution falls short of resolving problems which demand a more sophisticated analysis.

For a long time, the development of judicial reasoning in choice of law in domestic tort was hobbled by deference to what the High Court has now

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1 *Chaplin v Boys* [1971] AC 356 at 389 (Wilberforce LJ).

2 (2000) 172 ALR 625.

3 Its initial reception supports this; see Patrick Keyzer, ‘*Pfeiffer, Lange, the Common Law and the Constitutional Right to Natural Justice*’ (2000) 20 *Aust Bar Rev* 87 and Michael Elliott, ‘High Court Banishes Double Actionability Rule From the Federation’ (2000) 38 *Law Soc J* 62.

4 Above n2: the joint judgment (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), Kirby J’s separate but concurring judgment and Callinan J’s otherwise dissenting judgment all found for the applicant, John Pfeiffer Pty Ltd on this basis, as discussed below.

5 Consistent with precedent and the majority judgment in *Pfeiffer*, this case-note uses the Latin terms ‘*lex loci delicti*’ (or law of the place where the wrong giving rise to the liability was committed) and ‘*lex fori*’ (or law of the place where the court is held).

6 Above n2, with Callinan J dissenting.

7 Alexander Elder Anton, *Private International Law: A Treatise From the Standpoint of Scots Law* (2<sup>nd</sup> ed, 1990) at 5–6.

8 Lawrence Collins (ed), *Dicey and Morris on The Conflict of Laws* (13<sup>th</sup> ed, 2000) at 4.

recognised as an 'inappropriate borrowing' from English common law.<sup>9</sup> The 'double actionability' rule in *Phillips v Eyre*<sup>10</sup> was originally concerned with truly international torts; its application to intranational torts within the Australian Federation has generated much confusion and academic criticism.<sup>11</sup> Despite attempts to reformulate and clarify it, the ambiguous operation of the rule left it open to conflicting interpretation by both lower courts<sup>12</sup> and commentators.<sup>13</sup>

There were calls for reform,<sup>14</sup> most notably from the Australian Law Reform Commission (ALRC),<sup>15</sup> to which a majority of six justices has responded. *Pfeiffer* represents a dramatic change in choice of law rules for intrastate common law actions framed in tort. The reconsideration of the role of constitutional terms leaves open whether the new rules are constitutionally entrenched.<sup>16</sup> But it is clear that they emerge from the presumption of a uniform common law and the desire to promote certainty in a federal context.

What *Pfeiffer* significantly failed to do was respond to the ALRC's essential recommendation that a single *lex loci* rule be 'subject to an exception in defined circumstances consistent with the desirability of applying laws that have a real connection with the issues'.<sup>17</sup> The joint judgment and the separate concurring judgment of Kirby J constituted a majority which explicitly rejected the application of any 'flexible exception', at least in intranational torts.<sup>18</sup> In coming to this decision, it is regrettable that the majority appears to have only superficially considered important international developments which indicate a trend towards a flexible approach.

9 Above n2 at 653: 'What is surprising is not that this occurred but that it endured for so long' (Kirby J) and at 632 (Gleeson CJ et al).

10 (1870) LR 6 QB 1; 'As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England... Secondly, the act must not have been justifiable by the law of the place where it was done' at 28–29 (Willes J).

11 For an extended and balanced analysis, see Peter Edward Nygh, *Conflict of Laws in Australia* (6th ed, 1995) at 345–347. See also Peter Edward Nygh 'The Miraculous Raising of Lazarus: *McKain v R W Miller & Co (South Australia) Pty Ltd* (1992) 22 *UWAL Rev* at 394 where it is described as a rule 'without logical justification. Martin Davies, 'Too Little Imagination or Too Much? *Phillips v Eyre* 'Revisited Yet Again' (1995) 3 *TLJ* 273 at 274 calls it a 'perennial villain' which becomes 'as venerable and notorious... as Ned Kelly' in a later article by Martin Davies, 'Exactly What is the Australian Choice of Law Rule in Torts Cases' (1996) 70 *ALJ* 711 at 719. See also Friedrich Juenger 'Tort Choice of Law in a Federal System' (1997) 19 *Syd LR* 528 at 531.

12 See discussion of the conflicting decisions in *Wilson v Natrass* (1995) 21 *MVR* 41; *Martin v Kelly* (1995) 22 *MVR* 115; and *Soszynski v Soszynski* (1994) 62 *SASR* 197, by Martin Davies, 'Too Little Imagination or Too Much? *Phillips v Eyre* Revisited Yet Again', above n11.

13 See for example Martin Davies, 'Exactly What is the Australian Choice of Law Rule in Torts Cases' above n11.

14 Nygh, in 'The Miraculous Raising of Lazarus' above n11 at 395 doubted whether the current, or future High Court could show 'sufficient courage to abandon the... useless 19<sup>th</sup> century English baggage'; Davies in 'Exactly What is the Australian Choice of Law Rule in Torts Cases' above n11 at 720 thought judicial response 'unlikely', whereas Michael Pryles, 'Of Limitations and Torts and the Logic of Courts' (1992) 18 *MULR* 676 at 682 thought it 'inevitable'.

The application of inflexible rules always risks injustice for individuals. By reason of this decision, victims of workplace accidents may be advantaged by the accidental place of the tort, whilst their employer (or its insurer) may be disadvantaged.

As such, any real certainty will now depend upon the extent to which *Pfeiffer* permits comprehensive legislative responses. It provokes the latter because the outcome of the decision means that defendants in *Pfeiffer*'s position may enjoy a windfall, whereas if the facts were reversed, they may face an unexpectedly large common law liability. An examination of the facts and the decision should clarify this assertion.

## 2. *The Facts*<sup>19</sup>

The tort in issue<sup>20</sup> involved an action commenced in 1998 in the Australian Capital Territory (ACT) Supreme Court. John Pfeiffer Pty Ltd, 80 per cent of whose business was conducted in the ACT, was sued by Mr Rogerson, a carpenter in their employ, for damages for personal injuries. Rogerson had tripped over some webbing while working for Pfeiffer at the Queanbeyan District Hospital, located a few kilometres within the neighbouring border of New South Wales (NSW). Rogerson, a resident of the ACT who had been working for some four months on the particular site, gave evidence that he picked up his tools each day from the ACT business headquarters and returned them there after finishing work.

In NSW, the law area where Mr Rogerson was injured, employees are protected by the compulsory contribution of their employers to a statutory scheme that limits liability (and thus insurance costs) by 'capping' damages. This differs markedly from the ACT, the law area with which both parties clearly had the closest connection, where common law damages apply.

## 3. *At Trial*

At first instance, Master Connolly found Pfeiffer liable in respect of the breach of the duty of care. The issue of the quantum of damages remained to be determined. In applying Federal law, Master Connolly considered himself bound by the

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15 Australian Law Reform Commission, *Choice of Law* Report No 58 (1992) at para 6.14 stated that because the current rule 'engenders confusion, uncertainty, injustice and forum shopping', the time for reform had come.

16 Above n2 at 644 (Gleeson et al).

17 Above n15: see recommendation at 6.17 and justification at 6.22.

18 The degree to which the door has been left open for international torts and the implications of this are discussed in the text below.

19 The facts are largely taken from the joint judgment and Callinan J's judgment, above n2 and from the transcripts of the leave to appeal before the High Court: *Pfeiffer Pty Ltd v Rogerson*: <<http://www.austlii.edu.au/au/other/hca/transcripts>> (2 December 1999).

20 Before the High Court, the respondent also sought to frame the case in contract: see *ibid*, but it was held that the matter must be decided on the basis of tort law: above n2 at 628 (Gleeson CJ et al).

precedent of *Stevens v Head (Stevens)*,<sup>21</sup> which held that the provisions of a statute limiting damages were procedural rather than substantial and thus a matter to be determined by the *lex fori*. The master accordingly gave judgment for the respondent for \$31,689.<sup>22</sup> Because the case was decided on the basis of whether the relevant provisions were procedural or not, the 'threshold' issue of whether the governing law was the *lex loci* or *lex fori* did not arise.

Pfeiffer appealed to the Full Court of the ACT Supreme Court, which upheld the Master's finding,<sup>23</sup> then to the Full Court of the Federal Court, which unanimously dismissed the appeal for the same reasons.<sup>24</sup> As Callinan J noted in *Pfeiffer*,<sup>25</sup> all the judges followed the master in applying *Stevens* and finding that the statutory provisions, including the 'cap', were procedural and not substantive.

#### 4. *On Appeal to the High Court*

Pfeiffer sought special leave to appeal from the Full Court of the Federal Court. Following from one of the grounds of the appeal,<sup>26</sup> both parties agreed that it should constitute a test case to determine whether s118 of the Constitution<sup>27</sup> requires that the law to be applied in the assessment of the respondent's damages is that of the *lex loci* (NSW) rather than the *lex fori* (ACT).<sup>28</sup> Consequently, the Court heard the application for special leave to appeal as though it were the appeal, with the Solicitors-General of each state and territory as interveners. The parties agreed that, should liability be established and NSW law apply, the *Workers Compensation Act 1987* (NSW) would limit the amount of damages to be allowed.<sup>29</sup>

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21 (1993) 176 CLR 433.

22 Above n2 at 629 (Gleeson et al).

23 Heard and dismissed by Miles CJ, Crispin and Ryan JJ on 3 December 1997. See n2 at 670 (Callinan J).

24 Per O'Connor, Higgins, Cooper, Finn and Merkel JJ; see *ibid*.

25 Above n2 at 671–672 (Callinan J).

26 The four grounds are set out by Callinan J, above n2 at 671 and may be summarised as :

Error in characterising the 'cap' as procedural.

Error in failing to distinguish *Stevens*.

Error in finding the 'second limb' of *Phillips v Eyre* satisfied.

Error in failing to consider relevant Constitutional terms.

27 *Commonwealth of Australia Constitution Act 1900* (Imp), Ch. V, s118: 'Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State'.

28 Above n2 at 628 (Gleeson CJ et al).

29 Relevant provisions being Pt 5, concerned with common law remedies for workplace injuries; Division 3 re: injury/death caused by negligence of employer. Of most relevance are ss151G(2) and (4): 'The amount of damages to be awarded for non-economic loss is to be a proportion, determined according to the severity of the non-economic loss, of the maximum amount which may be awarded... [and] if the amount of non-economic loss is assessed to be \$36,000 or less, no damages for non-economic loss are to be awarded', and s151H (1): 'No damages are to be awarded for economic loss unless the injured worker has received a serious injury or dies as a result of the injury'.

Rogerson submitted that the Federal Court was correct in applying *McKain v R W Miller & Co (South Australia) Pty Ltd (McKain)*<sup>30</sup> and *Stevens*<sup>31</sup> regarding the distinction between substance and procedure, and that the laws of the *lex loci* are imported into the forum only for the purpose of determining whether the second limb of the double actionability test is satisfied. Thus the *lex fori* applied. Pfeiffer countered 'that the Court should reformulate the principles that govern how a claim in tort, brought in the courts of one Australian jurisdiction should be determined when some of the relevant facts occurred in another Australian jurisdiction',<sup>32</sup> so that the *lex loci* should apply.

## 5. *The Decision*

The majority embraced the opportunity such arguments provided to review the complexities of interjurisdictional tort law, and reformulate its governing principles and rules.

### A. *The Law Before Pfeiffer:*

The majority noted<sup>33</sup> how the double actionability rule left essential questions unresolved; this was partly because of its colonial origins, which had created a tendency to favour the *lex fori*. As the submissions before the Court showed, it was unclear whether one or other of the two limbs in *Phillips v Eyre* constituted a choice of law rule or whether it was a threshold test for jurisdiction which left the choice of law open.

In Australia, the rule in *Phillips v Eyre* was first applied in *Koop v Bebb*<sup>34</sup> and then in *Anderson v Eric Anderson*<sup>35</sup> in a manner allowing the *lex fori* to govern the action, while later decisions favoured the *lex loci*. In *Breavington v Godleman (Breavington)*<sup>36</sup> the rule was discarded by Mason CJ as 'a needless complication'<sup>37</sup> and by Wilson, Gaudron<sup>38</sup> and Deane JJ<sup>39</sup> in preference for a 'one law' approach. *Breavington* was initially hailed 'as marking a fundamental change in Australian conflicts law'.<sup>40</sup> This proved to be premature because the approach of the minority judges, Dawson,<sup>41</sup> Toohey<sup>42</sup> and Brennan<sup>43</sup> prevailed when the

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30 (1991) 174 CLR 1.

31 Above n21.

32 Above n2 at 627 (Gleeson CJ et al)

33 Id at 623 (Gleeson CJ et al).

34 (1951) 84 CLR 629.

35 (1965) 114 CLR 20.

36 (1988) 169 CLR 41.

37 Id at 77 (Mason CJ).

38 Id at 99 (Wilson and Gaudron JJ).

39 Id at 136 (Deane J).

40 Nygh, 'The Miraculous Raising of Lazarus', above n11 at 386.

41 Above n36 at 146 (Dawson J).

42 Id at 160-161 (Toohey J).

43 Id at 110-111 (Brennan J).

latter's narrower reformulation of the rule<sup>44</sup> was resurrected by the majority in *McKain*<sup>45</sup> and affirmed in *Stevens*.<sup>46</sup>

Because of continuing uncertainty in lower courts, Dawson J took the opportunity in *Gardner v Wallace*<sup>47</sup> to clarify the operation of the double actionability rule. But His Honour's emphatic statement that the substantive law of the *lex loci* was only imported into the forum for the purpose of determining whether the second limb was satisfied, and *not* for determining the choice of law, failed to remove the potential for ambiguous application.

The role of the 'flexible exception' for intranational torts also remained unclear. In cases involving international torts, the Privy Council in *Red Sea Insurance Co v Bouygues SA*<sup>48</sup> adopted and extended the 'flexible exception' defined by Lord Wilberforce in *Chaplin v Boys*.<sup>49</sup> The majority in *Pfeiffer* noted where the High Court had since appeared to endorse such a displacement of the *lex loci*. But lower courts have not done so consistently.<sup>50</sup>

### **B. Reformulation of Choice of Law Rule:**

The joint judgment in *Pfeiffer* found the rules for interstate torts open to reconsideration because *McKain* and *Stevens* had not removed such 'doubt and difficulty', nor had they stood for very long.<sup>51</sup> For Kirby J, the reasons were even more compelling: the Court had a duty to redress the 'injustice, uncertainty and unpredictability' that burdened the present law.<sup>52</sup>

The joint judgment identified the essential issue as being 'what effects the courts of the jurisdiction in which the proceedings are brought should give to legislation of the jurisdiction in which the tort was committed'.<sup>53</sup>

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44 Ibid: The first limb of the rule requires that the circumstances of the tort be such that, had they occurred in the forum, the plaintiff would have a cause of action entitling him or her to enforce a civil liability of the kind which the plaintiff seeks to enforce; the second requires that '[b]y the law of the place where the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind which the plaintiff claims to enforce'.

45 Above n30; see review by Nygh, 'The Miraculous Rising of Lazarus' above n11 (especially at 393) and review by Pryles, above n14.

46 Above n21.

47 (1995) 184 CLR at 98 (Dawson J).

48 [1995] 1 AC 190.

49 Above n1 at 389–392, where Lord Wilberforce argues against a mechanical application of his stricter second limb in cases where the place of the tort is purely fortuitous and the *lex fori* has the most significant relationship with the tort and the parties. Most importantly, an examination of the policy of the *lex loci* rule was 'necessary and inevitable' in cases where the law limits or excludes damages for personal injury (Wilberforce LJ).

50 For example, *Chaplin v Boys* *ibid*, was followed in *Corcoran v Corcoran* [1974] VR 164, but not in *Kolsky v Mayne Nickless* (1970) 72 SR (NSW) 437 or, more significantly for this paper, *Nalpantidis v Starke* (1995) 65 SAR 454.

51 Above n2 at 642 (Gleeson CJ).

52 *Id* at 664 (Kirby J).

53 *Id* at 627 (Gleeson CJ et al).

Three possible 'choices' were examined: the *lex fori*, *lex loci* and the 'proper law of the tort', with or without a flexible exception in each case.<sup>54</sup> These choices emerged from a careful consideration of Australian jurisprudence but a limited review of international developments. Ultimately, the majority adopted much of the reasoning of Mason CJ in *Breavington*,<sup>55</sup> but without what might be argued as being the essential qualification, or 'flexible exception'.<sup>56</sup> In doing so the decision follows the path taken by the Canadian Supreme Court in *Tolofson v Jensen; Lucas v Gagnon (Tolofson)*<sup>57</sup> in its comparable search for greater certainty.<sup>58</sup>

In contrast, Callinan J found that the double actionability rule still 'had a relevant role to play in the Federation'.<sup>59</sup>

### C. *Reformulation of the Distinction between Substance and Procedure:*

Against the background of judicial uncertainty, calls for reform<sup>60</sup> and the clear recommendations of the ALRC,<sup>61</sup> both the joint judgment and that of Kirby J<sup>62</sup> emphatically end the ambiguous and often artificial distinction between matters of substance and procedure.

In the absence of any unifying principle, the joint judgment proposed that two principles should now guide the court:<sup>63</sup> litigants must take the forum as they find it, and, adopting the distinction of Mason CJ in *McKain*,<sup>64</sup> only matters 'regulating the mode or conduct of court proceedings' are procedural. Limitation periods, whether they bar the remedy or extinguish the right, are matters of substance, as are all questions concerning kinds of damage and quantum of damages.<sup>65</sup> Callinan J concurs to the extent that the statutory cap on damages 'is in truth a matter of real substance'<sup>66</sup> to be governed by the *lex loci*.

### D. *Result*

Since quantum of damages is to be considered a substantive rather than a procedural issue, and since in proceedings involving a tort committed in another state or territory, the *lex loci* is the governing law in respect to all substantive

54 *Id* at 644 (Gleeson CJ et al).

55 Above n36 at 77–79 (Mason CJ).

56 Above n2 at 647 (Gleeson CJ et al).

57 (1995) 120 DLR (4<sup>th</sup>) 298.

58 The Canadian Court replaced the rule in *Phillips v Eyre* with an invariable application of the *lex loci* for interprovincial torts. For a detailed analysis of the decision, see Janet Walker, 'Choice of Law in Tort: The Supreme Court of Canada Enters the Fray' (1995) 111 *LQ Rev* 397.

59 Above n2 at 677 (Callinan J).

60 See for example, Nygh, 'The Miraculous Rising of Lazarus' above n1 at 395, who argued that such distinctions 'have no place in the modern law'.

61 Above n15 at para 10.13.

62 Above n2 at 659–660 (Kirby J).

63 *Id* at 651 (Gleeson CJ et al).

64 Above n30 at 26–27.

65 *Id* at 651 (Gleeson CJ et al).

66 *Id* at 677 (Callinan J).

issues, the majority found that the amount of Mr Rogerson's damages should be determined in accordance with the statutory provisions of the *Workers Compensation Act 1987* (NSW). Callinan J agreed with this outcome for largely different reasons.

## 6. *Reasons of the Joint Judgment (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ)*

After clarifying the logical distinction between jurisdiction and choice of law,<sup>67</sup> the joint judgment defined the problem as being that, where jurisdiction is valid,<sup>68</sup> 'questions can arise as to which law to apply where an act or omission occurred in a state or territory other than that in which proceedings are brought'<sup>69</sup> in determining 'the existence, extent or enforceability of rights and obligations'.<sup>70</sup>

The essence of the problem is, if the forum does not give effect to the *lex loci*, but instead applies its own laws, the outcome will differ according to the jurisdiction in which the proceedings are brought.<sup>71</sup> The joint judgment then used an examination of the current state of authority, the source of choice of law rules and their operation to demonstrate how the ambiguity of the double actionability rule has added to unpredictability.<sup>72</sup>

The problem demanded a solution. The majority has responded by finding that a single *lex loci* rule emerges from the federal context and constitutional principles, but confines it to domestic torts.<sup>73</sup> In applying the rule universally, the majority has placed certainty and simplicity before competing and far more complex demands of conflicts of laws. Their reasons for doing so require critical examination.

### A. *Why Choose the Lex Loci?*

With this decision, the majority has answered longstanding calls for the reformulation of choice of law rules that are more appropriate to resolving conflicts in the Australian federation.<sup>74</sup> It seems apt that federal considerations should feature so prominently in a decision taken on the eve of Australia's centenary of Federation. The majority stressed that terms like 'law area' and '*lex fori*' need to be understood as components of the Federation, that the Commonwealth itself is a law area with respect to matters of federal jurisdiction,<sup>75</sup>

67 Id at 633 (Gleeson CJ et al).

68 Either by personal jurisdiction through service of originating process, as established in *Laurie v Carroll* (1958) 98 CLR 310 and *Gosper v Sawyer* (1985) 160 CLR 548, or 'long arm jurisdiction' effected by the *Service and Execution of Process Act 1992* (Cth); See id at 630 (Gleeson J et al).

69 Above n2 at 630 (Gleeson CJ et al).

70 Ibid.

71 Ibid.

72 Id at 632 (Gleeson CJ et al).

73 Id at 627 and 647 (Gleeson CJ et al).

74 See ALRC above n15 at 3.8; See also Brian Opeskin, 'Constitutional Dimensions of Choice of Law in Australia' (1992) 3 *PLR* 152 at 152 and Juenger, above n11.

75 Above n2 at 627-628 (Gleeson CJ et al).



and that notions of 'sovereignty' are unhelpful when sovereignty is shared in a federation.<sup>76</sup> Within such a unified system, each state or territory must recognise the interests of others in the application of their laws to events occurring in those other jurisdictions. As a result, there is no need for double actionability.<sup>77</sup>

Constitutional considerations also play a crucial, if not determinative, role in the judgment. The first consideration involves their implications for the common law. It is reasoned that, following from *Lange v Australian Broadcasting Corp*,<sup>78</sup> 'the common law with respect to the choice of law rule for tort should be developed to take into account various matters arising from the Australian constitutional text and structure'.<sup>79</sup> Since the choice of law rules derive from the common law, which must adapt to the constitution,<sup>80</sup> constitutional considerations 'favour the adoption of a single choice of law rule consistently in both federal and non-federal jurisdiction in all courts in Australia'.<sup>81</sup>

The majority reconsidered the crucial role of s118 of the Constitution. They found that the operation of the 'full faith and credit' clause does not mean that there is a constitutional imperative to determine the proper law to be applied 'by reference to governmental interest in the application of the policy underlying the relevant statute law'. In its terms, s118 did not dictate the choice where one is to be made between different state legislation, nor did it dictate a common law choice of law rule.<sup>82</sup>

Rather, the terms of s118 are confined to suggesting how States should acknowledge the predominantly territorial interest of others in what occurs within their territory, and that the States 'are not foreign powers as are nation states for the purposes of international law'.<sup>83</sup> However, the joint judgment did not rule out the possibility that the cumulative effect of the constitutional text and structure entrenched the new rule, or at least restricted 'legislative power to abrogate or vary' it based on public policy.<sup>84</sup>

The choice of the *lex loci* as the appropriate governing law was seen to be consistent with significant international developments, which were briefly and selectively reviewed. It was noted that in Europe, the *lex loci* 'usually' governed liability<sup>85</sup> and the judgment assumed that there was a 'revival of support' for the *lex loci* in the United States.<sup>86</sup> As discussed below, a detailed examination of US developments does not support this contention.

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76 *Id* at 645 (Gleeson CJ et al).

77 *Id* at 650 (Gleeson CJ et al).

78 (1988) CLR 41.

79 Above n2 at 643 (Gleeson CJ et al).

80 *Id* at 638 (Gleeson CJ et al).

81 *Id* at 644 (Gleeson CJ et al).

82 Above n2 at 642 (Gleeson CJ et al).

83 *Id* at 643 (Gleeson CJ et al).

84 *Id* at 644; as compared with finding of Kirby J, as discussed below.

85 *Id* at 645 (Gleeson CJ et al).

86 *Id* at 646 (Gleeson CJ et al).

### **B. *Why Reject Flexibility?***

The majority adopted a strict application of the *lex loci* on two contentious grounds. The first ground involved a critique of the ‘interest analysis’ approach in the United States of America (US).

Perhaps more surprising than the characterisation of the US judicial trend as involving a ‘revival’ of the *lex loci* is the confident assertion that the merits of interest analysis have ‘been doubted’ there.<sup>87</sup> The joint judgment refers only to the somewhat dated ‘interest analysis’ in the 1935 case of *Alaska Packers Association v Industrial Accident Commission*<sup>88</sup> and academic commentary in 1963.<sup>89</sup> The judgment claimed that ‘interest’ qualifications have led to ‘very great uncertainty’ in the US, which increases ‘the cost to parties, insurers and society at large’.<sup>90</sup>

It was argued that with ‘interest analysis’, practical difficulties require courts to give ‘the closest attention to identifying what criteria are to be used to make the choice of law’ and there is insufficient guidance given to parties like insurers, ‘who must order their affairs on the basis of predictions about the future application of the rule’.<sup>91</sup> Regardless of the possible advantages of applying a universal rule more flexibly in international torts, such an approach therefore should not be adopted within Australia.<sup>92</sup>

The second ground concerns the fulfilment of just outcomes and the protection of reasonable expectations. In intranational torts,<sup>93</sup> the judgment identified the chief theoretical consideration in favour of applying the *lex loci* as being ‘that reliance on the legal order in force in the law area in which people act or are exposed to risk of injury gives rise to expectations that should be protected’.<sup>94</sup> The consequence of applying the *lex fori* is that ‘liability varies according to the number of forums to which the plaintiff may resort’ so that, potentially ‘the tortfeasor is exposed to a spectrum of laws imposing liability’.<sup>95</sup> This leads to uncertainty, unpredictability and the potential for forum shopping.

The joint judgment dispensed with issues of individual justice by arguing that, ‘for every hard case that can be postulated if one form of universal rule is adopted, another equally hard case can be postulated if the opposite rule is adopted’.<sup>96</sup>

## **7. *Judgment of Kirby J***

More vigorous in his criticism of the application of the rule in *Phillips v Eyre* than the joint judgment, Kirby J stated that the ‘time has come to lay that ghost to rest’

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87 Ibid.

88 294 US 532 (1935) at 547.

89 From 1963: see above n2 at 646 (Gleeson CJ et al).

90 Ibid.

91 Ibid.

92 Id at 647 (Gleeson CJ et al).

93 This may not apply in international torts: see id at 645 (Gleeson CJ et al).

94 Ibid.

95 Id at 647 (Gleeson CJ et al).

96 Ibid.

within Australian jurisdictions.<sup>97</sup> His Honour gave a detailed and precise ‘re-expression’ of the rules for jurisdiction and justiciability, summarising the choice of law rule as being the application by the forum court of the common law of Australia as modified by the statute law of the place where the tort occurred.<sup>98</sup> In matters concerning the purpose and character of a federation,<sup>99</sup> the reasonable expectation of parties,<sup>100</sup> and the possible retention of some flexibility for international torts,<sup>101</sup> Kirby J agreed in essence with the joint judgment. But for his Honour,

[n]either the provisions of the Constitution nor the implications necessarily derived from its language and structure yield a solution. Instead, the common law should be re-expressed to take into account the terms of the Constitution, the federal system of government it establishes and the Judicature for which it provides.<sup>102</sup>

And as his Honour stated earlier, today ‘there is no significant practical difficulty for a court in one law area to find and to apply the law of another area of the federation’.<sup>103</sup>

Unlike the joint judgment, Kirby J explicitly stated that constitutional considerations did not entrench this decision. Instead, his Honour emphasised that the legislative path remains open ‘to implement either the broader regime involving the proposals which the Commission has advanced, or different proposals’.<sup>104</sup>

## 8. *Dissenting Judgment of Callinan J*

Callinan J agreed with the majority that a statutory cap upon damages ‘is in truth a matter of real substance’<sup>105</sup> but did not think it ‘necessary or appropriate’ to deviate from the double actionability rule stated by the majority in *McKain* and *Stevens*, nor was it necessary to consider the possible application of s118 of the Constitution.<sup>106</sup>

Rather, His Honour considered that within the Federation, the double actionability rule still had a ‘a real purpose to serve’, since

the proposition... that a forum State should not be obliged to apply an obnoxious law of another State, is one which has the attraction of reserving to the States a

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97 Id at 654 (Kirby J).

98 Id at 666–667(Kirby J).

99 Id at 656 (Kirby J).

100 Ibid.

101 As indicated by the qualification that such a rule may apply ‘at least within a single federal nation’, id at 655, and the recognition that a different choice of law rule could be adopted for International torts, id at 665(Kirby J).

102 Id at 653 (Kirby J).

103 Id at 655 (Kirby J).

104 Id at 664 (Kirby J).

105 Above n2 at 677 (Callinan J).

106 Id at 677 (Callinan J).

right (in respect of a claim for a remedy in the forum that would not otherwise be available there) to reject that which is alien to the policies of a particular State.<sup>107</sup>

In seeking to shield the forum court from having to apply a remedy that 'is repugnant to the laws and policies' of the jurisdiction, this rationale resembles the earlier forms of 'interest analysis' of US courts, but differs from the more complex form currently used to determine whether the *lex fori* is a more appropriate choice.<sup>108</sup>

## 9. *Limitations: The Road Not Taken*

The most obvious limitation of the decision results from its rejection of any form of flexible methodology to ameliorate the injustices that inevitably will follow in a federation which has yet to achieve any harmony between its statutory compensation schemes for motor vehicle or workplace accidents.

### A. *Australian Solutions*

The merits of retaining some element of flexibility were argued persuasively by DeBelle J in his dissenting judgment in the exceptionally 'hard case' of *Nalpantidis v Stark*.<sup>109</sup> His Honour emphasised that the case, which involved no suggestion of 'forum shopping',<sup>110</sup> highlighted the 'markedly different' compensation laws throughout Australia with respect to damages claims for personal injury arising out of road traffic accidents.<sup>111</sup> The case concerned a South Australian (SA) defendant/driver and his plaintiff/passenger who was injured in a motor vehicle accident during a brief excursion into the neighbouring state of Victoria; the single vehicle involved was registered and insured in SA. The application of the *lex loci* meant that, in contrast to SA law, the provisions of the relevant 'no fault' Victorian statute substantially limited the plaintiff's damages.

Because of these 'special and extraordinary circumstances',<sup>112</sup> DeBelle J argued that, not only did the *lex loci* have 'little, if any, real connection with the proceedings', but the state of Victoria had 'little, if any, interest in the outcome', whereas the interests of SA were clearly affected. Because of this, his Honour recognised 'a legitimate exception', which promoted 'the interests of justice' while doing 'little to impair the interests of certainty'.<sup>113</sup> Such a finding reflects the recommendation for flexibility advocated by the ALRC.<sup>114</sup>

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107 Ibid.

108 See discussion in text below.

109 (1995) 65 SASR 454.

110 Id at 470 (DeBelle J).

111 Id at 480 (DeBelle J).

112 Id 481–482 (DeBelle J).

113 Ibid.

114 Above n15 at para 6.17 and 6.22.

## B. *International Solutions*

Unlike in Australia, the Parliament of the United Kingdom has responded to recommendations of law reform commissions<sup>115</sup> with the *Private International Law (Miscellaneous Provisions) Act 1995* (UK), Part III, by which the rule in *Phillips v Eyre* has been 'legislated out of existence'.<sup>116</sup> While Kirby J's impatience with legislative response<sup>117</sup> is understandable, given that several years have elapsed since the ALRC Report, it is regrettable that *Pfeiffer* did not review the UK legislation. While under s11 of this legislation, the general rule becomes the application of the *lex loci*, s12 provides that the court may apply another law in 'exceptional' cases if it has the closest connection with the event and the parties.

Of more concern is the lack of any substantial foundation for the assertion by the joint judgment that there has been a 'revival of support' for the *lex loci* in the United States.<sup>118</sup> On the contrary, according to a leading authority on American choice of law,<sup>119</sup> there has been swift acceptance of the influential role of policy and interest analysis since the 'landmark' decision in *Schmidt v Driscoll Hotel* in 1957.<sup>120</sup> There, the court held that the policies underlying the relevant forum statute were applicable even though the plaintiff had been injured out of state.<sup>121</sup> This method was followed in *Babcock v Jackson*,<sup>122</sup> but was most clearly expounded in *Neumeier v Kuehner*,<sup>123</sup> where Fuld J said that it was worth sacrificing certainty for the more just, fair and practical result that may be achieved 'by giving controlling effect to the law of the jurisdiction which has the greatest concern with, or interest in, the specific issue raised in the litigation'.<sup>124</sup> Such a result recognised the 'existence of disparate rules of law in jurisdictions that have diverse and important connections with the litigants and the litigated issue'.<sup>125</sup>

By 1997 only eleven US jurisdictions were still adhering to the traditional *lex loci* rule; on the basis of the trend shown by his annual survey, Symeon Symeonides concluded that it was 'beyond question' that those states still adhering

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115 Most relevantly, Great Britain Law Commission, *Private International Law: Choice of Law in Tort and Delict* (HSMO, 1990).

116 Juenger, above n11 at 532.

117 Above n2 at 653 (Kirby J).

118 Id at 646 (Gleeson CJ): see three references in fn 100, one of which (Douglas Laycock) offers support for a 'sophisticated interests analysis': Douglas Laycock, 'Equal Citizens of Equal Territorial States: The Constitutional Foundation of Choice of Law' (1992) 92 *Colombia L Rev* 249 at 331, see text below.

119 Russell Weintraub, *Commentary on the Conflict of Laws* (3rd ed, 1986) at 315–316. See also the 1991 Supplement at 66: 'The courts of thirty-five states... have displaced the place-of-wrong rule as the sole choice-of-law rule for torts'.

120 *Schmidt v Driscoll Hotel* 249 Minn 376, 82 NW 2d 365 (1957).

121 Weintraub, above n119 at 315.

122 *Babcock v Jackson* 191 NE 2d 279 (1963) (Fuld J).

123 286 NE 454 (1972) Court of Appeals of New York.

124 Id at 459 (Fuld CJ).

125 Id at 456 (Fuld CJ).

to the traditional rule would embrace opportunities to abandon it in the near future.<sup>126</sup> The latest survey confirms this prediction.<sup>127</sup>

Clearly, the High Court has misconceived any 'revival of support for the *lex loci*'<sup>128</sup> in the United States. In not fully exploring the roads taken by the US and the UK, the High Court may have missed an opportunity to reformulate a more sophisticated single law rule, which balances certainty with flexibility.

### 10. *Broader Implications of the Decision*

At first glance, the consequences of the decision seem profound, but simple. It has been applauded for the way in which it will curtail the practice of 'forum shopping',<sup>129</sup> and create predictability for litigants.<sup>130</sup> And Patrick Keyzer recently explored the interesting way in which its central 'federal' concepts 'may lead to the development of a constitutional right to natural justice'.<sup>131</sup>

Other consequences of *Pfeiffer* are far more contentious. The decision implies that:

1. where the workplace accident was 'fortuitously' committed within a jurisdiction with which both the employee and the employer have no 'real' connection, and
2. where standards of workplace care are not in dispute,
3. any statutory regime, set up to protect by compulsory participation all resident employees and limit the liability (and thereby costs) of their employers, was nevertheless intended to apply to a non-resident employee and to a non-resident employer.

The decision is based on the presumption that, in Australia, the same common law rules apply, subject to statutory modification.<sup>132</sup> But the common law is only uniform in principle,<sup>133</sup> and the 'statutory modifications' are often contradictory. This is why, when the extent of its liability became subject to such modification,

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126 Decreasing from twelve jurisdictions in 1996: see Symeon Symeonides, 'Choice of Law in the American Courts in 1996: Tenth Annual Survey (1997)' 45 *A J C L* 447; see table at 459, to eleven in 1997; see Symeon Symeonides, 'Choice of Law in the American Courts in 1998: Twelfth Annual Survey' (1999) 47 *AJCL* 327 at 345.

127 Symeon Symeonides, 'Choice of Law in the American Courts in 1999: One More Year' (2000) 48 *AJCL* 143 at 144–146. Two diversity cases (from Maryland and Virginia) have reached the US Court of Appeals for the 4<sup>th</sup> Circuit: *Wells v Liddy* 186F 3d 505 (1999) and *Yost v Travellers Insurance Co* 181 F 3d 95 (1999), discussed at 146–147.

128 Above n2 at 646 (Gleeson CJ et al).

129 See Paul Telford and Gail Hopley, 'A New Rule For Choice of Law in Tort: The Demise of Double Actionability' (2000) 15 *Australian Insurance Law Bulletin* 53 at 55 and Keyzer, above n3 at 87.

130 Keyzer, above n3 at 87, states that the decision 'meets the expectation of litigants', and Elliott, above n3 at 65, states that it brings 'the great comfort of certainty in the law', though not without paying the price of possible injustice.

131 Keyzer, above n3; see particularly at 90–93.

132 Above n2 at 648 (Gleeson CJ et al).

133 ALRC, above n15 at 3.2.

Pfeiffer enjoyed a windfall in this case. NSW employers (or their insurers) whose employees are fortuitously injured in the ACT may be surprised to learn that their liability is no longer limited by the predetermined levels of their state scheme. Such an unreasonable outcome may have been avoided had the Court asked whether the NSW legislature had any real interest in the application of its workplace scheme to an ACT employer's liability.

#### **A. *The Question of Statutory Construction***

In *O'Sullivan v Thai Airways*,<sup>134</sup> the NSW Court of Appeal had cause to determine the extraterritorial reach of a NSW compensation statute. Interestingly, Simpson J held that there was nothing in any of the relevant provisions of the *Motor Accidents Act 1988* (NSW) to confine its operation to injuries, accidents or vehicles registered or insured in NSW.<sup>135</sup> This was despite finding that the objects of the statute aimed to balance the interests of NSW motorists who participated in and financed the scheme, in keeping premiums to an acceptable level and providing proper compensation to those whose injuries were sufficiently serious to warrant it.<sup>136</sup> The legislature may not have intended to restrict damages to those who would be compensated from some other fund, but it needed to have expressly stated as much.<sup>137</sup>

Similarly, the NSW legislature may not have intended John Pfeiffer to benefit from the 'capped' damage provisions of the *Workers Compensation Act 1987* (NSW). Though it did not expressly limit the operation of the scheme, it could be argued that by operation of s155(i) of this Act, compulsory contributions and penalties for their evasion did imply such a limitation.

#### **B. *The Extraterritorial Limits of State Law***

Perhaps because of its dismissal of the merits of any 'interest analysis', the majority did not ask whether the legislature of NSW had any interest in extending the protection of its workers compensation scheme to non-contributing employers in other states or territories. Consideration of the extraterritorial reach of state laws provides some guidance in both asking and answering this crucial question.

In *Breavington*,<sup>138</sup> Deane J employed 'unique' reasoning<sup>139</sup> in arguing that the Constitution provides the mechanism for resolving competition between state laws due to the territorial confinement of their application or, in the case of multi-state circumstances, a determination of the 'predominant territorial nexus'.<sup>140</sup>

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134 (1998) NSW SC 28 MVR 469. The plaintiff sued a company incorporated in Thailand but registered in NSW for injuries suffered by her in a bus accident in Bangkok. The single issue before the Court was, if liability was established, whether the quantification of damages was governed by the common law or by the statutory scheme provided for by the *Motor Accidents Act 1988* (NSW).

135 *Id* at 474 (Simpson J).

136 *Ibid*.

137 *Id* at 475 (Simpson J).

138 *Above* n36.

139 *Opeskin*, *above* n74 at 161.

140 *Id* at 163.

Unfortunately, as Brian Opeskin has noted,<sup>141</sup> little guidance was given as to how a law is to be limited territorially (especially if silent on spatial operation), or how the predominant territorial nexus is to be determined. And being constitutionally entrenched, the principle would be impervious to judicial or statutory reform.<sup>142</sup>

However, the type of ‘sophisticated interests analysis’ defined by Douglas Laycock,<sup>143</sup> whereby he advocates asking the question: ‘What is it in the real world that these states disagree about?’,<sup>144</sup> offers a means of asking the territorial question without limiting the ability of the states to find statutory answers.

### C. *Intended Application of Statutory Compensation Schemes:*

The ALRC examined the difficulties of applying choice of law rules to statutory compensation schemes,<sup>145</sup> and to worker’s compensation schemes in particular.<sup>146</sup> The majority in *Pfeiffer* seems to have overlooked some of these complexities in assuming that the new rule ‘gives effect to the reasonable expectation of the parties’<sup>147</sup> and protects the tortfeasor (usually insurer) from a spectrum of laws imposing liability.<sup>148</sup> The broader implications of the decision do not support this.

Australia is a long way from enjoying harmony in the diverse compensation schemes which operate. Whenever a worker is employed to work in another state, two statutes apply,<sup>149</sup> or, as in *Pfeiffer*, one statute and a common law remedy. Because of the purposes of such schemes and their methods of operation, the ALRC found that the single choice of law rule it recommended for torts ‘is inappropriate for a worker’s compensation claim’, even where there was statutory uniformity. The ALRC recommended that, once uniformity was achieved, the ‘law of the place of habitual employment’ be adopted as the appropriate rule in worker’s compensation claims, as it is ‘the jurisdiction with which the employment is most closely related and which the worker would reasonably expect to govern his or her rights and obligations’.<sup>150</sup>

### D. *The Need For A Statutory Response*

Perhaps Mr Rogerson’s ‘habitual place of employment’ had become NSW.<sup>151</sup> If so, implementation of the ALRC recommendations would have required his employer to transfer cover where a ‘temporary’ absence became ‘habitual’ in character.<sup>152</sup> As it was, *Pfeiffer*, or its insurer, benefited from the application of the NSW provisions which ‘capped’ liability. But in a reverse situation, had *Pfeiffer*

141 *Ibid.*

142 *Id* at 164–165.

143 Laycock, above n118 at 331.

144 *Id* at 330.

145 Above n15 at para 7.1–7.38.

146 *Id* at 7.25–7.38.

147 Above n2 at 648 (Gleeson CJ et al).

148 *Id* at 647 (Gleeson CJ et al).

149 See discussion in ALRC, above n15 at para 3.6.

150 *Id* at para 7.32. It is also consistent with European developments.

151 He had worked at the hospital for about four months.

152 Above n15 at para 7.33. The Commission thought it was vital to clearly define ‘habitual’.



been a NSW tortfeasor contributing comparatively lower premiums in the expectation of limited liability protection, it may have been liable for unexpectedly high damages. Recognition of this could result in uniformly higher premiums in NSW if individual adjustments prove impractical.

Alternatively, legislatures may seek to amend their compensation schemes to meet the reasonable expectations of insured parties. Some may follow the example of one US State, which exempts workers injured within Maryland if both the employer and employee reside in another state, if the employment contract was formed in the other state, and if that other state reciprocates.<sup>153</sup>

## 11. Possible Complications

### A. Locating the Tort

Both Kirby J<sup>154</sup> and the joint judgment<sup>155</sup> acknowledged the difficulties of determining the possibly 'ambiguous' place of the tort, especially where it is connected with several law areas as in product liability torts. The Court in *Tolofsen* also discussed such difficulties.<sup>156</sup>

In the tort of libel, locating the *lex loci* is particularly problematic when it involves multi-state publication.<sup>157</sup> For this reason, the *Private International Law (Miscellaneous Provisions) Act 1995* (UK) excludes defamation from the new legislation.<sup>158</sup> The joint judgment questioned whether this tort demands the application of different rules.<sup>159</sup>

### B. Choice of Pleadings

In the special leave to appeal submissions for the *Pfeiffer* case, Rogerson argued that since the appeal 'raises an issue that goes to both contractual claims and tort claims', choice of law rules had to be modified in contract if they were modified in tort.<sup>160</sup> This was an issue that the Court chose not to address since it found the claim framed in tort. Although Kirby J recognised the complications which may arise where a claim is framed in both tort and contract, his Honour considered that the issue did not require determination in this particular case.<sup>161</sup>

But since there are many areas where there is concurrent liability in tort and contract, such as professional negligence, it is important to consider whether a

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153 Weintraub, above n119 (*Supplement*) at 76.

154 Above n2 at 664–665 (Kirby J).

155 *Id* at 647 (Gleeson CJ et al).

156 Above n57 at 1022.

157 See generally Alan Reed, 'To Chill A Mocking Word: Applicable Choice of Law and Jurisdiction Principles Over Multistate Defamation Under English and Australian Jurisprudence' (1997) 5 *Tort L Rev* 33, especially at 34–35.

158 See discussion in *id* at 41.

159 Above n2 at 647 (Gleeson CJ et al).

160 *Pfeiffer Pty Ltd v Rogerson* C/14 1999 [Leave to Appeal Hearing] (1 December 1999) at <<http://www.austlii.edu.au/au/other/hca/transcripts/1999/C14/2.html>>

161 Above n2 at 665 (Kirby J).

plaintiff may now get a different result depending on whether an action is framed in tort or contract, and a conflicting result if framed in both.

### C. *Two Law Regimes*

Whilst in 1998 one commentator was able to confidently assert that ‘a flexible exception exists in international tort cases’,<sup>162</sup> *Pfeiffer* now makes such an assertion better founded. But in leaving the international door open, *Pfeiffer* may have created the potential complication of two conflicting law regimes.

In the recent decision of *Zhang v Regie Nationale des Usines Renault SA (Zhang)*,<sup>163</sup> the NSW Court of Appeal clearly showed how lower courts may read *Pfeiffer* as confirming the continued relevance of *Stevens* and the double actionability rule for international torts. Stein JA (with whom Beazley J and Giles JA agreed) stated that *Pfeiffer* expressly limited its discussion to issues arising in respect of intranational, and not international, torts. *Zhang* involved liability for a product designed and manufactured in France causing a motor accident in New Caledonia; the appeal determined issues of jurisdiction, justiciability and choice of law, and held that NSW did not constitute a *forum non conveniens*.<sup>164</sup>

At the time of writing, Renault has been granted leave to appeal this decision to the High Court.<sup>165</sup> This provides the Court with an opportunity to decide whether the new ‘federal’ rules in *Pfeiffer* rejecting ‘double actionability’ extend to international torts; and whether the distinction between substance and procedure – described by counsel for Renault as ‘a reordering according to reason’,<sup>166</sup> – should be jettisoned. If so, the Court may consider the possibility, left explicitly open by *Pfeiffer*, of the application of a ‘flexible exception’. Given that *Pfeiffer* followed so closely the reasoning in *Tolofson*,<sup>167</sup> it seems likely to agree with the Canadian Court that scope exists for flexibility in international claims.

Notwithstanding the obvious desirability of recognising such flexibility in exceptional international tort cases, difficulties may arise in future cases involving a combination of international and intranational elements.

## 12. Conclusion

*Pfeiffer* will be welcomed for its promotion of federal principles and apparent creation of certainty. Clearly, the single *lex loci* rule meets the ALRC reform goals of simplicity, uniformity of results, and compliance with s118. But in not allowing for any flexible application of the rule, the Court has lost sight of the primary purposes of conflict of law defined by the ALRC: ‘treating parties equally and in accordance with their reasonable expectations’.<sup>168</sup> Persons who contribute to

162 Stuart Dutson, ‘Choice of Law in Tort in Domestic and International Litigation’ (1998) 26 *Australian Business Law Review* 238 at 247.

163 [2000] NSWCA 188 (27 July 2000).

164 Justice P W Young, ‘International Torts’ (2000) 74 (10) *ALJ* 657.

165 *Regio National Des Usines Renault SA and Renault Automobiles SA v Zhang* S192/2000(15 December 2000) <<http://www.austlii.edu.au/au/other/hca/transcripts/2000/S192/2.html>>

166 *Ibid.*

167 Above n57.

compensation schemes are entitled to the reasonable expectation that the resources of such schemes will be used exclusively to provide protection for contributors at a rate predetermined by their state law. But the effect of *Pfeiffer* is that compulsory contributors to a state scheme are now potentially liable at a rate to be determined by a state or territory not their own. Thus, unlike in *Nalpantidis v Stark*, it will not only be plaintiffs whose entitlement to justice are 'sacrificed on the altar of certainty'.<sup>169</sup>

It was equally reasonable for Mr Rogerson, as he went to work on the day of his accident, to expect that his rights as an ACT employee would not be limited by a law designed to protect NSW employees. And it is unfortunate for Mr Rogerson that the outcome of his case may have been different had it been framed in contract.

Like all rules, those governing choice of law must respond 'to the needs of real people in a real world'.<sup>170</sup> It was for this reason that the Court jettisoned the artificial distinctions between substance and procedure. However, simplistic solutions will not answer all the complex and important problems presented by interjurisdictional torts.<sup>171</sup> Setting courts the task of determining whether the *lex loci* has any real interest in a specific issue being litigated inevitably results in some 'hard cases'. However, principles governing the extraterritorial reach of state laws provide some guidance in this, as do those governing statutory construction. In sparing courts such difficulties, *Pfeiffer* may permit, and should provoke, legislative responses that protect reasonable expectations and ensure individual justice.

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168 Above n15 at para 2.2.

169 *Nalpantidis (2)* above n109 at 478–9 (Doyle CJ).

170 Weintraub, *Commentary*, above n119 at 4.

171 *Ibid.*