

Case Notes

Regie Nationale des Usines Renault SA v Zhang

Certainty or Justice? Bringing Australian Choice of Law Rules for International Torts into the Modern Era

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1. Introduction

Until March 2002, the Australian principle governing the choice of law in international torts was based on a rule originating from a long-forgotten rebellion in the former British colony of Jamaica. In order to avoid holding Governor Eyre liable for his suppression of the 1865 uprising, the English court in *Phillips v Eyre*¹ adopted the so-called ‘double actionability rule’, requiring that a tort claim be actionable under the laws of both the place of commission and of the forum before the case would be entertained.² Eventually reworked³ and adopted anew⁴ by Australian courts, this rule stood for nearly one and a half centuries as a bastion against the ‘inappropriate’ application of foreign laws within the forum.

However, in its recent decision in *Regie Nationale des Usines Renault SA v Zhang*,⁵ the High Court of Australia finally abandoned this colonial relic. In its place the Court adopted a new choice of law rule, providing that the applicable substantive law for all international torts will be the law of the place where the tort was committed (the *lex loci delicti*). In so doing, the Court extended its reasoning in *John Pfeiffer Pty Ltd v Rogerson*,⁶ where it had previously adopted the same rule for intranational torts. The Court rejected any ‘flexible exception’ to this principle, citing a desire to maintain a uniform approach to both intranational and international torts, and the need to promote certainty and predictability. In keeping with this apparent desire for certainty over more flexible notions of justice, the majority also ruled that the strict ‘clearly inappropriate forum’ test would continue to inform judicial discretion when considering whether to grant a stay of proceedings under the *forum non conveniens* doctrine.

This decision represents a landmark in the development of Australian private international law principles. Nonetheless, several monsters may yet be lurking below the surface. By favouring certainty and procedural simplicity over flexibility, this approach risks doing injustice in cases where the foreign law has

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1 [1870] LR 6 QB 1.

2 This rule was based upon the earlier decision in *The Halley* (1868) LR 2 PC 193.

3 See the judgment of Brennan J in *Breavington v Goddleman* (1988) 169 CLR 41 (hereinafter *Breavington*).

4 *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 (hereinafter *McKain*).

5 [2002] HCA 10 (hereinafter *Renault*).

6 (2000) 203 CLR 503; [2000] HCA 36 (hereinafter *Pfeiffer*).

no substantial connection to the parties or the action. It is also out of tune with international developments. This note will attempt to assess some of the potential pitfalls of the decision, and will conclude that the High Court's simple and rigid formulation will be inappropriate for the international context.

2. *Facts*

The plaintiff/respondent in this action, Mr Fuzu Zhang, had been living in NSW on a student visa since 1986. In February 1991, after receiving advice from Australian immigration authorities that he would be granted permanent residency if he made an application from outside Australia, he travelled to the French-administered territory of New Caledonia. There he hired a Renault 19 sedan, designed and manufactured in France by the defendants/appellants, the Renault companies.⁷ Both of these are French corporations that are not registered in Australia. While Mr Zhang was driving the car an accident occurred resulting in the car somersaulting onto its roof, which was crushed into the passenger compartment. Despite hospital treatment in New Caledonia and further medical attention in NSW, the plaintiff has been left permanently disabled by the severe spinal injuries that he sustained. Mr Zhang now resides in NSW.

Mr Zhang subsequently commenced proceedings against the Renault companies in the Supreme Court of NSW, claiming damages for personal injuries allegedly caused by the defective design and manufacture of the vehicle.⁸ As neither of the defendant companies had any presence in NSW, the plaintiff invoked the court's extraterritorial jurisdiction under Pt 10 r1A(1)(e) of the *Supreme Court Rules* 1970 (NSW), on the basis that the proceedings were for the recovery of damages suffered in NSW 'caused by a tortious act or omission wherever occurring'. The Renault companies moved for the proceedings to be stayed on the grounds that NSW was 'an inappropriate forum for the trial of the proceedings'.⁹ In particular, they contended that as all relevant events occurred in territories that were part of the French judicial system, the matter should be dealt with under French law.

3. *At Trial*

At first instance, Smart J agreed to stay the proceedings after 'weighing all the factors'¹⁰ in favour of and against hearing the claim in NSW.¹¹ While 'practical considerations' tended to favour a hearing in Sydney, the facts that the accident occurred in New Caledonia and the allegedly defective design and manufacture took place in France meant that French law should be applied in this case. On the

7 Regie Nationale des Usines Renault SA and Renault Automobiles SA (hereinafter 'the Renault companies').

8 In particular it was alleged that the roof supports were inadequate.

9 *Supreme Court Rules* 1970 (NSW) Pt10 r6A(2)(b) (hereinafter 'The Rule').

10 Above n5 at 154 (Kirby J).

11 This was granted on the condition that the companies submit to the jurisdiction of the courts of New Caledonia and that they waive any limitation defence.

basis of this finding, it was held that the case should be remitted to a French or New Caledonian court.¹²

Zhang appealed to the NSW Court of Appeal on the grounds that the primary judge had erroneously ruled that French law would be the *lex causae*, and thus that his discretion in staying the proceedings had miscarried. This appeal was upheld. In particular, Stein JA found that the role of the *lex loci delicti* was to be restricted to the question of justiciability, as determined through the double actionability rule, and that Australian law should be applied in this case.¹³ The court accordingly re-exercised the trial judge's discretion, and refused to stay the proceedings.

4. *On Appeal to the High Court*

The Renault companies appealed to the High Court, claiming that the Court of Appeal had erroneously applied the 'double actionability' rule. They argued that the reasoning in *Pfeiffer*,¹⁴ where Australian courts had embraced the *lex loci delicti* as the substantive law to be applied in intranational tort cases, should now be extended to foreign torts as well.¹⁵ This, they contended, would vindicate the original decision of Smart J. Zhang submitted in response that the double actionability rule should be maintained, with the *lex fori* supplying the substantive law.¹⁶ Alternatively, he submitted that the decision of the Court of Appeal to overturn the primary judge's ruling could be supported on other grounds, due to Smart J's erroneous application of the *forum non conveniens* principle. Specifically, a 'clearly inappropriate forum' test should have been applied in favour of the lesser 'inappropriate forum' standard applied by Smart J.¹⁷

A majority of the High Court of Australia¹⁸ dismissed the appeal. Six of the seven judges accepted the Renault companies' submission that the *lex loci delicti* should now provide the substantive law for international tort cases, without any 'flexible exception' to this rule.¹⁹ French law was therefore the applicable law in this case. Nonetheless, the majority still ruled that the Renault companies had not demonstrated that the Supreme Court of NSW was a 'clearly inappropriate forum', in the sense that a trial in that Court 'would be oppressive or vexatious to them, in any relevant sense'.²⁰

12 Id at 155–158 (Kirby J).

13 See *Thompson v Hill* (1995) 38 NSWLR 714, which the Court of Appeal cited in support of the application of the *lex fori* in cases involving torts committed outside of NSW.

14 Above n6.

15 Above n5 at 29.

16 Ibid. Zhang also submitted that the double actionability rule should now be subject to a 'flexible exception'.

17 Id at 30.

18 Gleeson CJ, Gaudron, Gummow, Hayne and McHugh JJ (joint judgment); Kirby and Callinan JJ dissenting.

19 Above n5 at 75.

20 Id at 81. An Australian court will not be a 'clearly inappropriate forum' merely because the *lex causae* is the law of a foreign court.

A. *An Appropriate Test for an Inappropriate Forum?*

The first issue addressed in the joint judgment was the appropriate test for granting a stay on the grounds of forum non conveniens. The accepted test as applied in Australian courts prior to this appeal was the 'clearly inappropriate forum' test, derived from the decision in *Voth v Manildra Flour Mills*.²¹ In that case, the High Court held that a stay should only be granted if the applicant could demonstrate that hearing the case in the local court would be 'oppressive', in the sense of 'seriously and unfairly burdensome, prejudicial or damaging', or 'vexatious', in the sense of 'productive or serious and unjustified trouble and harassment'.²² This principle originally arose as a mechanism of judicial reasoning to protect courts from abuse of their processes, as the court recognised in *CSR Limited v Cigna Insurance Australia Limited*:

the power to stay proceedings on grounds of forum non conveniens is an aspect of the inherent ... power, which *in the absence of some statutory provision* to the same effect, every court must have to protect its own processes. [Emphasis added.]²³

However, in this appeal, this judge-made doctrine was held in contrast to Pt 10 r6A(2)(b) of the *Supreme Court Rules* 1970 (NSW), which provides that a stay may be granted where the court is 'an inappropriate forum for the trial of the proceedings'. The difference between these two expressions is immediately obvious; as the majority judgment points out, the phrase 'inappropriate forum' is less emphatic than 'clearly inappropriate forum'.²⁴ However, the questions of whether these expressions imply different standards, and if so which standard should be applied, are more problematic. Smart J interpreted the wording of the Rule as requiring him to 'weigh the competing factors' in favour of and against hearing the matter in NSW, whereas the Court of Appeal held that Renault still had to satisfy the common law onus of showing that the NSW proceedings would be 'oppressive' or 'vexatious'. The High Court now had the opportunity to settle this issue.

The joint judgment concluded that the difference between these expressions was of no practical significance. They reasoned that the statutory Rule was invoked to give 'explicit recognition to the judge-made doctrine', and as such its meaning is to be determined by reference to case law that expounded that doctrine.²⁵ Thus the 'clearly inappropriate forum' test as outlined in *Voth* remains the applicable standard.²⁶ As this had not been satisfied by the Renault companies, the stay was refused.

21 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (hereinafter *Voth*).

22 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247 (hereinafter *Oceanic*). This principle was applied in *Voth*, above n21 at 564–565.

23 (1997) 189 CLR 345 at 391. Cited above n5 at 21.

24 Above n5 at 24.

25 *Id* at 23. Furthermore, as the court's power to stay proceedings is part of its inherent power to prevent abuse of its own processes — the same function performed by Rule 6A(2)(b) — the same considerations necessarily inform both tests.

26 *Id* at 78.

(i) Kirby J's Dissent

Kirby J regarded the majority's view that the judge-made doctrine could still be applied to interpret the statute as 'fundamentally mistaken':

I dissent from the notion that judges are authorised to adhere to their "doctrine" where a superior law making power ... has entered the field. In such, cases "judge-made doctrine" yields ... [A judge's] duty is to obey the written law.²⁷

In a scathing attack on the joint judgment's reasoning, Kirby J cited several recent decisions where the High Court had criticised lawyers for adhering to common law authority after this had been overtaken by legislation or statutory rules.²⁸ The joint judgment, so he argued, was 'a classic instance of the very error which this Court has repeatedly condemned in its recent instruction of others'.²⁹

Furthermore his Honour rejected the majority's argument that Pt 10 r6A(2)(b) had merely intended to codify the pre-existing doctrine, and thus should be interpreted with reference to common law. Unless the text of legislative rules is faithfully applied, he warned, 'the dead hand of "judge-made doctrine" will hang forever above legislation'.³⁰ Kirby J reasoned that the deletion of the adjective 'clearly' makes the test 'commensurately lighter'.³¹ Rather than having to show that the proceedings will be 'oppressive' in the forum, the appellants only had to demonstrate that the NSW Court was 'inappropriate' by weighing the competing factors.³² As the primary Judge had done this, Kirby J saw no basis for disturbing judgment.

(ii) Callinan J's Dissent

Callinan J expressed a similar dissent to that of Kirby J in arguing that the word 'clearly' had been deliberately omitted by the drafters of Pt 10 r6A(2)(b), and thus that the requirement of showing that proceedings were 'oppressive' or 'vexatious' had been abandoned.³³ However, his Honour diverged from the reasoning of Kirby J by arguing that the less restrictive wording of the statutory Rule permitted the application of Lord Goff's approach in *Spiliada*,³⁴ that the local proceedings should be stayed if a foreign court was shown to be a '*more appropriate forum*'.³⁵ His Honour reasoned that Australia's relatively loose jurisdictional rules that 'can lead to the assumption of jurisdiction in the most tenuous circumstances' justified a liberal rule as to staying of actions; that adoption of the *Spiliada* rule would

27 Id at 144 (Kirby J).

28 See for example *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 182 ALR 321 at 339; *The Commonwealth v Yarmirr* (2001) 184 ALR 113 at 184; *Allan v Transurban City Link Ltd* (2001) 183 ALR 380 at 392–393.

29 Above n5 at 146 (Kirby J).

30 Id at 147 (Kirby J).

31 Id at 162 (Kirby J).

32 Ibid.

33 Id at 194 (Callinan J).

34 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (hereinafter *Spiliada*).

35 Above n5 at 194 (Callinan J). In justifying this, his Honour reasoned that as the court had not considered Pt 10 r6A in *Oceanic* he was free to apply the dissenting judgment of Wilson and Toohey JJ, which had favoured the *Spiliada* test.

preserve greater international consistency; and that comity and the desire to deter forum shopping require that cases should not be determined in jurisdictions with little connection to the subject matter when a more appropriate forum exists elsewhere.³⁶

At present the judgment in *Renault* stands as authority that the ‘clearly inappropriate forum’ test continues to govern this area of Australian law. However, given the discrepancy between the wording of the Rule and the common law test, as well as the vigorous criticism by the minority judges, it is unlikely that the majority position will be regarded as unassailable. Further litigation will most probably be necessary before this issue is settled.

B. *The Empire Struck Down? The Demise of the ‘Double Actionability’ Rule*

Although this appeal was ultimately decided on the basis of the Renault companies’ failure to demonstrate that the NSW court was a ‘forum non conveniens’, a more significant development was the High Court’s re-assessment of the Australian choice of law rules for international torts.³⁷ Prior to this appeal, the choice of law in tort was governed by two distinct principles. The recent case of *Pfeiffer*³⁸ had established that the *lex loci delicti* would be applied in all cases dealing with intranational torts. However, the majority in that case had reserved judgment as to whether this principle should be extended to the international level. Thus the ‘double actionability’ rule as reformulated by Brennan J in *Breavington*,³⁹ which required a plaintiff to show that the subject of the claim would give rise to the same kind of liability in the forum as in the place where the wrong occurred, continued to operate as a threshold requirement for tort claims containing foreign elements.⁴⁰ If this test was satisfied, the *lex fori* would usually be applied.

The majority in *Renault* questioned the justification for this ‘threshold’ requirement.⁴¹ It was noted that the decisions in *Phillips v Eyre* and *The Halley*

³⁶ Ibid.

³⁷ Above n5 at 38. The majority found that such a re-assessment was necessary in the context of re-exercising the discretion concerning the stay application: ‘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.’

³⁸ Above n6.

³⁹ Above n3 at 110–111. Brennan J’s reformulation was as follows: ‘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.’

⁴⁰ Above n5 at 33.

⁴¹ Note that Windeyer J commented in *Anderson v Eric Anderson Radio & TV Pty Limited* (1965) 114 CLR 20 at 41 that the ‘double actionability’ rule dealt only with justiciability, by setting conditions for bringing a claim in the forum. He rejected the idea that this test provided a choice of law rule. This view was supported in *Pfeiffer*, above n6; and in *Tolofson v Jensen* [1994] 3 SCR 1022.

that established the rule, were 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*'.⁴²

The rule could therefore be explained as performing a similar function to modern 'public policy' principles for excluding 'repugnant' foreign laws.⁴³ Indeed, the joint judgment suggested that granting this rule any greater significance, such as determining the *lex causae*, would take it 'beyond its public policy root'.⁴⁴

Thus, the next question facing the Court was whether this primitive version of a public policy exclusionary doctrine should continue to influence choice of law decisions in Australian courts. The answer settled on by the majority and Kirby J was that 'whatever may have been said in favour of such of a requirement in England a century and a half ago, it cannot be supported today as anything more than an arbitrary rule'.⁴⁵

The principle was out of date, placed too great an emphasis on the *lex fori*, and created an untenable justiciability hurdle that did not apply to other areas such as contract and property. We might note that the application of the double actionability rule was not a matter of contention in this case, and Callinan J suggested that it would have been clearly satisfied on the presented facts.⁴⁶ Nonetheless, the joint judgment and Kirby J authoritatively ruled that '[t]he double actionability rule should now be held to have no application in Australia in international torts'.⁴⁷

In its place, and in line with more modern approaches to excluding 'inappropriate' foreign laws from the forum, the joint judgment advocated the frank application of *public policy* considerations.⁴⁸ In particular, the two bases identified by Brennan J in *Spycatcher* met with approval:

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 give rise to the obligation sought to be enforced.⁴⁹

This also reflects the High Court's approach to excluding foreign laws in other areas such as contract.

42 Above n5 at 49.

43 *Id* at 50.

44 *Id* at 54.

45 *Id* at 52.

46 *Id* at 214 (Callinan J).

47 *Id* at 60.

48 *Ibid*: 'we should frankly recognise that the question is about public policy and confront directly the issues that this may present.'

49 *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 49; cited above n5 at 57.

C. *The Way Forward: A New Choice of Law Rule for International Torts*

This decision finally answered the longstanding calls for the abandonment of the *Phillips v Eyre* principle. However, this did not settle the appropriate choice of law rule to be applied by Australian courts. The joint judgment therefore turned to the question of whether, as submitted by the appellants, the ruling in *Pfeiffer* should be extended to cases involving international torts. The majority judges and Kirby J in his minority decision concluded that it was now appropriate to apply the *lex loci delicti* as the law governing all questions of substance for both intranational and international tort claims.⁵⁰

Both judgments referred approvingly to how this principle would recognise the increasingly mobile and 'globalised' nature of personal interactions and activities;⁵¹ how it would discourage 'forum shopping',⁵² and perhaps most importantly, how it would promote certainty in the law.⁵³ However, a failing of the joint judgment is its lack of detailed reasons for its selection of the *lex loci delicti* as the appropriate rule. In particular it fails to consider any alternative rules,⁵⁴ the problems with a uniform application of the *lex loci delicti*, or even the contentious issue of whether this rule will actually provide certainty in choice of law.⁵⁵ The judgment of Kirby J does address many of these issues, and accordingly he delivers a far more compelling justification for the extension of the rule in *Pfeiffer*. In particular his Honour highlighted the desirability for a single choice of law rule in Australia,⁵⁶ the predominance of the *lex loci delicti* in other jurisdictions⁵⁷ and even human psychology, claiming that this principle satisfies 'the ordinary expectations of most parties'.⁵⁸ The High Court did not decide whether issues pertaining to the recovery of damages would be treated as substantive issues governed by the *lex loci delicti*.⁵⁹

A more contentious issue was whether a 'flexible exception' should be adopted with this rule. The joint judgment rejected this out of hand, citing the Canadian authority of *Tolofson v Jensen*, where La Forest J criticised the concept of 'interest analysis' that informs this exception.⁶⁰ However, once again there was little justification for this finding, and the minority judgments both expressed reservations about the applicability of the inflexible approach adopted in *Pfeiffer* to the international context.

50 Above n5 at 75; and at 121 (Kirby J).

51 *Id* at 65.

52 *Id* at 119 (Kirby J).

53 *Id* at 66.

54 See for example Australian Law Reform Commission, *Choice of Law Report No 58* (1992) at para 6.15.

55 These issues will be discussed in greater depth below.

56 Above n5 at 125 (Kirby J).

57 *Id* at 127 (Kirby J).

58 *Id* at 130 (Kirby J).

59 *Id* at 76.

60 (1994) 120 DLR 4th 289 (hereinafter *Tolofson*); cited above n5 at 62–63.

(i) Kirby J

Kirby J questioned the majority's assertion that all issues addressed by the 'flexible exception' could be adequately subsumed in considerations of 'public policy'. By way of example, his Honour referred to *Boys v Chaplin*⁶¹ where, he argued, 'public policy' could not have supported the rejection of Maltese law simply because Malta had an insubstantial connection with the action.⁶² This was again in line with his reasoning in *Pfeiffer*, where he left open 'the possible retention of some flexibility for international torts'.⁶³ Nonetheless, his Honour did not press this preference to a dissent, as he believed that in most cases an exception to the *lex loci delicti* rule based on public policy considerations would produce the same outcome as the 'flexible exception'.⁶⁴

(ii) Callinan J

Callinan J found no reason to consider the application of *Pfeiffer* to international torts, with or without a flexible exception. Nonetheless, he questioned whether this ruling, which depended heavily on the federal structure of Australia, could be transferred to the international context:

The conclusions of the majority in *Pfeiffer*, do however seem to me, with respect, to depend very much upon the nature of the federal structure of this country 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 nation, features which are self-evidently not present in international situations.⁶⁵

Indeed, this was the central reason why the *lex loci delicti* was not adopted as a general choice of law rule in that case.

5. *Broader Implications and Complications of the New Choice of Law Rule*

On an initial reading, there is merit in the strict application of the law of the place where a tort occurred to settle disputes. This appears to be a straightforward and sensible approach, as the ALRC recognised, we 'should be able to feel safe in Rome if [we] do there as Romans do'.⁶⁶

Applying the *lex loci delicti* should enable travelling persons to plan for risks that they may incur, as well as reducing the opportunity for forum shopping by plaintiffs. This is also consistent with a fundamental tenet of private international law, which 'exist[s] to fulfil foreign rights and duties, not to destroy them'.⁶⁷

61 [1971] AC 356.

62 Above n5 at 122 (Kirby J).

63 Elizabeth 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 *SLR* 145 at 155.

64 Above n5 at 123 (Kirby J).

65 *Id* at 215 (Callinan J).

66 Above n54 at para 6.21.

67 Above n5 at 129 (Kirby J).

Nonetheless, a deeper consideration of legal principles governing conflict of laws suggests that the inflexible application of the *lex loci delicti* may also generate more problematic consequences.

A. *Importing Inappropriate Foreign Law May Lead to Injustice*

As Kirby J has pointed out, the ‘public policy’ exception favoured by the joint judgment will not always prevent the importation of foreign laws that may be inappropriate for trying the case.⁶⁸ Public policy will only exclude the *lex loci delicti* where applying such law would be repugnant to public morality or standards of justice. This will not prevent, for example, the application of foreign statutory schemes that were designed within the context of the foreign state, even though the parties may have only a transitory and purely fortuitous connection with that state. Take the classic scenario where two citizens of State A have a motor accident in State B, which happens to have a statutory compensation scheme that limits motorists’ liability in order to reduce insurance premiums for its own residents. In such circumstances a rigid application of the law of State B, without any consideration of the respective compensation policies informing the laws of the different states, could result in injustice and the frustration of the reasonable expectations of the parties.⁶⁹ Such an outcome might be avoided if the local court could question whether State B’s legislature has any real interest in applying its compensation scheme to the parties, and choose to apply or reject that law accordingly.

There has also been wide academic criticism of the inflexible approach. Dicey has argued that a ‘mechanical’ rule is inappropriate for torts, as people do not plan tortious acts in reliance on the application of a particular legal system: ‘motor car accidents are rarely planned’.⁷⁰ Even Professor Kahn-Freund, who the majority cited in support of the inflexible rule,⁷¹ apparently changed his mind to favour ‘softer’ connecting factors over pure geographical location.⁷² Finally, the High Court’s reservation of judgment on the distinction between substance and procedure, and exactly what sort of foreign laws will be subject to the flexible *lex loci delicti* rule, creates further confusion.⁷³

B. *Will there be Certainty?*

The promotion of certainty and predictability for courts and parties alike was a primary consideration for both the majority and Kirby J. This conforms with La Forest J’s reasoning in *Tolofson*: ‘While ... the underlying principles of private international law are order and fairness, order comes first’.⁷⁴

68 Id at 122 (Kirby J).

69 See for example Friedrich Juenger, ‘Tort Choice of Law in a Federal System’ (1997) 19 *SLR* 529 at 540–541. For judicial discussion see *Wong v Wei* (1999) 65 *BCLR* (3d) 222.

70 Lawrence Collins (ed), *Dicey and Morris on the Conflict of Laws* (12th ed, 1993) at 1501–1502.

71 Above n5 at 44–47.

72 Otto Kahn-Freund, ‘General Problems of Private International Law’ (1974) 143 *Recueil des cours* 130, at 410–411; cited in Gary Davis, ‘John Pfeiffer Pty Ltd v Rogerson: Choice of Law in Tort at the Dawning of the 21st Century’ (2000) 24 *MULR* 982 at 1004.

73 Above n5 at 76.

74 *Tolofson*, above n60 at 311.

However, it is far from clear that the ruling in *Renault* will have this effect. Firstly, locating the tort will assume much greater significance, as the finding on where the tort occurred will now effectively settle the choice of law. However, this remains notoriously difficult. The problems associated with determining ‘*where in substance the cause of action arose*’, as required under the *Distillers* test,⁷⁵ can be illustrated on the facts of this very case. Was the ‘substance’ of Zhang’s cause of action the faulty design and manufacture of the car which apparently occurred in France, or the Renault companies’ failure to warn of the potential injury? If a failure to warn, did this occur where the warning might have been given at the time of manufacture in France, or where it might have been read by Zhang, upon hiring the car in New Caledonia? Alternatively, as liability only arises with injury, did the cause of action only arise at the place where the accident occurred?⁷⁶ The location of a tort can clearly become a significant issue in all but the most straightforward cases. Thus great scope for uncertainty remains, even with an inflexible *lex loci delicti* rule.

It is also possible that the ‘public policy’ exception could actually generate greater uncertainty than a ‘flexible exception’. ‘Public policy’ is by definition a vague and changeable concept: “‘public policy’ arguments simply mean that the court does not approve of law that the legislature [of the foreign territory] has chosen to adopt.”⁷⁷

This provides no parameters by which a court should exclude foreign law, thus rendering this process more unpredictable than a clear displacement principle such as those enunciated in the British legislation⁷⁸ or ALRC report.⁷⁹

Furthermore, the alternative to ‘very great uncertainty’, so feared by the High Court, does not have to be ‘absolute certainty’ where this would come at the expense of substantive justice. Likewise, ‘flexibility’ does not have to be synonymous with ‘very great uncertainty’. Gary Davis has pointed out that the English position, having employed a flexible common law rule for decades and now having entrenched that flexibility in statute, stands as testimony that a workable ‘middle ground’ can be forged.⁸⁰

C. Interactions with Other Areas of Law

The introduction of such a rigid rule for choice of law in torts could create complications where the claim may also be framed in other areas such as contract, where this rule would not apply. If a plaintiff pleads concurrent liability in tort and

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

76 The Australian Law Reform Commission agreed with the English and Scottish Law Commissions’ recommendation that the ‘place of injury’ should be the guiding principle for determining the location of the tort in personal injury: Australian Law Reform Commission, above n54 at para 6.35. See also *Porter v Bonojero Pty Ltd* [2000] VSC 265 for further illustration of the problems associated with locating a tort.

77 *Tolofson*, above n60 at 311.

78 *Private International Law (Miscellaneous Provisions) Act* 1995 (UK), ss11 & 12.

79 Above n54.

80 Davis, above n72 at 1003.

contract, it is entirely conceivable that he or she could be compelled to argue on the basis of two different legal systems.⁸¹ The plaintiff could also have recourse to completely different laws and get a different result depending on whether the action is framed in tort or contract,⁸² thus encouraging a form of ‘forum shopping’ by framing a claim to take advantage of the more favourable system of law. Once again, a flexible exception allowing the application of the most appropriate law could help to diminish such inconsistency.

Other fears have been raised that the High Court’s approach could inspire the adoption of similar rigid rules in other areas, such as the *lex loci contractus*.⁸³ At the very least, it is possible that this approach will hamper Australian conflicts law reform, by precluding courts from experimenting with different, more progressive approaches to choice of law.⁸⁴

6. *Breaking the Mould: Inconsistency with International Approaches*

The majority judges and Kirby J examined a number of foreign approaches to the choice of law issue, and cited the predominance of the *lex loci delicti* in other common law jurisdictions as a major imperative for adopting this rule.⁸⁵ However, it is arguable that the court’s analysis on this point was superficial. Indeed, further investigation of the approaches adopted in Canada, The United Kingdom and the USA show an acceptance of the *lex loci delicti*, but with the caveat that this rule can be displaced where appropriate.

A. *Canada*

The High Court cited the judgment of La Forest J in the case of *Tolofson v Jensen*,⁸⁶ where the Canadian Supreme Court adopted an inflexible *lex loci delicti* rule for intranational torts, mirroring the decision in *Pfeiffer*. To support their own reasoning, the majority in *Renault* referred to La Forest J’s assessment of the territorial limits of national law under the international legal order:

The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limit ... other states as a matter of ‘comity’ will ordinarily respect such actions.⁸⁷

Kirby J also referred to the same eminent judge’s finding that it was ‘axiomatic’ that the law of the place where the activity occurred should be applied as a general rule.⁸⁸

81 Note that a plaintiff will be required to raise and prove the foreign law in order to rely on it: above n5 at 70–72.

82 Above n63 at 162. See also Davis, above n72 at 1005.

83 Davis, above n72 at 1006; Juenger, above n69 at 542.

84 Juenger, above n69 at 543.

85 Above n5 at 127 (Kirby J).

86 Above n60.

87 *Id* at 16; cited in above n5 at 64.

88 *Ibid*, cited in above n5 at 128 (Kirby J).

While these passages are indicative of La Forest J's preference for an inflexible *lex loci delicti* rule for intranational torts, both the majority judges and Kirby J appear to have ignored a crucial aspect of the judgment. La Forest J did not apply the same reasoning at the international level, but accepted that in certain circumstances, considerations other than territorial nexus could be more determinative:

[B]ecause a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances.⁸⁹

It also appears that the High Court has failed to examine later Canadian jurisprudence on this issue. In the recent case of *Wong v Wei*⁹⁰ the Supreme Court of British Columbia applied a discretionary exception to the *lex loci delicti* rule in a tort claim arising from a motor accident in California. After a detailed analysis of La Forest J's decision in *Tolofson*, Kirkpatrick J ruled that a substantial connection between British Columbia and all the parties, coupled with the incompatibility of Californian legislation with British Columbian damages provisions, justified the application of the *lex fori* to avoid injustice.⁹¹

B. United Kingdom

The High Court makes repeated reference to English case law, particularly assessing the 'double actionability' rule set out in *Phillips v Eyre* and the exception to this established in *Boys v Chaplin*.⁹² Somewhat strangely, the joint judgment preferred to compare Australian choice of law principles with the now defunct British common law, rather than the new statutory provisions. There was therefore no discussion of the *Private International Law (Miscellaneous Provisions) Act 1995* (UK), which now governs choice of law questions in the UK. This is an unfortunate omission, as this statutory rule provides a viable option for reform in Australia. Section 11 sets out the 'general rule' that the 'law of the country in which events constituting the tort ... occurred' will be the applicable law.⁹³ Section 12 then provides that the general rule may be displaced where 'it is substantially more appropriate' for the law of another country to be applied, after comparing the significance of the factors connecting the tort with the place of commission with the factors connecting the tort to that other country.⁹⁴ We might note that Kirby J referred to s11 of this Act as evidence for his assertion that a rule applying the *lex loci delicti* 'commands almost universal contemporary allegiance'.⁹⁵ However, as was the case with the High Court's assessment of

⁸⁹ *Tolofson*, above n60 at 307–308.

⁹⁰ (1999) 65 BCLR (3d) 222.

⁹¹ *Id* at 31 (Kirkpatrick J). A similar exception was applied in *Hanlan v Sernesky* (1997) 35 OR (3d) 603.

⁹² Above n61.

⁹³ Note s11(2) expands on this to explain how the rule will apply to the specific torts of personal injury, death, damage to property, and other claims.

⁹⁴ Note s12(2) includes factors relating to the parties, to the events, or to any circumstances or consequences of the events.

⁹⁵ Above n5 at 128 (Kirby J).

Tolofson v Jensen, the equally significant recognition of an exception to this general rule has been conveniently overlooked.

C. USA

A different approach to choice of law has been adopted in the USA, known as 'interests analysis'. This method is similar to the 'proper law of the tort',⁹⁶ as it involves 'weighing the relative contacts with the competing jurisdictions to determine which has the most significant connections with the wrong'.⁹⁷ While the *lex loci delicti* will usually govern, this will be displaced where justice, fairness and best practical results may better be achieved by applying the law of a jurisdiction which has the greatest interest in the subject of litigation.⁹⁸

Once again this approach was ignored by the majority, and summarily rejected by Kirby J as being 'hopelessly confused, chaotic [and] unpredictable'.⁹⁹ This may have been overly hasty. Although the application of the proper law of the tort as a distinct principle has been repeatedly rejected as too uncertain,¹⁰⁰ it may have merit as a guideline for displacing a general *lex loci delicti* rule. In *Neumeier v Kuehner*,¹⁰¹ Fuld J argued that in certain circumstances it may be worth sacrificing certainty in favour of justice and recognising more important connections between the litigation and another law area. At any rate this principle warranted further consideration by an Australian court looking to establish a new rule for determining the choice of law for torts with international elements.

Clearly the High Court has misconceived the international approaches that it claims to have reflected. While the *lex loci delicti* rule has indeed gained international acceptance, this is only one half of the equation. To parallel the argument made by Elizabeth James in her note on *Pfeiffer*,¹⁰² by not fully exploring the roads taken by Canada, the UK and the USA, the High Court may have again missed an opportunity to establish a more sophisticated choice of law rule that balances certainty and flexibility in international tort cases.

96 The 'proper law of the tort' was mooted as an option for a new choice of law rule: above n54 at para 6.16.

97 *Tolofson*, above n60 at 309.

98 *Neumeier v Kuehner* 286 NE 454 (1972), 459 (Fuld J). Note that this method was adopted in *Schmidt v Driscoll Hotel* 82 NW 2d 365 (1957), and followed in *Babcock v Jackson* 191 NE 2d 279 (1963).

99 Kahn-Freund, reviewing Morse, *Torts in Private International Law* (1979) 50 *British Year Book of International Law* 200 at 201; cited in above n5 at 127 (Kirby J).

100 See for example above n54 at paras 6.18–6.19.

101 *Neumeier v Kuehner*, above n98 at 456 (Fuld J).

102 James, above n63 at 158.

7. *Conclusion*

Renault represents a major landmark in the development of Australian private international law. Most notably, it has finally banished the outdated double actionability rule, Kirby J's 'breath from a bygone age',¹⁰³ from Australian choice of law principles, and opened the way for the development of more appropriate rules for our modern existence. It also appears to have installed a greater measure of certainty for choice of law questions, and ensured a uniform approach in cases involving intranational and international torts.

Nonetheless, the High Court's obsession with certainty and predictability may come at the expense of substantive justice. While this spectre did not arise in this case, it is not hard to imagine scenarios where the rigid application of a foreign law could deprive a party of his or her reasonable expectation that the claim will be determined according to the laws (and statutory compensation schemes) of the home forum. Therefore, while the *lex loci delicti* is certainly an improvement on the old rules, this decision does not appear to mark the end of the reform process. Further judicial or even legislative consideration of our choice of law rules for international torts will be necessary to ensure that the process started in *Pfeiffer* and carried on in *Renault* is continued, to improve both certainty and individual justice in this troublesome area of the law.

103 Above n5 at 132 (Kirby J).