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The Domestic Liability of Australian Mining Companies for International Environmental Harm

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SUMMARY

This paper explores the domestic liability of Australian mining companies for environmental damage caused by operations in other countries. It examines the jurisdictional arguments that companies may raise to prevent litigation reaching Australian courts, including foreign land limitations, forum non conveniens and choice of law arguments. It then considers recent developments in Australian tort law in light of relevant jurisdictional issues. The High Court's departure from the text of proximity and its replacement with concepts of "vulnerability" and "control", its recent expansion of the duty to avoid the negligent infliction of pure economic loss, trends in the test for breach of duty and in the interpretation of statutory defences are examined. The paper also reviews current proposals for an international code of conduct for multinational mining corporations and other non-governmental options for reform. The paper concludes that Australian mining companies face considerable risk of successful proceedings being brought in Australian courts for environmental harm occurring overseas. In order to avoid such liability in the future, companies should implement best practice environmental management standards for foreign mining operations and negotiate agreements with local communities for the life of the mine.

INTRODUCTION

The contamination of the Tisza River in Romania earlier this year focused international attention on the environmental management

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practices of transnational mining companies.[1] It sharpened community concerns over the environmental and human rights performance of Australian companies operating in developing countries.[2] The incident renewed calls for a binding code of practice for companies operating in places with lower environmental standards than their home state,[3] and threats of litigation in Romanian, Hungarian and Australian courts.[4] In light of these threats, this paper explores the domestic liability of Australian mining companies for environmental damage caused by operations in other countries.

Part One examines the jurisdictional arguments that companies may raise to prevent litigation reaching Australian courts, including foreign land limitations, forum non conveniens and choice of law arguments. It concludes that Australian courts have been willing to hear actions brought by foreign nationals against Australian residents. This exposes Australian companies to higher risks of domestic liability than their British or American counterparts, although they may still avail themselves of defences that applied in the country in which the incident occurred. Part Two considers recent developments in Australian tort law in light of the jurisdictional issues examined in Part One. The High Court's departure from the text of proximity and its replacement with concepts of "vulnerability" and "control", its recent expansion of the duty to avoid the negligent infliction of pure economic loss, trends in the test for breach of duty and in the interpretation of statutory defences are examined. Part Two concludes that, to the extent that choice-of-law rules involve some consideration of Australian torts law, foreign plaintiffs' cases will be considerably strengthened by recent developments. Part Three considers current proposals for an international code of conduct for multinational mining corporations. It concludes that binding obligations are unlikely to arise in the near future, but may form part of further investment

[1] 378,500 litres (or 100,000 m^3) of cyanide waste entered the Szamoz and Tisza Rivers from a tailings dam at the Baia Mare gold mine in Romania, operated by Aural, a joint venture between the Romanian Government and Australian Esmerelda Explorations. Initial concentrations of cyanide were reportedly 327-700 times the legal limits. The poisoning of the River, which flows into the Danube River, was described by the European commission as a "European dimension catastrophe". For details of Esmerelda's operations in Baia Mare, see the Esmerelda web-site: www.esmerelda.com.au. For coverage of the incident from an environmentalist's perspective, see the web-site of the Mineral Policy Institute: www.mpi.org.au/features/esmerelda.

[2] See generally J Atkinson, *Undermined: The Impact of Australian Mining Companies in Developing Countries* (1998) Melbourne, CAA.

[3] L Brereton & N Bolkus, Media Release, *BHP and Ok Tedi: comprehensive review of environmental standards required*, 12 April 2000, located on the Mineral Policy Institute web-site (4 July 2000) www.mpi.org.au.

[4] Those threats were realised on 11 July 2000, when the Hungarian Government informed Esmerelda Exploration Pty Ltd of their intention to claim $181 million in damages arising from the January spill: ABC News Online, 11 July 2000: www.abc.net.au/news/2000/07/item200007110441435_1.htm (visited 11 July 2000). Yugoslavia announced 13 July its intention to claim about $3 million for the losses it has suffered.

liberalisation accords. The paper concludes that Australian mining companies face considerable risk of successful proceedings being brought in Australian courts for environmental harm occurring overseas. In order to avoid such liability in the future, companies should implement best practice environmental management standards for foreign mining operations and negotiate agreements with local communities for the life of the mine.

PART ONE: JURISDICTIONAL IMPEDIMENTS TO DOMESTIC LITIGATION

Domestic courts endeavour to respect the legal systems of other sovereign states. Several aspects of the rules of private international law will affect whether foreign plaintiffs are able to commence proceedings in domestic courts. This part examines those rules, drawing comparisons with the approach taken in other jurisdictions where relevant. It will be shown that the most significant hurdles facing foreign litigants are that claims based on damage to foreign land and property are precluded and that Australian courts that agree to hear foreign claims will nonetheless apply relevant foreign law.

The "Mozambique" Prohibition on Claims Over Foreign Land

Environmental harm that occurs in a foreign country is generally best addressed by the law of that country. Domestic courts are reluctant to hear claims based on damage to the territory of another state, because it risks interfering with the internal affairs of that sovereign state. The actions brought by Papua New Guinean villagers against Ok Tedi Mining Limited (OTML) and Broken Hill Proprietary Company (BHP) in the Supreme Court of Victoria are significant for being the first time that Australian courts have accepted jurisdiction over tortious damage to foreign territory.[5] In 1994, *Dagi*,[6] *Shackles*[7] *Ambetu*,[8] and *Maun*[9] brought proceedings in the Supreme Court of Victoria on behalf of themselves and others who had suffered loss as a result of the operation of the OK Tedi gold and copper mine in

[5] S Lee, "The Ok Tedi River: Papua New Guinea or the Parish of St Mary Le Bow in the Ward of Cheap?" (1997) 71 *Australian Law Journal* 602 at 603.
[6] *Dagi and Others v BHP Minerals Pty Ltd and Ok Tedi Mining Ltd*, No 5782 of 1994.
[7] *Barry John Shackles and Daru Fish Supplies Pty Ltd v BHP Minerals Pty Ltd and Ok Tedi Mining Ltd*, No 5980 of 1994. Shackles' claims were similar to those of Maun and the Marapka Clan. In addition, it claimed that Shackles and Daru had lost the ability to fish the river for commercial profits and for transport. *Shackles* Statement of Claim, at 6.
[8] *Ambetu and Others v BHP Minerals Pty Ltd and Ok Tedi Mining Ltd*, No 6861 of 1994.
[9] *Maun and Others v BHP Minerals Pty Ltd and Ok Tedi Mining Ltd*, No 6862 of 1994.

Papua New Guinea.[10] The plaintiffs alleged that OTML as operator and BHP as majority owner of the mine, polluted the Ok Tedi River system and modified its water flow.[11] The plaintiffs claimed that this adversely affected the residents of downstream riparian settlements and villages.[12]

In the original Statements of Claim, eight causes of action were pleaded:

- intentional and unlawful damage under the principle in *Beaudesert Shire Council v Smith*;[13]
- nuisance;
- trespass;
- negligence in polluting and contaminating the Ok Tedi River, land and flood plains; disposing of waste products so as to interfere with the use of the river, land and flood plains; causing the waters to become detrimental to human health; and interfering with the possession, occupation, use, enjoyment, ownership and customary rights of the plaintiffs;

[10] The plaintiffs apparently selected the Victorian Supreme Court because "they wanted Australians to see the damage an Australian company had caused to their land and their lifestyle". J Gordon, "OK Tedi: The Law Sickens from a Poisoned Environment" (1995) *Law Society Journal* (October) 58 at 60.

[11] BHP owns 52% of the mine, 18% is owned by Canadian Mettal Mining Corporation (a subsidiary of German Mettalgesellschaft), and the PNG Government owns 39%.

The Ok Tedi River is a tributary of the Fly River, a system that runs for over 700 miles. Waste from the mine is pumped directly into the Ok Mani River, which then flows into the Ok Tedi River.

Sedimentation has raised the river bed by an average of 5 metres, 10 metres in upper reaches. During peak production, suspended sediment levels in the river were predicted to increase by 1000%. Increased sediment has rendered the water unfit for human consumption and many villagers are reluctant to consume whatever fish species they catch, for fear that they are contaminated. From about 1990, the siltation of lagoons also prevented fish species from gaining access, resulting in a 50% pa drop in the barramundi harvest. This was exacerbated by the presence of copper in the waste water. Dissolved copper in average concentrations of about 15% can kill algae and affect the food chain. The first 70 kilometres of the Ok Tedi River have been assessed as "biologically dead", with significant changes to the species diversity and fish biomass along its length. By 1993, the fishing industry in the area had ceased to operate. Downstream in the Fly River, in the Gulf of Papua, local residents are complaining of severe bank erosion caused by the heavy traffic of ships travelling to and from the mine site.

For a discussion of the environmental impacts of the mine, see H Rosenbaum & M Krockenberger, *Report on the Impacts of the Ok Tedi Mine in Papua New Guinea*, ACF, Melbourne, 1993; H White, "Including Local Communities in the Negotiation of Mining Agreement: The Ok Tedi Example" (1995) 8 *The Transnational Lawyer* 303; A Fowler, "After the Gold Rush" *Four Corners*, ABC Television (10 April 2000). Earlier this year, the Chairman of BHP, Paul Anderson, described Ok Tedi as a "dysfunctional aspect of BHP's portfolio", acknowledging that the pollution problem was worse than expected. Fowler, ibid.

[12] The river level rise inundated about 8 square kilometres of surrounding forest land and drowned the small farm gardens along the banks: *Dagi* Statement of claim, op cit n 6, at 6-9. White, ibid, at 320; N Moshinsky, "The OK Tedi Mine Dispute" (1995) 69 *Law Institute Journal* 1114.

[13] (1966) 120 CLR 145, subsequently overruled in *Northern Territory v Mengel* (1995) 129 ALR 1.

- strict liability under the principle of *Rylands v Fletcher*;[14]
- breach of obligations imposed on OTML under two agreements made between OTML and the Government of PNG[15]; and
- breach of obligations imposed by the Ok Tedi Fifth Supplemental Agreement.[16]

Dagi and his co-claimants alleged that they were the possessors and occupiers of land adjacent to the OK Tedi River; the owners of the land; the riparian proprietors by custom and/or beneficially entitled to the use of the water from the river and surrounding flood plains. They also claimed to live on the land and flood plains and traditionally use the water from the river and flood plains. They claimed losses from degradation to the land by flooding; soil erosion from the banks of the river; loss of water for domestic and commercial purposes; and diminishing food sources because of drops in numbers of fauna. The Statements of Claim in the *Maun, Ambetu* and *Shackle* proceedings alleged that the plaintiffs lived on the land and traditionally used water from the Ok Tedi River.[17]

BHP made numerous interlocutory applications,[18] and only late in the proceedings did they seek leave to amend their defence to plead want of jurisdiction.[19] The application sought to rely, inter alia, on the

[14] (1868) LR 3 HL 330, abolished in Australia in 1994 in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

[15] Mining (Ok Tedi) Agreement ch No 363, at cl 5.1(k) (1976), Mining (Ok Tedi Supplemental Agreement) ch No 363A (1980). These agreements exempted Ok Tedi from PNG's environmental law and provided for minimal government supervision of mine operations. The 1980 Agreement required the construction of a tailings dam, on which construction commenced in 1983.

[16] The government permitted the temporary operation of the mine after the dam collapsed in 1984. The fifth supplemental agreement (Mining (Ok Tedi Fifth Supplemental Agreement) ch No 363E (1986) contained a Permanent Tailings Licence under which penalties were contemplated for failure to complete dam construction within a specified time. Under the sixth supplemental agreement, however, OTML was permitted to run the mine without a tailings dam until 1990. It was also required to monitor the river system for pollution, with the possibility that the government would consider requiring a tailing dam should pollution levels become too high. All constraints on tailings discharge into the river system were withdrawn in 1989. White, op cit n 11, at 326. *Dagi, Shackles, Ambetu and Maun v The Broken Hill Pty Co Ltd and Another* [1997] 1 VR 428 at 431 (hereinafter *Dagi et al*).

[17] *Dagi et al*, op cit n 16, at 432 and 457.

[18] The defendants made the following motions: to set aside judgment in default; to have the proceedings struck out as an abuse of process; to strike out the representative part of the proceedings based on technically deficient consent by the represented parties; to strike out the statement of claim as a defective pleading and on the basis that it was not properly particularised; to obtain security for costs; claims of contempt of court against the plaintiffs' solicitors and associated requests that they be ordered to discontinue commenting on the proceedings; to obtain an injunction preventing counsel for the plaintiffs from making further public comment and to extend the timetable for discovery. Slater & Gordon, "Who Is funding the Ok Tedi Litigation? (Information Sheet) (1995), cited in White, op cit n 11, at n 230. The attempt to strike out failed, as did the attempt to amend the defence. A challenge to the validity of the retainer agreement between the solicitors and plaintiffs was rejected, but an application to plead the statute of limitations was allowed.

[19] Gordon, op cit n 10, at 61.

Mozambique[20] principle that limits domestic courts' jurisdiction where it would involve a ruling on rights to land located solely within another's territory. The defendants argued that the plaintiff's claims were *local* actions that could only arise in PNG, rather than *transitory* actions that were not based upon claims over land located a foreign territory.

Byrne J ruled on the jurisdiction of the Supreme Court of Victoria in September 1995.[21] His Honour accepted that the principles underlying *Mozambique* were part of Australian law and were not supplanted by the exercise of a forum non conveniens discretion.[22] Byrne J did, however, limit the application of *Mozambique* to cases where the claim to title or possession is the "gravamen" or "foundation" of the cause of action:[23]

> " … at common law, the Court will refuse to entertain a claim where it essentially concerns rights, whether possessory or proprietary, to or over foreign land, for these rights arise under the law of the place where the land is situate and can be litigated only in the courts of that place. The claim must not merely concern those rights, it must essentially concern them. That is because the rights must be the foundation or the gravamen of the claim."[24]

Accordingly, Byrne J held that the court lacked jurisdiction over the *Dagi* claims for damages for trespass, private nuisance and negligence in relation to the PNG land and the Ok Tedi River because they were founded upon possessory rights to foreign land.[25] The gravamen or foundation of the *Maun*, *Ambetu* and *Shackles* causes of action in negligence was their *loss of amenity or enjoyment* of the

[20] *British South Africa Co v Companhia de Mocambique* [1893] AC 602. In *Mozambique*, the plaintiff alleged that the defendant had trespassed on the plaintiff's mine in South Africa. The court held that such a claim was not justiciable in an English Court of plenary jurisdiction because they could not enforce a decree regarding title or possession of foreign land.

[21] *Dagi et al*, op cit n 16. See the discussion in P Solomon, "The Ok Tedi: Papua New Guinea or the Parish of St Mary Le Bow in the Ward of Cheap? A Reply" (1998) 72 *Australian Law Journal* 231 at 232.

[22] *Dagi et al*, op cit n 16, at 434 and 432. The forum non conveniens doctrine is discussed below notes 35-80 and accompanying text.

[23] *Dagi et al*, op cit n 16, at 441.

[24] Ibid.

[25] Ibid, at 442, 447, and 451. The law of nuisance has traditionally only granted rights to sue to persons with a proprietary interest in land. This approach is inconsistent with the focus of the tort, which is interference with the *use and enjoyment* of land – rights which do not depend on ownership or other legal interest. The UK courts took tentative steps in the 1990s to acknowledge this inconsistency, permitting a plaintiff occupier to bring proceedings in nuisance against a harassing phone caller: *Khorasandjian v Bush* [1993] QB 727. This trend was reversed in 1998, however, when the House of Lords held unanimously that title to sue in nuisance depended on interference with recognised property rights: *Hunter v Canary Wharf Ltd* [1997] AC 655. The position in Australia is uncertain, but may be more consistent with the *Khorasandjian* approach, see *Lanestar Pty Ltd v Arapower Pty Ltd* (unreported CA (Qld), 22 November 1996, per Fitzgerald P, Pincus JA & Moynihan J), and *Animal Liberation (Vic) Inc v Gasser* [1991] 1 VR 51.

land and this was not founded on possessory or proprietary rights to the land itself.[26] On this analysis, the *Mozambique* principle did not preclude the Supreme Court of Victoria from exercising jurisdiction.[27] A similar result is likely to follow from the claim of the Hungarian and Yugoslavian governments in the bankruptcy proceedings of Esmerelda Exploration Ltd. The governments are claiming $181.7 and $3 million respectively, for loss of livelihood and profits from fishing and loss of tourism suffered by their nationals.

Prominent private international lawyers have criticised the *Mozambique* principles.[28] Davis argues that the Common Law rules relating to jurisdiction over foreign land are no longer relevant in any superior court in Australia.[29] New South Wales abolished the *Mozambique* rule with the *Jurisdiction of Courts (Foreign Land) Act* 1989 (NSW), s 3 of which provides that: "The jurisdiction of any court is not excluded or limited merely because the proceedings relate to, or may otherwise concern land or immovable property situated outside New South Wales."

This broad conferral of jurisdiction is qualified by s 4 of the Act, which gives a New South Wales court the discretion to decline jurisdiction "if it considers itself to be an inappropriate forum". The New South Wales reform was introduced to address dissatisfaction with the *Mozambique* rule, and to conform to the removal of such limitations *within* Australia by the complementary cross-vesting legislation.[30] The cross-vesting legislation of every state and territory obliges the Supreme Court of each jurisdiction to consider whether it would provide an appropriate forum for the resolution of a matter affecting foreign land, *regardless* of whether the matter concerned title to land, rights to its possession or trespass on it.[31] Davis suggests that the *Dagi* litigation might have been "argued differently" without invoking the *Mozambique* limitation at all. That is, had the plaintiffs used the New South Wales legislation combined with the respective cross-vesting legislation, the Supreme Court of Victoria might have

[26] *Dagi et al*, op cit n 16, at 451.

[27] Subject to the other jurisdictional requirements being satisfied. Following the ruling that the court had jurisdiction over several claims, the parties reached an out of court settlement in 1996. The plaintiffs are recommencing proceedings against the defendants on the basis of alleged non-compliance with the terms of the settlement. Slater & Gordon Media Release, *Ok Tedi 2*, 11 April 2000, located on the Mineral Policy Institute web-site (2 July 2000) www.mpi.org.au.

[28] See eg, P Nygh, *Conflict of Laws in Australia* (6th ed), Butterworths, Sydney, 1995, at 115 and M Davis, S Ricketson & G Lindell, *Conflicts of Laws: Commentary and Materials*, Butterworths, Sydney, 1997, at 166.

[29] J Davis, "The Ok Tedi River and the Local Actions Rule: A Solution" (1998) 72 *Australian Law Journal* 786 at 787.

[30] Ibid, at 787; E Sykes & M Pryles, *Australian Private International Law* (3rd ed), Law Book Co Ltd, Sydney, 1991, at 61.

[31] *Jurisdiction of Courts (Cross Vesting) Act* 1987 (NSW), s 4 and its equivalent in every state and territory.

been able to take jurisdiction over the proceedings, even to the extent that they were based upon a connection to PNG land.[32]

The Rule Against Intervention in the Activities of a Foreign State

Australian courts will not judge the conduct of a foreign government within its own territory.[33] Applying this deferential approach to state actions, Byrne J in the Ok Tedi proceedings held that claims based on breaches of the OTML Agreements and PNG legislation were not justiciable because the matters raised "had the hallmarks of an act of government, and it was not for a court of a foreign state to intrude into this activity".[34] Where, therefore, the behaviour of the foreign government is inextricably linked with the activities of the mining companies, without any independent basis for claim, Australian courts will not entertain jurisdiction.

The Forum Non Conveniens Discretion

The Ok Tedi cases demonstrate the willingness of at least the Supreme Court of Victoria to permit amendments to Statements of Claim that give the foreign plaintiff an amenable alternative forum. Provided future environmental plaintiffs do not base their claims on possessory or proprietary rights to foreign land, the *Mozambique* principle will not operate. Plaintiffs will, however, have to overcome the court's discretionary application of the forum non conveniens doctrine.[35] This Common Law doctrine gives courts a general discretion to stay or dismiss proceedings where it appears that they are an inappropriate forum in which to hear a matter.[36] It has proved to be instrumental in halting proceedings in several prominent international personal injury cases involving multinationals, including claims based on the 1984 Bhopal disaster in India and the claim against Shell by the family of executed Nigerian activist, Ken Saro-Wiwa.[37]

[32] Davis, op cit n 29, at 788.

[33] The principle of state immunity may now be limited to conduct related to the traditional public functions of government: *Buttes Gas and Oil v Hammer* [1982] AC 888.

[34] *Dagi et al*, op cit n 16, at 454.

[35] Ibid, at 432. It is worth noting that the defendants in the Ok Tedi proceedings failed to argue that the court should decline to accept jurisdiction on the grounds of forum non conveniens: Moshinsky, op cit n 12, at 1117.

[36] W Harris, "Life after Voth v Manildra Flour Mills Pty Ltd: the Application of forum non conveniens by Australian Courts in Transnational Proceedings" (1992) 22 *Queensland Law Society Journal* 21.

[37] Both actions were brought in the United States pursuant to the US *Alien Tort Claims Act* 28 USC 1350 (1994). That Act provides that "The district courts shall have original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a

The traditional forum non conveniens test, articulated in *St Pierre v South American Stores*,[38] provides that a court may not refuse to exercise its jurisdiction unless it "would work an injustice because it would be oppressive or vexatious to [the defendant] or would be an abuse of process in some other way".[39] Defendants seeking a relocation of proceedings found it difficult to satisfy the *St Pierre* approach, because it required proof that the plaintiff was not acting in good faith.[40] United States and British courts have substantially modified the traditional "abuse of process" test, preferring a "most suitable" or "most appropriate" forum approach. United States courts dismiss cases on forum non conveniens grounds "whenever, on balance, forum contacts [were] more strongly in favour of a foreign forum".[41] The "most appropriate forum" approach is routinely applied to stay proceedings involving foreign plaintiffs and United States resident defendants.[42] In the United Kingdom, courts have stayed proceedings brought by a foreign plaintiff where the plaintiff failed to show that England was clearly the appropriate forum in which the case should be tried in the interests of all the parties and the ends of justice.[43]

Australia has not followed the United States and United Kingdom forum non conveniens jurisprudence. In *Oceanic Sun Line Special Shipping Co Inc v Fay*,[44] the High Court asked whether permitting an action to remain in the local court would be vexatious or oppressive.[45] Of the discretion to dismiss proceedings, Deane J said:

treaty of the United States". It covers breach of definable, universal, obligatory norms that are the object of concerted international attention. B J Kieserman, "Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act" (1999) 48 *Catholic University Law Review* 881 at 900-901, notes 107-108 and the references therein. US courts have taken 3 approaches to ATCA claims: permitting suits for heinous violations of international law; granting an implicit right to sue and applying Federal Common Law; and interpreting the Act as a forum-shifting statute for transitory torts and applying the forum state's choice of law rules which in the case of the United States means the law of the place in which the wrong occurrred. Ibid at n 22, citing B Stephens & M Ratner, *International Human Rights Litigation in United States Courts* (1996). Most actions have been dismissed for lack of subject matter and on forum non conveniens grounds. Ibid, at n 26. Courts have declined to recognise environmental harm as grounding an action under the ATCA: *Beanal v Freport McMoRan Inc*, 969 F Supp 362 at 384. See also P Prince, "Bhopal, Bougainville and OK Tedi: Why Australia's Forum Non Conveniens Approach is Better" (1998) 47 *International Comparative Law Quarterly* 573 at 592.

[38] [1936] 1 KB 383 (hereinafter *St Pierre)*.

[39] Ibid, at 398, per Sir Leslie Scott LJ.

[40] M Pryles, "The Struggle for Internationalism in Transnational Litigation" (1987) 61 *Australian Law Journal* 434 at 435.

[41] Prince, op cit n 37, at 574.

[42] The US Supreme Court approved this approach in *Piper Aircraft Co v Reyno* 454 US 235 (1981).

[43] *Berezovsky v Michaels and Others; Glouchkov v Michaels and Others* [2000] UKHL 25, 11 May 2000, located at www.bailii.org/uk/cases/UKHL/2000/25.html (visited 10 July 2000) per Lord Hoffman, citing *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 (hereinafter *Spiliada)*.

[44] (1988) 165 CLR 197 (hereinafter *Oceanic)*.

[45] Ibid, at 247-248 per Deane J, Gaudron J concurring at 265. See L Collins, "The High Court of Australia and Forum Conveniens: The Last Word" (1991) 107 *The Law Quarterly* 182 at 183.

> "[t]hat power is a discretionary one in the sense that its exercise involves a subjective balancing process in which the relevant factors will vary … The power should only be exercised in a clear case and the onus lies on the defendant to satisfy the local court in which the particular proceedings have been instituted that it is so inappropriate a forum for their determination that their continuation would be oppressive and vexatious to him. Ordinarily, a defendant will be unable to discharge that onus unless he can identify some appropriate foreign tribunal to whose jurisdiction the defendant is amenable and which would entertain the particular proceedings at the suit of the plaintiff. Otherwise, that onus will ordinarily be discharged by a defendant who applies promptly for a stay or dismissal if he persuades the local court, that having regard to the circumstances of the particular case and the availability of the foreign tribunal, it is a clearly inappropriate forum for the determination of the dispute between the parties."[46]

Despite differences in the reasoning of each member of the majority, *Oceanic* reflected the High Court's desire to adhere to established Australian authority;[47] to recognise the plaintiff's right to select the forum;[48] to treat judicial discretionary powers cautiously;[49] and to limit the potential injustice worked by the broad forum non conveniens in cases where the foreign law provides no effective remedy.[50] The High Court clarified its view of the forum discretion in *Voth v Manildra Flour Mills Pty Ltd*.[51] It supported the test enunciated by Deane J in *Oceanic*,[52] quoted above, adding that a plaintiff is prima facie entitled to the jurisdiction it has regularly invoked,[53] unless it can be established that the forum chosen is "clearly inappropriate."[54]

The majority in *Voth* also concluded that the discussion by Lord Goff in *Spiliada*[55] of "relevant connection factors" would assist in determining whether the chosen forum was "clearly inappropriate".[56] The connecting factors include:

[46] *Oceanic*, op cit n 44, at 247-248 per Deane J.
[47] Ibid, at 253 per Deane J.
[48] Ibid, at 239 per Brennan J, at 252 per Deane J.
[49] Ibid, at 239 per Brennan J, at 265 per Gaudron J.
[50] Ibid, at 254 per Deane J. See also Collins, op cit n 45, at 182, and generally, Nygh, op cit n 28, at 103.
[51] (1990) 171 CLR 538 per Mason CJ, Dean J, Dawson J and Gaudron J at 552 (hereinafter *Voth)*.
[52] *Oceanic*, op cit n 44, at 247-248 per Deane J.
[53] Ibid, at 241.
[54] Ibid, at 248.
[55] Op cit n 43, at 478.
[56] *Voth*, op cit n 51, at 564-565, per Mason CJ, Deane, Dawson and Gaudron JJ. In *The Rothnie* [1996] 2 Lloyd's Rep 206, the UK courts confirmed that the connecting factors were more important than personal or juridical advantage.

- any significant connection between the forum and the subject matter of the action; [57]
- the places of residence business of the parties;[58]
- location of witnesses and evidence;[59]
- the law governing the transaction; [60]
- the existence of an alternative forum abroad;[61]
- existence of pending proceedings in a foreign court;[62]
- the presence of a jurisdiction clause in an agreement between the parties;[63] and
- personal or juridical advantage (including the availability of greater damages in the forum, the existence of a more favourable limitation period, better trial procedures and the existence of assets within the forum for the satisfaction of any judgment obtained).[64]

In *Voth*, the court granted a stay despite their recognition that the plaintiff is entitled to seek personal or juridical advantage.[65] Since *Voth*, the Federal Court and the Supreme Court of New South Wales have recognised the plaintiff's right to juridical advantage and in some instances have applied a "liberal view" of what constitutes advantage.[66] In particular, Australian courts have refused to grant stays where they consider foreign courts less able to apply Australian statute law in a manner favourable to the plaintiff.[67] Most recently, however, in *Laminex (Australia) Pty Ltd v Coe Manufacturing Co*,[68]

[57] *Spiliada*, op cit n 43, at 478.
[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Ibid, at 477. In *Oceanic*, however, Deane J suggested at 248 that the identification of an alternative, competent forum is not a precondition to a stay being granted.
[62] *McHenry v Lewis* (1883) 22 Ch D 397 at 399 per Jessel MR. In such cases, the defendant is said to be "doubly vexed".
[63] R Garnett, "Stay of Proceedings in Australia: A 'clearly inappropriate' test?" (1999) 23 *Melbourne University Law Review* 30 at 62-63. Where exclusive jurisdiction clauses are incorporated into an agreement, courts apply a "strong reasons" test to prevent a stay. See, eg, *Williams v The Society of Lloyds* [1994] 1 VR 274; *Leigh-Mardon Pty Ltd v PRC Inc* (1993) 44 FCR 88; *CSP Computer Security Products Pty Ltd v Security Dynamics Technologies Inc* (unreported, Federal Court of Australia, Heery J, 12 March 1996).
[64] *Spiliada*, op cit n 43, at 475.
[65] *Voth*, op cit n 51, at 57.
[66] Garnett, op cit n 63, at 46.
[67] *DA Technology Australia Pty Ltd v Discreet Log Inc* (unreported, Federal Court of Australia, 10 March 1994) In this case, there was no relief equivalent to s 53 of the *Trade Practices Act* 1974 (Cth); *CE Heath Underwriting & Insurance (Australia) Pty Ltd v Barden* (unreported, Supreme Court of New South Wales, Rolfe J, 19 October 1994) In this case, most connecting factors pointed to England as the most appropriate forum, but a stay was refused because English courts would be unlikely to apply the *Trade Practices Act* 1974 (Cth) and *Fair Trading Act* 1987 (NSW) satisfactorily.
[68] Unreported, Supreme Court of NSW, James J, 19 December 1997.

the New South Wales Supreme Court sought to reinstate the position in *Voth*, holding that a defendant would be disadvantaged if a plaintiff could seek similar relief at home.[69]

The alleged tort in *Voth* was committed in the United States State of Missouri, that being where the defendant had performed the act that gave rise to the damage. The defendant resided and worked in Missouri, the alleged damage was referable to the United States taxation law; and the greater part of the evidence was in Missouri.[70] Applying its re-stated principles, the High Court was satisfied that the Australian court was a "clearly inappropriate forum" and granted a stay of proceedings. The court ignored the benefits available to the plaintiff in terms of recovery of costs and damages had the action continued in New South Wales and not the United States.[71]

Since *Voth*, orders for a stay of proceedings have only been issued in about 20 percent of cases in which the defendant is an Australian resident or corporation.[72] In each case, however, the ultimate decision to grant or deny the stay of proceeding has depended upon specific facts. In *Williams v The Society of Lloyds*,[73] the Supreme Court of Victoria held that since the evidence was located in London and was "likely to be extremely large in amount, it would be vexatious and oppressive to the defendants if the trial were to take place in Victoria".[74] *Williams* demonstrates that all connecting factors must be taken into account and highlights the benefit to defendants if a large proportion of the evidence and witnesses are located in a foreign jurisdiction. By contrast, however, the plaintiffs, the damage and much of the evidence in the Ok Tedi litigation were located in Papua New Guinea (PNG). Despite this, the Supreme Court of Victoria upheld the appropriateness of its forum for pursuing the litigation.

[69] Garnett, op cit n 63, at 48. The court was satisfied that equal relief to that sought under Australian legislation was available under US statute law.

[70] Collins, op cit n 45, at 183.

[71] Garnett, op cit n 63, at 35.

[72] Ibid, at 40.

[73] For example, connecting factors such as the place in which the wrong occurred, the location of the evidence and witnesses were central to the issuing of a stay in *Williams v The Society of Lloyds* [1994] 1 VR 274 at 325. In that case, a Victorian resident conducted insurance business with two English companies, including the defendants. The defendants obtained a stay because the action related to conduct almost entirely performed in the UK and went "to the very foundation of the conduct of Lloyd's market in London", and because substantially all the evidence (oral and documentary) was in the UK.

See also, *Banque Paribas v Jarrett* (unreported, Supreme Court of Victoria, Orminston J, 25 July 1991) (the foreign plaintiff had chosen to forego advantages by bringing proceedings in Victoria and not England); *Prebble v Australian Broadcasting Corporation* (unreported, Supreme Court of NSW, Levine J, 6 September 1996) (a New Zealand politician sought a stay against the ABC for broadcasting defamatory material. The defendant was Australian and the action arose entirely in Australia); *James Hardie Industries Pty Ltd v Grigor* (unreported, Supreme Court of NSW, Court of Appeal, Spigelman CJ, Mason P and Beazley JA, 18 June 1998) (New Zealand defendant was denied a stay of proceedings in a liability claim. The majority stated that there were strong policy reasons for an Australian court to exercise jurisdiction).

[74] Garnett, op cit n 63, at 40.

Whether this outcome would have been different had the defendant been allowed to pursue a forum non conveniens defence is now a matter of conjecture.

Australian courts have granted stays when the plaintiff has commenced proceedings against the defendant in another jurisdiction. In such circumstances, the defendant is said to be "doubly vexed",[75] and allowing the proceedings to continue is likely to lead to oppression and vexation. In *Discovision Associates v Distronics Ltd*,[76] for example, the Supreme Court of Victoria granted a stay of local proceedings after the plaintiffs commenced proceedings in two other jurisdictions. The claims in those proceedings, although not identical, all arose from the same facts.[77] In such circumstances, the court concluded that continuing the action would "unfairly burden" the defendants.[78]

Summary

In the United States and United Kingdom, resident corporations defending allegations of environmental damage in developing countries have obtained dismissals in most cases. The Australian courts' refusal to adopt this forum non conveniens approach has made Australian courts more fertile locations for claims against Australian companies in tort.[79] The application of the forum non conveniens principles will depend on the particular facts of each case. The onus of proving domestic courts to be a vexatious forum will be discharged if the defendant can show that the cause of action arose outside the forum; and that the burden imposed on the defendant by having to appear in the forum outweighs any legitimate advantage to the plaintiff.[80] Defendants seeking a stay of proceedings on these grounds should identify *all* the connecting factors in relation to the elements of the cause of action and the conduct of the proceedings.

Choice-of-Law Rules

Even when a court agrees to hear a case involving a foreign tort, it must determine the case by reference to complex rules relating to the choice of law. Procedural requirements, narrowly defined, are

[75] *Mc Henry v Lewis* (1833) 22 Ch D 394 at 399.
[76] (1998) 39 IPR 140 at 140.
[77] Ibid, at 145.
[78] Ibid, at 146.
[79] Prince, op cit n 37, at 592.
[80] *Westpac Banking Corp v P & O Containers Ltd* (1991) 102 ALR 239 at 243-244, per Pincus J.

governed by the law of the forum.[81] In respect of substantive law, four alternatives arise:[82]

1. Courts may ignore the law of the foreign state and apply the law of the forum (lex fori), which would encourage forum shopping.
2. Courts may apply the law of the place in which the wrong occurred (the lex loci delicti), which offers certainty, but may not be the most appropriate law on the facts.
3. Courts may apply the law of the jurisdiction with the greatest concern, because of its relationship with the occurrence or with the parties (the proper law of the tort).[83]
4. Courts may apply *both sets of law*, requiring the plaintiff to meet the tests for liability set by both the lex fori and the lex loci delicti.

Until very recently, the fourth approach – sometimes referred to as the "double actionability" rule – has prevailed in Australia for both international and interstate torts.[84] In the *Ok Tedi* litigation, Byrne J held that to succeed in the Supreme Court of Victoria, the plaintiffs had to show:

> "[f]irstly, that the circumstances giving rise to the claim are of such a character that, if they occurred in Victoria (lex fori), 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; further, the act must not have been justifiable by law of the place where the wrong occurred (lex loci delicti); and that by the law of the (lex loci delicti) place in which the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind that the plaintiff seeks to enforce."[85]

[81] Nygh, op cit n 28, Ch 16. In *Pfeiffer*, the High Court held that laws relating to the existence, extent or enforceability of remedies, rights and obligations should be regarded as substantive laws: *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36, 21 June 2000, C14/1998, at para 102.

[82] Nygh, op cit n 28, at 341.

[83] Derived from *Babcock v Jackson* (1963) 191 NE 2d 279.

[84] *Breavington v Godleman* (1988) 169 CLR 41, at 110-111, per Brennan J: "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 arise out of circumstances of such a character that, if they had occurred within the territory of the forum, a cause of action would have arisen entitling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce: and 2. By the law of the place in which the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind which the plaintiff claims to enforce. This restatement is narrower in expression than the traditional formulation of the *Phillips v Eyre* conditions which speak of a 'character that … would have been actionable' and 'justifiable'. It defines more precisely the issues which are referred for determination to the lex fori and the lex loci respectively."

[85] *Dagi et al,* op cit n 6, at 443 citing *Phillips v Eyre* [1870] LR 6 QB 1, as expanded in *Breavington v Godleman* (1988) 169 CLR 41, at 110-111, *McKain v RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1 at 39 (*McKain),* and *Stevens v Head* (1993) 176 CLR 433.

On the double actionability approach, the act must give rise to civil liability in respect of the head of damages that the plaintiff is seeking to claim, and there must be identity between the persons by whom and to whom the obligation is owed in both countries.[86] It is presumed that the law of the place of the wrong is comparable to that of the forum, *unless* the defendant proves otherwise.[87] Accordingly, Common Law negligence claims will be defeated if the defendant can point to rules limiting liability or statutory or other regulatory instruments of the forum country or the host country that permitted the conduct forming the basis of the cause of action.

The defendants in the Ok Tedi litigation admitted discharging tailings into the Ok Mani River. But they argued that the plaintiffs' rights were governed solely by PNG law, and that the environmental impacts were "the necessary and unavoidable consequence of the lawful, reasonable and proper operation of the mine and the discharge of the tailings as duly authorised by and under the law of PNG …"[88] The availability of the statutory defence was limited, however, because the defendants had been intimately involved in drafting the instruments in question.[89] Had it been possible to demonstrate an arm's length involvement with the development of the legislative regime, the defendant would probably have been able to rely upon their statutory authority (although Australian courts may have taken a more robust approach to their interpretation[90]). The issue will be more complicated in the case of Hungary's claim against Esmerelda, because the act giving rise to the damage occurred in Romania. Is the lex loci delicti Romanian law or Hungarian? The answer to this question will be critical in deciding the operation of defences, such as statutory authorisation. The general principle in negligence is that no cause of action arises without proof of damage. Since damage is an essential ingredient, it might be argued that the tort is not committed until damage occurs, and it may then be said to

[86] *McKain*, ibid at 39, per Brennan J (Dawson, Toohey & McHugh JJ concurring).

[87] *Hunter Grain Pty Ltd v Hyundai Merchant Marine Co Ltd* (1993) 117 ALR 507, at 524 per Shepherd J.

[88] Amended defence (amended pursuant to leave granted by the Hon Mr Justice Byrne on 15 March 1995), *Maun and Others v The Broken Hill Pty Co Ltd and Ok Tedi Mining Ltd*, No 6862 of 1994, 6 (Maun amended defence). This defence was based on the "Eighth Supplementary Agreement", the proposed Papua New Guinea Bill and the mine's leases and operating licences. See Moshinsky, op cit n 12, at 1116.

[89] *Dagi et al*, op cit n 6, at 431. The PNG Government's attempt to pass legislation that made it an offence for locals to bring actions in foreign courts was abandoned when the Supreme Court of Victoria found BHP to be in contempt of court for its role in drafting the legislation. Cummins J ruled in September 1995 that BHP's conduct constituted a contempt (*Dagi v The Broken Hill Pty Co Ltd and Ok Tedi Mining Ltd*, unreported, 25 September 1995) but this decision was reversed on appeal: *BHP Pty Ltd v Dagi and Others* [1996] 2 VR 117.) Had it proceeded without BHP's intervention, no cause of action would have been sustainable because civil liability would have been extinguished in Papua New Guinea – the lex loci deliciti. See Gordon, op cit n 10, at 62 and Moshinsky, op cit n 12, at 1116.

[90] The scope and operation of that defence is discussed in more detail in Part Two below.

have been committed in the place where the damage occurs. On this approach, Hungarian law will apply and the defendants will have no defence to liability. An alternative view in the case of a "downstream" claim, is that the damage occurs the moment the river is polluted upstream because at that point, the flow of the river makes damage downstream inevitable. Were this view adopted, Romanian law would govern the issue of liability. In the context of choice of law determinations, the Privy Council has suggested an ex post facto assessment of the place of the tort: "The right approach is, when the tort is complete, to look back over the events constituting it and ask the question: where in substance did the cause of action occur?"[91]

Applying this test, courts have concluded that the mere fact of the location of damage is insufficient to make that the place of the wrong. Instead, the focus has been on "the place at which the activity of the defendant was directed".[92] How the courts will approach this tricky issue in relation to pollution damage remains unclear.

In June 2000, the High Court revised its choice of law test for intrastate torts.[93] It rejected what it described as the "double actionability" rule that had applied previously, in favour of the lex loci delicti. In doing so, the High Court acknowledged that its departure from established Australian and United Kingdom principles was necessitated by the relationship between the Australian Constitution the Common Law.[94] The court made clear, however, that it was *not* ruling upon the issues that arise in an international context, [95] so the test applied by Byrne J remains applicable, at least for the time being.

The choice of law rules applied by Australian courts represent a significant hurdle to foreign claimants. Few companies undertake activities overseas that are illegal in the host country. Indeed, the primary concern of environmentalists is that the host state has agreed to lower standards, or waived liability, in a "race to the bottom" to attract investment. Where the host government enacts statutory defences or authorises the activities in question, Australian courts are bound to consider these laws. Subject to the discussion of statutory authorisation below, the application of host state law will preclude many claimants from recovery.

[91] *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 at 468 per Lord Pearson.
[92] Nygh, op cit n 28, at 351.
[93] *Pfeiffer*, op cit n 81.
[94] Ibid, at para 34.
[95] The joint judgment of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ footnoted this clarification with a reference to *Berezovsky v Michaels and Others, Glouchkov v Michaels and Others* [2000] UK HL 25, 11 May 2000. That case does not, however, raise choice of law issues. Rather, it considers the UK forum non conveniens test in relation to the tort of defamation.

PART TWO: APPLICATION OF SUBSTANTIVE LEGAL PRINCIPLES – IMPLICATIONS FOR FOREIGN CLAIMANTS OF DEVELOPMENTS IN NEGLIGENCE LAW

While it seems fairly clear that a local court will consider and apply the law of the place in which the tort occurred, that law is presumed to be consistent with Australian principles unless the defendant proves otherwise. Several recent developments in Australian negligence principles are therefore pertinent to an examination of the domestic liability of Australian companies for foreign environmental damage. Four key themes have emerged. Firstly, proximity has been replaced as the general determinant of the existence of a duty of care between the defendant and the plaintiff. Courts now apply a fluid test that considers such factors as the vulnerability of the plaintiffs and the control of the defendants over the risks to which the plaintiff is vulnerable. Secondly, these principles have recently been applied to permit recovery for pure economic loss, a special category of case to which the courts traditionally applied an "exclusionary rule" limiting recovery. Thirdly, the courts have recognised that in high-risk activities, the standard of care owed to a plaintiff may approach strict liability, and that compliance with industry standards may not necessarily demonstrate the exercise of reasonable care. Finally, it is possible that courts will construe narrowly legislative exclusions from liability and statutory defences. These themes are discussed in more detail in this Part.

The "Vulnerability" Test for Duty of Care

Until 1997, the concept of proximity was the unifying conceptual determinant for the existence of a duty of care in negligence.[96] Proximity involved a 2-step inquiry that required proof of a relationship of physical, circumstantial or causal closeness between the plaintiff and defendant, plus a consideration of the policy implications of finding that a duty of care arose.[97] The High Court abandoned the test in *Hill v Van Erp*,[98] recognising its inherent uncertainty and imprecision. Since *Hill v Van Erp*, courts have preferred to examine the particular facts of "difficult" cases and identify the special factors that justify or preclude the finding that a

[96] *Jaensch v Coffey* (1984) 155 CLR 549; 54 ALR 417; *Hackshaw v Shaw* (1984) 155 CLR 614; 56 ALR 417; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; 60 ALR 1; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR; 63 ALR 513; *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340; *Gala v Preston* (1991) 172 CLR 243.

[97] *Jaensch v Coffey*, ibid, at 444 per Deane J.

[98] (1997) 188 CLR 159; 142 ALR 687.

duty of care arises.[99] It is difficult to articulate a single set of elements common to every case. The underlying theme is a vulnerability on the part of the plaintiffs, arising from an inability to take precautions to protect themselves from the risks posed by the defendant.[100] The defendant owes that party a duty if they have actual or constructive knowledge of the risk, and exclusive control over measures required to reduce or minimise the risk.[101]

If the key determinants for establishing a duty of care are now vulnerability and control, foreign plaintiffs who live near or downstream from mining activities will almost certainly be able to show that mine operators owed them a duty of care. In very few cases could the defendant argue successfully that plaintiffs were in a position to protect themselves from risk posed by mine operations, short of fundamentally modifying their lifestyle. Nor will it be easy to show that they had no relevant control over the precautions required to reduce the risk.

Application of the Vulnerability Test to Cases of Pure Economic Loss

The reciprocal criteria of vulnerability and control pervaded the judgments of the High Court in *Perre v Apand*.[102] In seven separate judgments, the High Court held that the defendants owed the plaintiff potato farmers a duty to prevent their economic loss. The plaintiffs lost their right to access the Western Australian market by virtue of Western Australian quarantine legislation, which was triggered by Apand's negligent supply of contaminated seed to a farm within the relevant statutory radius of the plaintiff's farm. In so finding, the High Court confirmed its departure from the "exclusionary rule" that had applied to claims for pure economic loss arising from negligent conduct.[103] Mindful of the policy reasons for such a rule, the court

[99] *Pyrenees Shire Council v Day* (1998) 192 CLR 330; 151 ALR 147 (*Pyrenees)*; *Esanda Finance Corp Ltd v Peat Marwick Hungerfords (Reg)* (1997) 188 CLR 241; 142 ALR 750; *Perre v Apand Pty Ltd* (1999) 64 ALR 606; 73 ALJR 1190 (*Perre*); *Crimmins (as executrix of the estate of Crimmins dec'd) v Stevedoring Industry Finance Committee* (1999) 167 ALR 1 (*Crimmins)*.

[100] See, eg, *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, at 551; 120 ALR 42, per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; *Hill v Van Erp*, op cit n 96, at 186 per Dawson J (Toohey J concurring), and 216 per McHugh J; *Pyrenees* ibid, at 372-3 per McHugh J, 421 per Kirby J; *Perre*, ibid, at 1193-4 per Gleeson CJ, 1197-8 per Gaudron J, 1217 per McHugh J, 1231 per Gummow J, 1248 per Kirby J, and 1271 per Callinan J; *Crimmins*, ibid, at 12 per Gaudron J, 61 per Kirby J, and at 25-25 per McHugh J (Gleeson CJ concurring).

[101] See, eg, *Pyrenees* op cit n 99, at 362 per Toohey J, 372 per McHugh J, 389 per Gummow J, 420-1 per Kirby J; *Perre*, op cit n 99, at 1193-4 per Gleeson CJ, 1197-8 per Gaudron J, 1217 per McHugh J, 1230-1 per Gummow J, 1248 per Kirby J, 1253-4 per Hayne J, and 1270 per Callinan J; *Crimmins*, op cit n 99, at 13 per Gaudron J, 26 per McHugh J (Gleeson CH concurring); and 166 per Gummow J.

[102] Op cit nn 99-101.

[103] *Perre*, op cit n 99, at 1192 per Gleeson CJ, 1207-1210 per McHugh J, 1225-1226 per Gummow J, 1237-1239 per Kirby J, 1256 per Hayne J, and 1269 per Callinan J.

concluded that imposing a duty would not unfairly hinder the defendant's commercial autonomy. The various judgments drew attention to the following aspects of the case that justified the imposition of a duty:

- the defendants had knowledge of the plaintiffs as a limited class of people who would be affected by the supply of contaminated potatoes;
- liability would not be indeterminate because it was capable of realistic calculation;
- the defendant already owed a duty to the farmers to whom it supplied the potatoes;
- the defendant's supply of contaminated seeds to the farm breached South Australian legislation; and
- the plaintiffs were unable to protect their own interests.

Perre v Apand is extremely important in domestic claims for foreign environmental damage because of the impact of the *Mozambique* principle discussed in Part One. It will be recalled that Byrne J in the Ok Tedi litigation held that the Supreme Court of Victoria had no jurisdiction to decide on claims based on propriety or possessory rights over PNG territory. Instead, the plaintiffs had to limit their arguments to claims based on loss of amenity and subsistence rights that were not directly referable to property damage. Such a claim is analogous (albeit not identical) to a claim for pure economic loss, in so far as it does not depend on proof of any property damage on the part of the plaintiff. Similarly, the Hungarian Government's claim in respect of lost tourism income (which apparently plummeted in the period following international coverage of the spill) is also best described as a claim for pure economic loss. The High Court's application of basic negligence principles, subject to overriding questions regarding imposts on the defendant's commercial autonomy, may make it easier for foreign plaintiffs to bring such claims in the future.

Perre v Apand may easily be distinguished, however, in cases involving large numbers of plaintiffs. In the Ok Tedi litigation, the out of court settlement apparently applied to 30,000 villagers.[104] The Hungarian claim is being brought by the government, but on behalf of numerous affected individuals and industries. Courts hearing such claims in the future may resist imposing a duty on the defendant for pure economic loss because it would expose them to indeterminate liability to an indeterminate class in an indeterminate amount.[105] On

[104] Slater & Gordon, op cit n 19.
[105] *Ultramares Corp v Touche* 174 NE 441 at 444 (1931) per Cardozo CJ.

the other hand, courts may also recognise that the only reason that the action is being argued as a *quasi*-pure-economic loss claim is the peculiar operation of the *Mozambique* principle. Without the *Mozambique* principle, the plaintiffs could claim for property damage – a claim that is not subject to the same policy limitations.

The Variable Standard of Care for High-Risk Activities

A breach of a common law duty will be proved where it can be shown that the defendant failed to take the precautions expected of a reasonable company in its position. The High Court has emphasised that where the risks associated with an activity are very high, the standard expected of a defendant will also be high: "Indeed, depending on the magnitude of the danger, the standard or reasonable care may involve a degree of diligence so stringent as to amount practically to a guarantee of safety."[106]

In the case of environmental damage from mining incidents, a breach of duty may be argued in respect of several aspects of the event: the incident giving rise to the escape, the failure to have appropriate mitigation or response measures in place; and the failure to warn nearby residents or down-stream users of the dangers created by an incident. In assessing what a company should have done, courts will consider a range of factors, including:

- the nature and seriousness of the potential harm;
- the sensitivity of the receiving environment;
- the current state of technical knowledge for the activity;
- the different measures that might have been taken;
- the financial implications of the different measures;[107] and
- the beneficial uses to which the surrounding area is put.

Evidence that a company knew of the problems associated with an activity help to show that it should have taken precautions to avoid the risks.[108] This is not to say, however, that wilful blindness is an appropriate risk management strategy, since a failure to identify and prevent foreseeable, albeit unforeseen, risks will also constitute a breach of duty. Nor may companies rely on compliance with industry norms to satisfy their duty of care – courts may conclude that industry

[106] *Burnie Port Authority*, op cit n 100, at 554 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.
[107] The first five criteria are adapted from the *Environmental Protection Act* 1994 (Qld), s 36, which sets out the "general environmental duty" with which every person is expected to comply.
[108] *Rogers v Whitaker* (1992) 175 CLR 479; 109 ALR 625.

standards simply demonstrate that the entire industry is performing at an unacceptably low level in light of the risks posed by their conduct. Since the High Court's decision in *Rogers v Whitaker*[109] regarding a doctor's standard of care, courts around the country have held that in particular circumstances, compliance with professional or industry standards does not discharge a duty of care.[110]

Following the 1984 earthquake-induced collapse of an Ok Tedi tailings dam, OTML determined that the cost of an alternative was too high and the PNG Government withdrew its insistence on this requirement.[111] Leaving aside the issue of government acquiescence, the variable standard of care articulated in *Burnie Port Authority* may well lead to a conclusion that the decision to proceed without a dam was unreasonable, *despite* the high cost of dam construction. Continued operation of the mine is particularly open to scrutiny in light of a recent World Bank report recommending the decommissioning of the mine on environmental grounds.[112]

Critics of the Baia Mare incident in Romania argue that the precautions necessary to prevent cyanide leaks "amount to basic plumbing" and that an escape cannot be regarded as an accident: "it has to be bad design at the outset".[113] Even in cases where the defendant can show that the failure to construct a tailings dam was reasonable in the circumstances, plaintiffs may argue other breaches, such as a failure adequately to monitor mine operations, a failure to implement emergency mitigation, or a failure to warn downstream or local residents of risks. These claims may be stronger in cases where the operation of the mine itself is authorised by some form of licence or by statute.

Narrow Interpretation of Statutory Exclusion Clauses

Choice of law rules require local courts to apply the law of the territory in which the environmental damage and resulting losses occur, as well as the law of the forum.[114] Those foreign states may have issued licences or granted some other form of statutory approval that the company seeks to rely on as a defence to liability.

[109] Ibid.
[110] See, eg, *Mercer v Commissioner for Road Transport and Tramways (NSW)* (1937) 56 CLR 580; *Rogers v Whitaker* (1992) 175 CLR 479; 109 ALR 625; *EPA v Ampol Pty* Ltd (1993) 81 LGERA 433; *Ryan v Great Lakes Shire Council & Others* (1999) 102 LGERA 123.
[111] White, op cit n 11, at 312.
[112] World Bank, 7 March 2000, cited on the Minerals Policy Institute web-site: www.mpi.org.au (7 July 2000).
[113] P Younger (University of Newcastle UK) quoted in T Wesolowsky, "Cyanide Spill Points to Mining Safety Failures", 24 February 2000, located on the Mineral Policy Institute web-site: www.mpi.org (7 July 2000).
[114] Op cit nn 81-92 and accompanying text.

Australian courts have taken a cautious approach to the defence of statutory authority: only if the damage complained of was an "inevitable consequence" of the authorised operation of the mine will the defence be available.[115] The defence requires more than proof that the mining activity itself is authorised. The company must show that negligent damage arising from the operation is also expressly or impliedly authorised. The defendant will also have to demonstrate that there was no alternative method of undertaking the authorised activity that did not entail the infliction of damage.[116]

The operation of statutory defences will depend ultimately on the precise wording of licences, licence conditions, or other statutory instruments. Provisions explicitly negating liability for negligence will obviously afford greater protection, although these too are subject to "jealous" interpretation. In *Puntoreiro and Anor v Water Administration Ministerial Corporation*,[117] the High Court permitted recovery against the Water Corporation for crop damage caused by the provision of contaminated irrigation water, despite a statutory protection from liability. The *Water Administration Act* 1986 (NSW), s 19(1) provided that:

> "Except to the extent that an Act conferring or imposing functions on the Ministerial Corporation otherwise provides, an action does not lie against the Ministerial Corporation with respect to loss or damage suffered as a consequence of the exercise of a function of the Ministerial Corporation, including the exercise of a power:
>
> (a) to use works to impound or control water; or
>
> (b) to release water from any such works."

The High Court held that the immunity should be construed in light of the context of the Act as a whole and not carried further than a "jealous" interpretation would allow.[118] Thus, the authorisation to engage in tortious conduct must be expressed in unmistakable and unambiguous language.[119] Without such language, a presumption arises that the legislature did not intend to authorise what would otherwise constitute tortious conduct.[120] Since the s 19 immunity did not *expressly* extend to omissions, the court held that the provision should be interpreted to apply only to positive conduct on the part of

[115] *Allen v Gulf Oil Refining* [1981] AC 1001; *York Brothers (Trading) Pty Ltd v Commissioner of Main Roads* [1983] 1 NSWLR 391 at 397-8.
[116] *York Brothers (Trading)* ibid; *Van Son v Forestry Commission (NSW)* (1995) 86 LGERA 108; [1995] Aust Torts Reps 62,282, & 81-333; *Symons Nominees Pty Ltd v Roads and Traffic Authority of NSW* (1997) Aust Torts Reps 81-413, at 63,826-827.
[117] (1999) 165 ALR 337.
[118] Ibid, at 339 per Gleeson CJ & Gummow J, affirming *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 116 per Kitto J.
[119] Ibid, at 344, per McHugh J, citing *Coco v The Queen* (1994) 179 CLR 427.
[120] Ibid.

the Corporation,[121] and then only to conduct that formed part of the Corporation's functions.[122]

In the Ok Tedi litigation, the authority to operate the mine without a tailings dam (the Fifth Supplemental Agreement) would probably have afforded a defence, had it not been for the defendant's role in developing those documents. It is hard to imagine how a gold and copper mine could be operated without a tailings dam *without* creating environmental damage. In other words, the damage would be an inevitable consequence of the authorised activity. In Hungary's and Yugoslavia's claims against Esmerelda for the Tisza River contamination, the position is more complicated. Reliance by Esmerelda on its operating licences (whatever their provisions might be) may protect them in respect of claims within Romania or brought on behalf of Romanian nationals, but it is difficult to see how a court could construe those authorities as having extraterritorial effect. It would contravene basic principles of international law to permit the Romanian Government to issue licences that authorise the infliction of environmental harm on another state. Moreover, if the applicable law is Hungarian, not Romanian,[123] the statutory defence is irrelevant, since the Hungarian Government granted no approvals.

It is worth noting that the environmental protection legislation in the Australian Capital Territory, Queensland, South Australia, Tasmania, Victoria specifically preserves the rights of individuals to bring common law actions in respect of licensed pollution noise emissions.[124] In these jurisdictions, no lawful activity defence may be implied from the grant of an environmental approval.

Summary

The past five years have seen a dramatic expansion in the scope and standard of liability in negligence. The test for duty of care has been redefined and explicitly extended in relation to claims for pure economic loss. The variable standard of care that the calculus of negligence comprehends will require an extremely high level of precautions in cases involving high-risk activities. Moreover, there has been renewed willingness to construe narrowly the scope and application of statutory authorisations of negligently inflicted damage. These developments considerably increase the likelihood of success in actions brought under Australian law. While local courts hearing foreign claims must apply the law of the place in which the tort occurred, they may well be influenced in their application of that law by the evolution of comparable principles in Australian tort law.

[121] Ibid, at 368, per Callinan J.
[122] Ibid, at 369.
[123] For a discussion of choice of law rules, see above nn 81-95 and accompanying text.
[124] *Water Pollution Act* 1984 (ACT), s 29; *Noise Control Act* 1988 (ACT), s 4; *Water Act* 1992

PART THREE: ENVIRONMENTAL CODES OF CONDUCT AND INVESTMENT LIBERALISATION

Publicity surrounding the Ok Tedi mine's problems prompted calls for Australia to enact enforceable codes of environmental conduct for Australian mining companies operating overseas, or for the extra-territorial application of Australian environmental laws.[125] These calls were renewed following the contamination of the Tisza River in February this year, and the enactment of such laws in respect of sex tourism and bribery of foreign officials. For a whole range of domestic and international diplomatic reasons, it is extremely unlikely that the Australian Government would adopt such an extraterritorial approach. Indeed, the Environment Minister dismissed these suggestions earlier this year, pointing to the rights of other nations to adopt their own standards of environmental management and the widespread adoption of the Australian Minerals Council Voluntary Code for Environmental Management.[126] The Code was first introduced in 1996, but was substantially revised in February 2000. The new Code sets out seven obligations for signatories:

1. Accept environmental responsibility for all their actions.
2. Strengthen their relationship with the community.
3. Integrate environmental management into all aspects of the industry's activities.
4. Minimise the environmental impacts of their activities.
5. Encourage responsible production and use of products.
6. Continually improve their environmental performance.
7. Communicate their environmental performance.

There is considerable disagreement over the effectiveness of voluntary industry codes of practice. The new code is an improvement in so far as it requires the preparation of annual environmental reports, which are subject to independent assessment triennially. The "shame" factor therefore operates as a powerful

(NT), s 17(1); *Environmental Protection Act* 1994 (Qld), s 21; *Environment Protection Act* 1993 (SA), s 8; *Environmental Management and Pollution Control Act* 1993 (Tas), s 10; *Environment Protection Act* 1970 (Vic), s 65(1).

[125] P Durkin, "Scrutiny of Australian Companies Operating in Asia: Is there a Need for Greater Home Government Appraisal?" (1995) 4 *Australian Environmental Law News* 51 at 52. The only control that currently applies to Australian companies investing overseas is the *Banking Act* 1959 (Cth) pursuant to which outflows of Australian currency can be controlled and the *Taxation Administration Act* 1953, which requires taxation clearance in respect of currency transactions.

[126] The Code is located on the Minerals Council of Australia web-site: www.enviro-code.minerals.org.au. The Code applies to 260 overseas sites.

incentive, although in other industries, this has prompted some companies to remove themselves from the list of signatories. Two things may occur in the short-to-medium term that move all industry members towards public reporting requirements. The first is that Australian mining companies who operate overseas may be required to lodge reports to the national pollution inventory (NPI) for above-threshold emissions in their foreign operations.[127] The NPI currently applies only to domestic pollution emissions.[128] Were there to be on-going pressure to address poor environmental practices in Australian companies operating overseas, however, an extension of NPI obligations would be a simple first step.

The second possible development is the adoption of the OECD's Guidelines for Multinational Enterprises as part of renewed attempts to develop an investment liberalisation agreement. The OECD's ill-fated proposals for a Multilateral Agreement on Investment (MAI) foundered in 1998 in the face of criticism that the Agreement lacked safeguards for environmental, cultural and labour rights protections.[129] Negotiations have been relocated to the World Trade Organisation, although they too are stalled.

The Guidelines are formally only one part of the OECD Declaration on International Investment and Multinational Enterprises.[130] They recognise the benefits of foreign investment to home and host countries in the form of contribution to the efficient use of capital, technology and human and natural resources; facilitating the transfer of technology; and human resource-capacity building in poorer countries.[131] They reaffirm the potentially important role of multinationals in promoting sustainable development[132] and remind governments of their on-going obligation to implement appropriate environmental and developmental standards.[133] While the Guidelines are voluntary, governments are

[127] *National Environment Protection (National Pollution Inventory) Measure* 1998, located on the NPI web-site: www.environment.gov.au/epg/npi.
[128] Spills from tailings dams trigger NPI reporting requirements where threshold volumes are passed, but the NPI currently only applies within Australia.
[129] For an examination of the MAI's environmental impacts, see J McDonald, "The Multilateral Agreement on Investment: Heyday or MAI-day for Ecologically Sustainable Development" (1998) MULR 617.
[130] OECD, *Review of the OECD Guidelines for Multinational Enterprises*, March 1999 http://www.oecd.org/daf/investment/guidelines/envmarch.pdf (visited 20 May 2000), para 6. The other three elements of that Declaration are the National Treatment Instrument, the Instrument on International Investment Incentives and Disincentives, and the Instrument on Conflicting Requirements. The objective of the Guidelines was to "balance" the overall package of rights and responsibilities, by setting out some disciplines on MNE behaviour.
[131] OECD, Guidelines for Multinational Enterprises, 10 January, 2000, adopted 8 December, http://www.oecd.org/daf/investment/guidelines/newtexte.html, Pt 1, s 1, at para 4.
[132] Ibid, at para 5.
[133] Ibid, at para 10.

expected to encourage Multinational Companies (MNCs) to observe the guidelines to the extent appropriate.[134]

For the purposes of this discussion, the most significant provisions are those contained in Pt II, "General Policies" and Pt V, "Environment." The General Policies stipulate that MNCs should refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, fiscal, or other issues.[135] Part V exhorts companies to undertake their activities in a manner sensitive to the need to protect the environment, taking into account the framework of laws, regulations and administrative practices in the countries in which they operate, and in accordance with relevant international principles, objectives and standards. In particular, companies are expected to implement environmental management systems, apply the precautionary principle where risk assessments demonstrate a risk of serious or irreversible environmental harm, and maintain adequate contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations. The commentary to the Guidelines states that the drafters contemplate MNCs participating in the gradual raising of environmental standards in host states, even where it is not formally required.[136] The OECD obligations are therefore quite similar in content to those of the Minerals Council Code.

The short-term holds no prospect for these guidelines assuming the force of law among OECD members. But given that these countries are home to the vast majority of multinational mining companies, it is safe to assume that the guidelines represent a starting point for progress towards ever-higher expectations being placed on mining operations in poor countries. Other possibilities include the establishment of a certification and labelling scheme for minerals from sustainably managed mines, similar to the Forest Stewardship Council's (FSC) scheme for timber. In the absence of strong regulation, this market approach is strongly supported by the World-Wide Fund for Nature (WWF). The FSC's forest certification scheme has been highly successful, in terms of the number and size of certified forest areas, and the impetus it has created for other management initiatives. The FSC's forest management principles lay down broad concepts that must then be modified to national and regional conditions. A minerals scheme would have to do the same, but it is arguable that with a more "technology-based" industry, the variations may be less than those required for different forest types.

[134] Ibid, Pt I, s 2, para 1.
[135] Ibid, Pt II, General Policies, para 5.
[136] Ibid, Commentary.

The Australian development NGO, Community Aid Abroad (CAA) has consistently argued for the establishment of an independent Mining Industry Ombudsman, funded by the Australian Government and mining companies and backed by a legislative code of conduct.[137] The Ombudsman position would serve as an intermediary between aggrieved local communities and Australian mining companies over the entire life of a mining operation and assist with dispute resolution through mediation and facilitated negotiation. In February 2000, CAA established its own Ombudsman, in the absence of any initiative from the Australian Government or industry. By May this year, the CAA Ombudsman had received five requests for assistance – three from communities in Indonesia and two from PNG. All five requests related to concerns over the environmental impacts of Australian mining operations.

One thing that pervades all of these voluntary initiatives is the need for companies to consult with local communities in the host country prior to mine establishment.[138] This requires considerably more than negotiating "social dividends" with the governments concerned, who frequently act for vested interests or for the benefit of the national GDP without regard to the catastrophic consequences that may be visited upon certain groups. Where mining agreements are struck between the company and the government, "[t]he true resource owner does not participate. So the government negotiates the best deal for itself, not for the owner".[139] CAA regards local consultation as a fundamental prerequisite to the establishment of mining operations in any developing country.[140]

CONCLUSION

This paper has canvassed the principal legal issues arising from claims brought in Australia for environmental damage caused in foreign mining operations. Foreign plaintiffs may struggle to bring their action in local courts. Mining operations that are undertaken with a governmental joint venture partner may enjoy immunity

[137] J Atkinson, "Basic Human Rights and the Impact of Mining Companies, Part 1 – What Should be Done" May 1999, located on the CAA web-site: www.caa.org/campaigns/mining/impact1.html.
[138] White, op cit n 11; Durkin, op cit n 125, at 55.
[139] Law Reform Commission of PNG, "Working Group Paper: Economics, Environment, and the Interface with the World", in *New directions in Resource Management for Papua New Guinea: Report of the Law Reform Commission Resources Management Workshop* (Law Reform Commission Occasional Paper No 20, 1990), 56, cited in White, op cit n 11, at n 256.
[140] Atkinson,op cit n 137. Atkinson articulates CAA's central tenet, to wit: that local landowners must have the right to determine whether exploration and/or mining proceeds on their land. See also J Atkinson, "Basic Human Rights and the Impact of Mining Companies, Part 2 – Ensuring Proper Standards" May 1999, located on the CAA web-site: www.caa.org/campaigns/mining/impact2.html.

because of a local court's refusal to examine the state actions of a foreign sovereign. In addition, the court will not consider claims based on damage to foreign land and may stay proceedings because the forum is inappropriate, vexatious or oppressive. Even if the court accepts jurisdiction, choice of law rules mean that defences that would have obtained in the country where the tort was committed must be applied.

To the extent that Australian torts law is relevant, the scope of liability in negligence has expanded in recent years. The circumstances in which a duty of care arises now focus on the plaintiff's vulnerability and the defendant's ability to control the risk, and the courts recognise that highly hazardous activities demand a standard of care that approaches strict liability. Moreover, companies relying upon government licences or statutory authorisation of their mining activities cannot be assured of a defence, since these instruments are construed narrowly. These developments all increase the foreign plaintiff's chances of success.

It is inappropriate in a highly globalised operating environment, however, that environmental liability should depend upon the vagaries of private international law and domestic tort law. Australian mining companies benefit from their overseas operations. Cheap labour and ready access to resources make mineral-rich developing countries desirable destinations for foreign investment. For some companies, low environmental standards might also enhance the attractiveness of foreign mining opportunities. As a shared resource, however, the environment should be removed from the competitiveness equation, by expecting best practice of mining companies wherever they operate. At present, this obligation is hortatory at best. The Australian Minerals Industry Code of Environmental Management and the OECD Guidelines for Multinational Enterprises attract no sanctions for non-compliance, other than international opprobrium. Despite the difficulties that inhere in such a proposal, the future may well see the formalisation of these guidelines to ensure that high quality environmental management is legally enforceable. The law may have to catch up with environmental imperatives: "In a world where clean water and biodiversity may ultimately be valued more than gold, [the mining] industry will need to reinvent itself to avoid being dumped on the sustainability slag heap."[141]

[141] Atkinson, op cit n 137, quoting "Mining: Undermining Our Common Future" (1997) *Tomorrow*.

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