

## CASE NOTES

### REGIE NATIONAL DES USINES RENAULT SA V ZHANG\*

#### CHOICE OF LAW IN TORTS AND ANOTHER FAREWELL TO *PHILLIPS V EYRE* BUT THE *VOTH* TEST RETAINED FOR *FORUM NON CONVENIENS* IN AUSTRALIA

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##### I INTRODUCTION

In beginning his separate judgment in *Regie National des Usines Renault SA v Zhang*, his Honour, Kirby J, adverted to the depressing descriptions of the subject of private international law as ‘a dismal swamp’ and as ‘one of the most baffling subjects of legal science.’<sup>1</sup> These descriptions may appear apt in relation to two particular areas of private international law which have given rise to acute difficulties in recent years. The first concerns the rules governing the stay of local proceedings on the ground of the inappropriateness of the local forum (sometimes referred to as *forum non conveniens*). The second relates to the choice of law rules which govern liability for tortious conduct that occurs outside the law area of the court hearing an action. Both these issues arose for decision by the High Court of Australia in *Zhang*.

The High Court, both in *Zhang* and in the preceding case of *John Pfeiffer Pty Ltd v Rogerson*,<sup>2</sup> has performed the signal service of eliminating much of the uncertainty that has surrounded the choice of law rules for tort. This has been principally achieved by finally rejecting, for Australia, the so-called double

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\* (2002) 187 ALR 1 (High Court of Australia) (*‘Zhang’*).

<sup>1</sup> *Zhang* (2002) 187 ALR 1, [86], citing William Prosser, ‘Interstate Publications’ (1953) 51 *Michigan Law Review* 959, 971 and Benjamin Cardozo, *The Paradoxes of Legal Science* (1928) 67.

<sup>2</sup> (2000) 203 CLR 503 (*‘Pfeiffer’*).

actionability test established many years ago in *Phillips v Eyre* and much litigated since then.<sup>3</sup> The same probably cannot be said about the effect of the High Court's latest pronouncement on the principles which govern a stay of local proceedings on the ground of *forum non conveniens*.

It is doubtful whether it was strictly necessary for the High Court in *Zhang* to rule on the relevant rules which govern the application of the substantive law in tort. As was emphasised by Callinan J in his dissenting judgment, the substantive law that applied in the place where the allegedly wrongful act occurred in *Zhang* was, on any view, a material circumstance in determining whether there should have been a stay of proceedings commenced in the New South Wales Supreme Court.<sup>4</sup> In any event, it was highly desirable and appropriate for the nation's highest court of appeal to clarify what had become the source of almost intolerable confusion surrounding the choice of law rules in tort.

It is convenient to begin with the choice of law rule established in *Zhang* and defer until later the description of the facts of the case and the explanation of the precise relevance of the rule to those facts.

## II CHOICE OF LAW

### A *The Position before Zhang*

Before the High Court decided *Breavington v Godleman* in 1988,<sup>5</sup> it was commonly assumed that an action for a tort committed outside the law area of the court, whether committed in or outside Australia (intra-national and international torts), had to satisfy the two conditions established in *Phillips v Eyre* (hence the description of 'double actionability'). First, the wrong alleged 'had to be of such a character that it would have been actionable if it had been committed' in the forum: that is, the law area of the court in which the action was commenced. Secondly, 'the act must not have been justifiable by the law of the place where it was done.'<sup>6</sup> Once those two conditions were satisfied the court of the forum then applied its own law to govern the substantive (and procedural) rights and liabilities of the parties to the action.<sup>7</sup>

Much uncertainty surrounded the meaning of these two conditions, in particular the meaning of the terms 'actionable' and 'justifiable'. In the many cases that dealt with the application of this test there was a tendency to interpret the conditions as if they were statutory provisions. Additionally, the test was abandoned in other common law countries in favour of applying the substantive law of the place where the wrong was alleged to have been committed. This came about as a result of either statutory enactment or judicial interpretation.

An exhaustive, although not final, analysis of this area of the law was undertaken by the High Court in *Breavington* where it was unanimously agreed that the action should be dismissed in that case, since common law liability in

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<sup>3</sup> (1870) LR 6 QB 1.

<sup>4</sup> *Zhang* (2002) 187 ALR 1, [192], [213].

<sup>5</sup> (1988) 169 CLR 41 ('*Breavington*').

<sup>6</sup> *Phillips v Eyre* (1870) LR 6 QB 1, 28–9 (Willes J).

<sup>7</sup> See, eg, *Koop v Bebb* (1951) 84 CLR 629; *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20.

negligence had been abolished in road accident cases according to the law in force in the Northern Territory where the accident had occurred. Unfortunately, the members of the Court gave different reasons for reaching this result and no single proposition commanded the support of a majority. Nevertheless, at least four members of the Court can be taken to have rejected, admittedly for different reasons, the double actionability test in relation to intra-national torts.<sup>8</sup> This led some to conclude that the test no longer applied in Australia for such torts.<sup>9</sup> Even if this conclusion was correct, its effect was short lived.

Not long after *Breavington*, and somewhat to the surprise of many commentators, a majority of the High Court expressly endorsed the continued application of the double actionability test for intra-national torts in *McKain v RW Miller & Co (SA) Pty Ltd*.<sup>10</sup> Not surprisingly, the majority comprised three of the judges who adhered to the test in *Breavington* in addition to a member of the Court who was appointed after the latter case had been decided.<sup>11</sup> Two of the members of the Court who rejected the test in *Breavington* initially refused to accept its reinstatement, especially as they thought that the matter was neither necessary for the decision, nor had it been the subject of oral argument by counsel in the case.<sup>12</sup>

In reinstating *Phillips v Eyre*, the majority adopted the reformulation of the double actionability test attempted by Brennan J in *Breavington*,<sup>13</sup> where he sought to remove some of the uncertainty that had surrounded the nature of the test both in England and Australia. For a plaintiff to be able to sue in the forum in relation to a wrong occurring outside the territory of the forum, it was necessary to show that the plaintiff's claim arose in such circumstances and was of such a kind as to give rise to a civil liability according to both the law of the territory of the forum (*lex fori*) if the wrong had arisen out of circumstances which had taken place in that territory, and also the law of the place where the wrong occurred (*lex loci delicti*).<sup>14</sup>

One could have been forgiven for agreeing with the view expressed in a lucid and helpful note on *McKain*, suggesting that the case added considerable certainty to an area of law that was in much need of it, even if it had done so in a

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<sup>8</sup> *Breavington* (1988) 169 CLR 41 (Mason CJ, Deane, Wilson and Gaudron JJ). Although they were able to reach the same result in the case, Brennan, Dawson and Toohey JJ did so by adhering to the double actionability test.

<sup>9</sup> See Martin Davies, Sam Ricketson and Geoffrey Lindell, *Conflict of Laws: Commentary and Materials* (1997) [8.2.6]–[8.2.7].

<sup>10</sup> (1991) 174 CLR 1 ('*McKain*').

<sup>11</sup> *McKain* (1991) 174 CLR 1, 38–40 (Brennan, Dawson, Toohey and McHugh JJ).

<sup>12</sup> These two judges were Deane and Gaudron JJ: *McKain* (1991) 174 CLR 1, 45 (Deane J), 54 (Gaudron J). See also their respective dissenting judgments in *Stevens v Head* (1993) 176 CLR 433, 461–2, 464. The remaining member of the Court in *McKain*, Mason CJ, also thought that *Breavington* had decided that the double actionability rule no longer applied in relation to torts committed in Australia: *McKain* (1991) 174 CLR 1, 14. The reinstatement was later accepted by these three judges in *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463, 471, 480.

<sup>13</sup> (1988) 169 CLR 41, 110–11.

<sup>14</sup> *McKain* (1991) 174 CLR 1, 38–40. The restatement was acknowledged to be narrower than the traditional formulation of the conditions in *Phillips v Eyre*.

manner that lacked the enlightenment of some of the dissenters who did not favour the adoption of the double actionability test.<sup>15</sup>

Unfortunately, any hope of certainty was dispelled in what can only be described as a decade of confusion, illustrated by a baffling array of conflicting state appellate decisions and even, in one instance, a conflict between the differently constituted divisions of the same Court of Appeal.<sup>16</sup> A number of areas of major uncertainty arose. First, there was disagreement about the precise meaning of the double actionability test, even amongst the supporters of the new formulation of that rule. On one view of the rule, the identical notion of the actionability required in the two conditions operated as a double choice of law rule. Once the two conditions were satisfied there was no further role to be left to the law of the forum in relation to the aspects of the action that were classified as substantive, as distinct from procedural.<sup>17</sup> On the other view, the rule was only a threshold or jurisdictional requirement consisting of two essential pre-conditions which, once satisfied, still required the application of the substantive law of the forum as the ultimate law governing the rights and liabilities of the parties.<sup>18</sup> Secondly, even if the rule was only a threshold or jurisdictional requirement, which law should be applied: the *lex fori*<sup>19</sup> or the *lex loci delicti*?<sup>20</sup> Thirdly, doubt persisted regarding whether the rigours of the two conditions could be mitigated by the existence of 'flexible exceptions', and, if so, whether the same exception or exceptions operated to qualify only the second condition (*lex loci*) or both conditions of the double actionability test (*lex loci* and *lex fori*). The application of the exception to the *lex loci* had been accepted in England and was later extended by the Privy Council to cover the *lex fori*.<sup>21</sup> Doubts persisted as to whether the exception or exceptions applied in Australia, particularly in relation

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<sup>15</sup> Brian Opeskin, 'Choice of Law in Torts and Limitation Statutes' (1992) 108 *Law Quarterly Review* 398, 404.

<sup>16</sup> For an excellent exposition of the difficulties, see Martin Davies, 'Exactly What is the Australian Choice of Law Rule in Torts?' (1996) 70 *Australian Law Journal* 711; see also Davies, Ricketson and Lindell, above n 9, [8.2.7]–[8.2.33].

<sup>17</sup> Arguably Brennan J himself took this view in *Breavington* (1988) 169 CLR 41, 110–11 in the passage adopted with approval by the majority in *McKain*, especially when that passage is read with his Honour's endorsement of the approach taken by Lord Wilberforce in *Chaplin v Boys* [1971] AC 356, 385 and also Mason CJ in his dissenting judgment in *Stevens v Head* (1993) 176 CLR 433, 440. See also *Mason v Murray's Charter Coaches and Travel Services Pty Ltd* (1998) 159 ALR 45, 56–7 (Drummond J), but see 62–5 (Sackville J).

<sup>18</sup> This was the view taken by Dawson J in *Gardner v Wallace* (1995) 184 CLR 95, 98. See also *Thompson v Hill* (1995) 38 NSWLR 714, 734–5 (Clarke JA); *Wilson v Natrass* (1995) 21 MVR 41; *Nalpanidis v Stark* (1996) 65 SASR 454, 473 (Debelle J), but see 457–8 (Doyle CJ) and 470 (Bollan J).

<sup>19</sup> As suggested by the authorities collected in the preceding note above apart from the case decided by the Victorian Court of Appeal.

<sup>20</sup> *Wilson v Natrass* (1995) 21 MVR 41, 51, 58 (Ashley and Hedigan JJ); *Chisholm v Pasmenco Metals-BHP Pty Ltd* (Unreported, New South Wales Court of Appeal, Kirby P, Sheller and Powell JJA, 24 July 1995).

<sup>21</sup> As to the *lex loci*, see *Chaplin v Boys* [1971] AC 356, 378 and 391–2 (Lords Hodson and Wilberforce respectively); *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14. As to the *lex fori*, see *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190.

to intra-national torts, even after what appeared to be a clear rejection of the exception in *McKain*.<sup>22</sup>

It is little wonder that, given the state of the authorities described above, the South Australian Chief Justice was able to say of these kinds of questions that they ‘might stimulate an enjoyable seminar for experts in the conflict of laws’ but they filled him with ‘a sense of impending doom as he tackled the complexities which arise in this area of the law.’<sup>23</sup> It is of course true, as was illustrated by *Breavington*, that a difference of views on such questions does not always affect the result in a case. Nevertheless, as was indicated earlier, it is fortunate that the current High Court has now avoided the need to resolve these uncertainties by abandoning the double actionability test for intra-national torts in favour of the *lex loci* rule in *Pfeiffer*. This welcome development came about principally as a result of the need to reinterpret and modify the common law rules of private international law in their application to wrongs committed in the law areas of a country which enjoys a federal system of government. This led the majority to conclude in *Pfeiffer* that ‘within the federal system, it is appropriate that each State and Territory recognise the interest of the other States and Territories in the application of their laws to events occurring in their jurisdiction.’<sup>24</sup> The Court left open on that occasion whether the modification of the same rules was dictated by sections 117 and 118 of the *Australian Constitution*.<sup>25</sup> Clearly these constitutional provisions do not directly address the choice of law that governs the commission of international torts. Whether or not the application of the *lex loci* rule to torts committed in Australia is constitutionally mandated by these provisions or other constitutional considerations, the adoption of the rule for such torts did not necessarily decide the position in relation to international torts — an issue that arose on the facts of *Zhang*.

## B The Position as a Result of Zhang

### 1 The Adoption of the Lex Loci in Place of the Double Actionability Test

It is necessary first to turn to the reasons why a majority of the High Court in *Zhang* abandoned the double actionability test for international torts and then adopted, in its place, the *lex loci delicti* as the law governing the substantive

<sup>22</sup> So far as intra-national torts were concerned, the exception was accepted in *Corcoran v Corcoran* [1974] VR 164, *Warren v Warren* [1972] Qd R 386, *Borg Warner (Aust) Ltd v Zupan* [1982] VR 437 and *Woodger v Federal Capital Press of Australia Pty Ltd* (1992) 107 ACTR 1, 36 (Miles CJ), but rejected in *Kolsky v Mayne Nickless Ltd* (1970) 72 SR (NSW) 437 and seemingly by the majority in *McKain* (1991) 174 CLR 1, 38–9 and also in *Jones v TCN Channel Nine Pty Ltd* (1992) 26 NSWLR 732, 736 and *Nalpanitidis v Stark* (1996) 65 SASR 454, 479 (Doyle CJ, with whom Bollen J agreed), cf 479–82 (Debelle J).

<sup>23</sup> *Nalpanitidis v Stark* (1996) 65 SASR 454, 456 (Doyle CJ).

<sup>24</sup> *Pfeiffer* (2000) 203 CLR 503, [96] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

<sup>25</sup> *Ibid* [70].

rights and liabilities of the parties in an action for tort.<sup>26</sup> Reference will be made later to whether the latter rule is itself subject to any ‘flexible’ or other exceptions.

The case in defence of the double actionability test has, in modern times, rested on the respect owed to previous judicial authority and, to a lesser extent, the need to reduce forum shopping. But, as Kirby J indicated in his judgment, the High Court ‘cannot decide amongst these various options for the choice of law rule by reference solely to legal authority.’<sup>27</sup>

The majority and Kirby J traced the main justification for that rule established in *Phillips v Eyre* back to the case of *The Liverpool, Brazil and River Plate Steam Navigation Co Ltd v Benham*.<sup>28</sup> That case involved a collision between a Norwegian vessel and a British steamship (the ‘Halley’) in Belgian waters when the Halley was under compulsory pilotage. The owners of the Norwegian vessel sued the owners of the Halley to recover damages suffered by their vessel as a result of the collision. The owners of the Halley sought to defend the action by alleging that the collision was caused either by the negligence of the pilot appointed by the Belgian authorities, or as a result of an inevitable accident. Under Belgian law, but not, as it then stood, English law, the owners of a vessel under compulsory pilotage were vicariously liable for the negligence of the compulsory pilot. The Privy Council dismissed the action essentially because it refused to give effect to the Belgian law in question. As is pointed out by the editor of *Dicey and Morris on the Conflict of Laws*,<sup>29</sup> the Privy Council seems to have regarded

the vicarious *liability* imposed by Belgian law upon shipowners for the fault ‘of a person whom they were compelled to receive on board their Ship, in whose selection they had no voice, whom they had no power to remove or to displace’<sup>30</sup> as ‘prejudicial to the rights of other Nations or to those of their subjects’<sup>31</sup> or perhaps even as ‘manifestly contrary to public justice.’<sup>32</sup>

As was also pointed out in *Dicey and Morris*, there is a passage in the judgment of the Privy Council that suggests that the action was dismissed on a special ground of public policy and not by reason of any general rule of the conflict of laws.<sup>33</sup> In *Phillips v Eyre*, Willes J was able to cite *Halley* as authority

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<sup>26</sup> The majority comprised Gleeson, Gaudron, McHugh Gummow and Hayne JJ, who delivered a joint judgment, and also Kirby J, who delivered a separate judgment. As in *Pfeiffer* (2000) 203 CLR 503, [201], in relation to intra-national torts, Callinan J did not find it necessary to re-examine the continued application of the double actionability rule, this time in relation to international torts: *Zhang* (2002) 187 ALR 1, [213]–[214]. Henceforth, ‘the majority’ refers to the judges who delivered the joint judgment.

<sup>27</sup> *Zhang* (2002) 187 ALR 1, [115].

<sup>28</sup> (1868) LR 2 PC 193 (‘*Halley*’), discussed in *Zhang* (2002) 187 ALR 1, [43]–[60], [112]–[113].

<sup>29</sup> Lawrence Collins (ed), *Dicey and Morris on The Conflict of Laws* (12<sup>th</sup> ed, 1993) 1490 (‘*Dicey and Morris*’) (emphasis added).

<sup>30</sup> *Halley* (1868) LR 2 PC 193, 202.

<sup>31</sup> *Ibid* 203, where Joseph Story, *Commentaries on the Conflict of Laws* (4<sup>th</sup> ed, 1852) 32 was quoted with approval.

<sup>32</sup> *Halley* (1868) LR 2 PC 193, 203.

<sup>33</sup> Collins (ed), above n 29, 1490. The relevant passage may be found in *Halley* (1868) LR 2 PC 193, 203.

for the proposition that an action could not be maintained in relation to a foreign tort unless it would have been actionable if committed in England.<sup>34</sup>

In *Zhang*, the majority regarded *Halley* as having been based on an exaggerated view of public policy which was adopted at a time when the exclusionary rules of private international law with respect to public policy were not as developed as they are now, and before what was described as ‘the development of a body of case law’ on the subject.<sup>35</sup> The failure of the forum to give effect to a liability which is not recognised by the domestic law of the forum was to adopt an arbitrary rule and ‘a stringent domestic policy.’<sup>36</sup> This was inconsistent with the more enlightened and modern attitude of ensuring that public policy is not abused as a means of failing to give effect to foreign laws otherwise applicable, merely because the law differs from the domestic law of the forum on the same matter. In the famous remarks of Cardozo J from his judgment in *Loucks v Standard Oil Co of New York*,<sup>37</sup> which were referred to with approval: ‘We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.’<sup>38</sup>

More is needed to show that the forum should not give effect to a foreign law on this ground. In that regard their Honours also referred with approval<sup>39</sup> to the factors which inform the modern exclusionary doctrine based on public policy as stated by Cardozo J in a passage in his judgment in the same case:<sup>40</sup>

The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.<sup>41</sup>

To the extent that the first condition of the double actionability test was previously adopted as a technique for forum control specifically applicable in tort cases, it should now be recognised that the question relates to public policy and the issues that the same concept raises.<sup>42</sup>

A number of other reasons were given by the majority and Kirby J for abandoning the double actionability test, many of which also support the adoption of the *lex loci delicti* as the only law which should govern the commission of an international tort. In the first place, the double actionability test was seen as peculiar to the rules of private international law in relation to

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<sup>34</sup> (1870) LR 6 QB 1, 28–9.

<sup>35</sup> *Zhang* (2002) 187 ALR 1, [49].

<sup>36</sup> *Ibid* [45], [53], adopting the phrase used by John Westlake, *A Treatise on Private International Law* (2<sup>nd</sup> ed, 1880), 222.

<sup>37</sup> (1918) 120 NE 198.

<sup>38</sup> *Ibid* 201. The approving reference appears in *Zhang* (2002) 187 ALR 1, [55].

<sup>39</sup> *Zhang* (2002) 187 ALR 1, [58], [60].

<sup>40</sup> Cardozo J was quoted with approval in *Pfeiffer* (2000) 203 CLR 503, [91].

<sup>41</sup> *Loucks v Standard Oil Co of New York* 120 NE 198, 202 (1918).

<sup>42</sup> *Zhang* (2002) 187 ALR 1, [60].

torts.<sup>43</sup> Secondly, and more importantly, as Kirby J pointed out in his judgment, ‘the predominant international principle for the choice of law in respect of wrongs (torts or delicts) has long been that the applicable law is that of the place where the wrong was committed (*lex loci delicti*).’<sup>44</sup> This was apparently established in Europe by the 18<sup>th</sup> century at the latest, and at least initially in the United States of America where the rule in *Phillips v Eyre* never gained acceptance.<sup>45</sup> In the United Kingdom legislation was enacted to give effect to the recommendations of the English and Scottish Law Commission. Those recommendations proposed the abolition of the double actionability test in favour of the *lex loci*, subject to its displacement in favour of the law of another country which has the most significant relationship with the occurrence of the tort.<sup>46</sup> More recently, the rule was also abandoned in Canada as a result of judicial reinterpretation of the common law.<sup>47</sup>

Thirdly, the *lex loci* rule was thought to promote greater certainty in the law despite the inconvenience caused by the need for proof of the relevant foreign law, which is seen as the inevitable result of any choice of law rule which selects a foreign system of law.<sup>48</sup> Associated with this factor was the fact that ‘in an age of high personal and professional mobility ... activity-related connections are increasingly thought to offer a more stable and predictable criterion for choice of law.’<sup>49</sup> In addition, the *lex loci* was seen as ‘a forum neutral connecting factor’ which contained ‘the promise of more even-handed justice for both parties.’<sup>50</sup>

Kirby J relied on other reasons to support the adoption of the new rule: its tendency to give effect to the expectations of the parties which could be assumed to accord primacy to the law of the place of the wrong; applying the same law would help defendants to minimise their exposure to risk by accident prevention, to insure effectively and allocate appropriately for potential costs; its clarity and simplicity; and finally, its tendency to reduce forum shopping.<sup>51</sup>

His judgment also seeks to explain, even if only briefly, what is also implicit in the majority judgment, namely the rejection of what may be described as the ‘proper law approach’ adopted in many jurisdictions in the US after they

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<sup>43</sup> Ibid [59], although compare, in relation to the choice of law rules for contract, the relevance of more than one system of law in relation to the question of illegality in the strict sense of that term and also the possible ability of the parties to choose different systems of law to govern different parts of the same contract (‘depeçage’): Davies, Ricketson and Lindell, above n 9, [9.3.31]–[9.3.44] (illegality) and [9.2.20]–[9.2.28] (depeçage).

<sup>44</sup> *Zhang* (2002) 187 ALR 1, [127]–[128]. See also as regards the majority, [35], [63]–[65].

<sup>45</sup> Ibid [127].

<sup>46</sup> *Private International Law (Miscellaneous Provisions) Act 1995* (UK) ss 10–12; discussed in *Zhang* (2002) 187 ALR 1, [35], [128]. The double actionability test was not abolished with regard to liability in defamation.

<sup>47</sup> *Tolofson v Jensen* [1994] 3 SCR 1022 (‘*Tolofson*’); mentioned in *Zhang* (2002) 187 ALR 1, [62]–[64] (majority), [128] (Kirby J).

<sup>48</sup> *Zhang* (2002) 187 ALR 1, [66] (majority).

<sup>49</sup> Ibid [65].

<sup>50</sup> Ibid (majority), quoting with approval Catherine Walsh, ‘Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Product Liability Claims’ (1997) 76 *Canadian Bar Review* 91, 110.

<sup>51</sup> *Zhang* (2002) 187 ALR 1, [130].

abandoned the *lex loci* rule as the only choice of law rule for torts.<sup>52</sup> The search under that approach is for the system of law that has the most significant relationship to the occurrence of the tort and the parties involved, with reference to a number of factors to assist in determining what that system should be in each case. Obviously, the place of the tort under such an approach is only one of many factors to be considered. As his Honour pointed out, that approach involves greater flexibility which has, however, had the effect of leading to considerable uncertainty and difficulty of application. This becomes the principal reason relied on for its rejection in Australia. Although it is not in the writer's view decisive, it is interesting to note that comparable difficulties attend the application of a similar test when a court seeks to determine what law should govern a contract where the parties have not chosen the law for themselves. In this situation the interests of certainty in business transactions might be thought to assume greater importance.

Kirby J held that whatever advantages the double actionability test offered were outweighed by the benefits of the *lex loci* and the issue was not one which should await legislative intervention.<sup>53</sup> As he was at pains to emphasise in *Pfeiffer*,<sup>54</sup> the application of the *lex loci* will not be free from complexity, and he listed a number of formidable difficulties, not the least of which is how the location of a tort is determined. The latter difficulty is almost inherent to any approach if a court is to apply foreign rather than domestic laws in relation to torts arising out of circumstances which occur outside the forum. In that regard, the majority in *Zhang* repeated without elaboration its warning that it should not be assumed that the cases which deal with the service of defendants outside the jurisdiction ('long arm' jurisdiction) are to be used for choice of law purposes.<sup>55</sup>

Other difficulties noted by Kirby J included the effect of claims being framed in tort and contract, given the different choice of law rules which apply to both of those claims, and whether claims for contribution and those created by statute can be characterised as tortious. However, these difficulties would also be likely to arise whatever choice of law rules are applied to actions in tort. They probably denote the existence of more fundamental problems of characterisation which attend the kind of choice of law rules that are based on establishing a nexus between the claimed cause of action and the jurisdiction whose law is to be applied to the same cause of action — the 'jurisdiction selecting' approach.<sup>56</sup>

## 2 Flexible Exceptions

There remains the question whether the *lex loci* rule is subject to any flexible or other exceptions apart from the exception already discussed, namely, the non-application of foreign laws that are found to be contrary to contemporary notions of public policy. The view of the majority was that the *lex loci* rule was

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<sup>52</sup> Ibid [127] (Kirby J), [61]–[66] (majority). The rejection by the majority of the so-called 'flexible exception' to be mentioned below supports its unwillingness to apply the proper law approach.

<sup>53</sup> Ibid [116]–[117], [121].

<sup>54</sup> (2000) 203 CLR 503, [150]–[151].

<sup>55</sup> *Zhang* (2002) 187 ALR 1, [74] referring to *Pfeiffer* (2000) 203 CLR 503, [81].

<sup>56</sup> For the different approaches possible see Davies, Ricketson and Lindell, above n 9, [7.1.1]–[7.1.9].

not subject to such an exception. Kirby J's inclination was to reserve that question but he did not press his preference to a dissent.<sup>57</sup> When he supported the adoption of the *lex loci* rule in place of the double actionability test, Mason CJ favoured a qualification which would have given effect to a flexible exception to that rule.<sup>58</sup> The majority view is, on the whole, regrettable.

The majority conceded that the application of flexible exceptions may often be subsumed, in practice, by the issues presented in the refusal of the forum to apply foreign laws on the ground of public policy. Their Honours apparently preferred to treat the matter as a branch of the public policy reservations. Presumably, their view was based on the importance of certainty stressed earlier in their judgment since no other supporting reasons are given.

The typical situation often advanced to illustrate the application of the flexible exception concept is the action in negligence arising out of a road accident which occurs outside the forum, where the only connection with the law of the place of the alleged wrong is that the wrong occurred there and all parties to the action are resident in the forum. The need to confine the exception to situations of this kind is prompted by a desire to avoid the acceptance of the wider proper law of the tort approach favoured in the US. The aim here is to ensure that any exception does not swallow up the main rule. Its confined application in *Chaplin v Boys*<sup>59</sup> by at least two members of the House of Lords was thought by one of them to represent a principle which was 'at least a common denominator of the United States decisions,' without involving all the uncertainty generated by the proper law approach.<sup>60</sup>

As Kirby J acknowledged, it may be that in practice it will not make any difference whether the same qualification to the *lex loci* rule is expressed as a flexible exception or as a branch of the public policy exclusionary doctrine. But he also indicated that it may not always be so, relying in that regard on its application in *Chaplin v Boys*.<sup>61</sup> It essentially becomes a choice between avoiding the lesser of the two evils of uncertainty generated by both approaches. As the majority conceded, 'the public policy reservations ... cannot be contained in closed categories.'<sup>62</sup> This recalls the remark that 'public policy is a very unruly horse and when once astride it you never know where it will carry you'<sup>63</sup> and, as one American writer has observed, 'it operates as the "x" of the law, the unknown quantity.'<sup>64</sup>

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<sup>57</sup> *Zhang* (2002) 187 ALR 1, [73], [75] (majority), [121]–[123] (Kirby J). The Canadian Supreme Court in *Tolofson* [1994] 3 SCR 1022, 1054 left open the possible existence of a flexible exception, but only in relation to foreign torts. Neither that court nor the Australian High Court recognises the existence of such an exception as regards intra-national torts essentially because of federal considerations: *Zhang* (2002) 187 ALR 1, [105]–[108] and *Pfeiffer* (2000) 203 CLR 503, [80].

<sup>58</sup> *Breavington* (1988) 169 CLR 41, 76–7.

<sup>59</sup> [1971] AC 356, 385 (Lord Hodson), 391–2 (Lord Wilberforce).

<sup>60</sup> [1971] AC 356, 391–2 (Lord Wilberforce).

<sup>61</sup> *Zhang* (2002) 187 ALR 1, [122]–[123].

<sup>62</sup> *Ibid* [53].

<sup>63</sup> *Richardson v Mellish* (1824) 2 Bing 229, 252 (Burrough J), cited in *Foster v Driscoll* [1929] 1 KB 470, fn 2.

<sup>64</sup> Albert Ehrenzweig, cited by Peter Nygh, *Conflict of Laws in Australia* (6<sup>th</sup> ed, 1995) 281. Both statements quoted in the text accompanying the preceding and present note were also quoted by the author in Davies, Ricketson and Lindell, above n 9, [5.2.25].

The majority recognised that the flexible exception adopted in *Chaplin v Boys* reflected the influence of ‘American government interest analysis.’ This kind of analysis is associated with the ‘proper law of the tort’ approach favoured in the US which their Honours seemingly rejected.<sup>65</sup> Yet the majority seemed to suggest that such an analysis is required by the modern exclusionary public policy doctrine when they also accepted that ‘the modern tendency is to frame [public policy reservations] with closer attention to the respective governmental interests involved.’<sup>66</sup>

### 3 Other Matters

It is important to mention that the adoption of the *lex loci* rule was subject to two caveats.<sup>67</sup> First, the Court left open the issue, now resolved in the case of intra-national torts, of whether limitation periods and all questions about the kinds and amount of damages that can be awarded can be regarded as questions of substance and not procedure. Questions of procedure continue to be governed by the law of the forum. Secondly, it also reserved for future consideration the *Mozambique* rule,<sup>68</sup> the standing of *Potter v Broken Hill Proprietary Co Ltd*,<sup>69</sup> and the position in relation to maritime and aerial torts.

Furthermore, in relation to the question of procedure, the majority envisaged that questions concerning which law will apply to govern the rights and liabilities of the parties to a foreign tort tended to be decided in interlocutory processes before trial, such as an application for a stay of proceedings in the forum.<sup>70</sup> It was also thought appropriate to resolve questions concerning whether public policy considerations prevent the application of a foreign law in the same kind of proceedings.<sup>71</sup> The majority sought to clarify the rules that govern the pleading of foreign laws for international torts in light of the abandonment of the double actionability test. The existence of such a law remains a question of fact that must be proved with the assistance of expert evidence. The majority seems to have suggested that whereas there is no obligation on either party to plead a foreign law in order to establish a cause of action in tort for foreign torts, the rule remains that a party who wishes to rely on a foreign *lex loci delicti* must allege, and if necessary prove, the existence of that law.<sup>72</sup> Failure to prove that law would presumably have the effect of enabling the forum to act on the presumption that the law in question is the same as that of the forum.

The majority in *Pfeiffer* also adverted to another caveat.<sup>73</sup> This was the possibility that a litigant might seek to rely on a cause of action created by the law of another state where the cause of action was made actionable in the courts of that state, subject to compliance with particular procedures and the grant of

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<sup>65</sup> *Zhang* (2002) 187 ALR 1, [63].

<sup>66</sup> *Ibid* [53], citing *Attorney General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 40–5.

<sup>67</sup> *Zhang* (2002) 187 ALR 1, [76] (majority), [121] (Kirby J).

<sup>68</sup> *British South Africa Co v Companhia de Mocambique* [1893] AC 602.

<sup>69</sup> (1906) 3 CLR 479.

<sup>70</sup> *Zhang* (2002) 187 ALR 1, [73].

<sup>71</sup> *Ibid* [60], [73].

<sup>72</sup> *Ibid* [68]–[71].

<sup>73</sup> (2000) 203 CLR 503, [94]–[95].

novel remedies. The same law might go further and entrust disputes not to courts but to a special tribunal set up for that purpose and for which there was no equivalent in the forum. The illustration given was a law which created a new statutory cause of action for the invasion of privacy. Their Honours indicated that a litigant who invoked the jurisdiction of the forum had to take the procedures and courts of the forum as the litigant found them. The problem serves as a reminder of the difficulty which arose in relation to international conflicts in the well-known case of *Phrantzes v Argenti*.<sup>74</sup> In that case, an unsuccessful attempt had been made to enforce, in an English court, a remedy known to Greek but not English law, even though Greek law might otherwise have been applied in accordance with normal choice of law principles. No doubt the same problem could arise with regard causes of action for alleged tortious wrongs committed outside Australia.

### III JURISDICTION

#### A *The Facts in Zhang*

As they did in *Pfeiffer*,<sup>75</sup> the majority pointed to the distinction between questions of jurisdiction and choice of law.<sup>76</sup> Jurisdiction is concerned with the authority of a court to hear and determine an action, while choice of law relates to the laws that are applied in the exercise of the same authority. Logically, one would expect that the latter issue is only addressed after a court has satisfied itself that it has authority to deal with the action. But, as *Zhang* itself illustrates, the nature of the law to be applied in an action which is concerned with facts and circumstances that take place outside the forum can become a highly significant factor in determining whether the action should be stayed on the ground of the inappropriateness of the forum or, as some would argue, the existence of a more appropriate foreign court to hear the same action. *Zhang* involved just such a situation.

The plaintiff and respondent in the case was Mr Zhang who had resided in New South Wales since 1986 and later became an Australian citizen. In February 1991 he travelled to New Caledonia, a French colony in the Pacific Ocean, where he hired a Renault motor car which was manufactured by the defendant companies who were the appellants in this case. The appellants were foreign companies who were not registered in Australia, nor did they maintain any offices there. Their principal place of business was in France. The respondent was severely injured as a result of an accident involving the hired car. He spent some days in hospital in Noumea and was then transported back to Sydney, where he was a patient in a spinal unit until June 1991 after which he remained severely disabled. He commenced an action against the appellants in the Supreme Court of NSW in which he claimed damages for his injuries and alleged that the hired car was negligently designed and manufactured. The appellants were served out of the jurisdiction on the basis that the proceedings

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<sup>74</sup> [1960] 2 QB 19.

<sup>75</sup> (2000) 203 CLR 503, [25] (majority); see also [115] (Kirby J).

<sup>76</sup> *Zhang* (2002) 187 ALR 1, [7].

were for the recovery of damages suffered in NSW which were ‘caused by a tortious act or omission wherever occurring’ (‘long arm’ jurisdiction).<sup>77</sup>

The judge at first instance, Smart J, declined to exercise the jurisdiction and granted an application to stay the action. He thought the factors in favour and against granting the application to stay the action were evenly balanced, and that one important factor favouring the success of the application was that the NSW Supreme Court would have to apply French law as it applied to New Caledonia as the substantive law to determine the rights and liabilities of the parties. His decision was reversed by the Court of Appeal, which considered Smart J to be mistaken about the need to apply French law despite the location of the alleged tort outside NSW, and also found that the appellant companies had not discharged the onus of showing that NSW was a ‘clearly inappropriate forum’ — the currently accepted test which governs stay applications.<sup>78</sup>

### B *The Position before Zhang*

The prima facie obligation of a court to exercise the jurisdiction it possesses when it is regularly invoked by litigants who have complied with all the necessary procedural steps required for its exercise is subject to certain exceptions. One of these exceptions concerns the inherent power of the court to decline the exercise of its jurisdiction because of the inappropriateness of the court to determine the action by reference to considerations which are the result of judge made law. The principles to be applied in exercising the jurisdiction to stay proceedings have undergone a significant transformation both in England and in Australia. But, as will be seen below, English courts have been prepared to go further than Australian courts in qualifying the obligation of a court to exercise its jurisdiction. The issue is whether this difference will and should be maintained.

At first, and at least until the middle of the last century, courts in both countries stayed regularly commenced proceedings only in very strict and narrow circumstances. A mere balance of convenience was not sufficient and a litigant seeking a stay was required to show that:

- (1) the continuance of the proceedings would work injustice to the defendant because it would be oppressive or vexatious to the defendant or would be an abuse of process in some other way; and
- (2) the stay would not cause an injustice to the plaintiff.<sup>79</sup>

The terms ‘oppressive’ and ‘vexatious’ were given a narrow and strict operation.<sup>80</sup>

The process by which English courts widened the exercise of the jurisdiction to stay proceedings was gradual and finally culminated in 1987 with the adoption

<sup>77</sup> Supreme Court Rules 1970 (NSW), r 10.1A(1)(e).

<sup>78</sup> *Zhang v Regie Nationale des Usines Renault SA* [2000] NSWCA 188 (Unreported, Beazley, Stein and Giles JJA, 27 July 2000) [48] (Stein JA). Beazley JA at [1] and Giles JA at [54] agreed.

<sup>79</sup> See, eg, *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382, 398 (Scott LJ); *Maritime Insurance Co Ltd v Geelong Harbour Trust Commissioners* (1908) 6 CLR 194; *Cope Allman (Australia) Ltd v Celermajer* (1968) 11 FLR 488, 492–3 (Gibbs J).

<sup>80</sup> For an illustration see *Egbert v Short* [1907] 2 Ch 205.

by the House of Lords of the *forum non conveniens* test in *Spiliada Maritime Corporation v Cansulex Ltd*.<sup>81</sup> This is sometimes described as the ‘the clearly more appropriate forum’ test and should be distinguished from the ‘clearly inappropriate forum’ test to be explained below. The test in *Spiliada* is summarised in the remarks made by Lord Goff when he indicated that a stay would only be granted if the court was satisfied there was some other forum which was more appropriate for the trial of the action as the ‘natural forum’. The latter forum was ‘that with which the action had the most real and substantial connection’.<sup>82</sup> This in turn was determined by reference to a number of connecting factors: those affecting the convenience and expense to the parties, such as the availability of witnesses; the law governing the relevant transaction; and the places where the parties respectively reside or carry on business.<sup>83</sup> The process involves a complicated and sophisticated balancing or weighing of all the factors, including the significance to the plaintiff of losing any ‘legitimate personal or juridical advantage’ available in the forum.<sup>84</sup>

The issue arose for decision in Australia, but was not resolved, in *Oceanic Sun Line Special Shipping Co Inc v Fay*,<sup>85</sup> a case heard on appeal from the NSW Court of Appeal. Only two members of the High Court, Wilson and Toohey JJ, agreed with Kirby P (as he then was)<sup>86</sup> in favouring the adoption of the *Spiliada* test in place of the traditional test. The three remaining members of the High Court, Brennan, Deane and Gaudron JJ, each delivered separate judgments in which they rejected that test but in doing so put forward different formulations of the applicable test in a way that did not command majority support from the Court. Significantly, only Brennan J adhered to the traditional test.

This gave rise to the inevitable need for further clarification, which occurred in *Voth v Manildra Flour Mills Pty Ltd*<sup>87</sup> where the High Court by a majority once again refused to adopt the *Spiliada* test.<sup>88</sup> The majority also rejected the traditional test in favour of adopting, subject to some modification, the reformulation of the traditional test favoured by Deane and Gaudron JJ in *Oceanic Sun*. That test also involves a complex process of weighing competing factors. Under the test formulated by Deane J, it is still necessary for the party seeking the stay to show that the local court is a ‘clearly inappropriate forum’, which will be the case if continuance of the proceedings would be ‘oppressive’ in the sense of ‘seriously and unfairly burdensome, prejudicial or damaging’, or ‘vexatious’, in the sense of ‘productive of serious and unjustified trouble and

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<sup>81</sup> [1987] 1 AC 460 (*‘Spiliada’*).

<sup>82</sup> *Ibid* 477–8.

<sup>83</sup> *Ibid* 478.

<sup>84</sup> *Ibid* 482–4.

<sup>85</sup> (1988) 165 CLR 197 (*‘Oceanic Sun’*).

<sup>86</sup> *Oceanic Sun Line Special Shipping Co Inc v Fay* (1987) 8 NSWLR 242, 258–63.

<sup>87</sup> (1990) 171 CLR 538 (*‘Voth’*).

<sup>88</sup> The majority comprised of Mason CJ, Deane, Dawson and Gaudron JJ who joined in delivering a joint judgment. Brennan and Toohey JJ delivered separate dissenting judgments.

harassment.<sup>89</sup> The terms ‘oppressive’ and ‘vexatious’ are read in a broader sense than that envisaged under the traditional test.<sup>90</sup> The majority in *Voth* also agreed with Gaudron J, who had in turn agreed with Deane J. That agreement was subject to the qualification that the question of whether the substantive law of the forum would be applied in the determination of the rights and liabilities of the parties should be seen as a very significant factor.<sup>91</sup> The majority in *Voth* did, however, stress that the focus must not be upon that factor to the exclusion of all others.<sup>92</sup>

Although the same majority rejected the ‘clearly more appropriate forum’ test in favour of the ‘clearly inappropriate forum’ test, the rejection was qualified by two key concessions. First, the majority recognised that in the application of the latter test, the discussion by Lord Goff of the ‘connecting factors’ and ‘a legitimate personal or juridical advantage’ would provide valuable assistance.<sup>93</sup> Secondly, ‘the availability of relief in a foreign forum will always be a relevant factor in deciding whether or not the local forum is a clearly inappropriate one.’ Given those concessions it is not difficult to understand why they thought that the two tests are similar and for that reason were likely to yield the same result in the majority of cases.<sup>94</sup>

In the end, however, the two tests are not identical and the difference lies in the emphasis placed on the appropriateness of the *local* forum rather than the appropriateness of any available *foreign* forum.<sup>95</sup> As their Honours pointed out in ‘those cases in which the ascertainment ... is a complex and finely balanced question, the court may more readily conclude that it is not a clearly *inappropriate* forum.’<sup>96</sup>

By the time *Zhang* arose for decision, the High Court had reaffirmed its adherence to the *Voth* test in a case involving the jurisdiction of the Family Court.<sup>97</sup> But *Zhang* presented the High Court with an opportunity to re-examine its attitude at least in the light of alterations made to the NSW Supreme Court Rules 1970 (‘Rules’) which had taken effect after the High Court’s decisions in both *Oceanic Sun* and *Voth*.

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<sup>89</sup> *Oceanic Sun* (1988) 165 CLR 197, 247 and adopted in *Voth* (1990) 171 CLR 538, 564–5. The author suggests that perhaps the onus of showing that the local court is *not* a clearly inappropriate forum could rest with the plaintiff in cases where a defendant is served overseas and the plaintiff seeks leave to continue the proceedings when a the defendant has not entered any appearance: cf *Voth* at 564 where the majority dealt with the position under rules of court which required leave to be obtained to serve a defendant overseas. See also Peter Nygh, *Conflict of Laws* (6<sup>th</sup> ed, 1995) 106.

<sup>90</sup> See Davies, Ricketson and Lindell, above n 9, [4.1.8]–[4.1.9].

<sup>91</sup> *Oceanic Sun* (1988) 165 CLR 197, 266.

<sup>92</sup> *Voth* (1990) 171 CLR 538, 566.

<sup>93</sup> *Ibid* 564–5.

<sup>94</sup> *Ibid* 558.

<sup>95</sup> *Ibid* 565.

<sup>96</sup> *Ibid* 558 (emphasis added). The late Professor Nygh observed in 1995 that despite the similarity between the two main tests it could not be denied that in almost all cases decided since *Voth*, a stay of proceedings has been refused: Nygh, above n 89, 107, fn 57.

<sup>97</sup> *Henry v Henry* (1996) 185 CLR 571, 586–7 (Dawson, Gaudron, McHugh and Gummow JJ).

C *The Position as a Result of Zhang*

It appears that no attempt was made by any party in the case to re-argue the correctness of the *Voth* ‘clearly inappropriate forum’ test. It follows that the same test remains binding for the time being on all Australian courts as a correct exposition of the inherent common law power of a court to stay proceedings on the ground of the inappropriateness of the local forum selected by a plaintiff. The only real issues in the case were whether the changes made to the Rules required a departure from that test and, if not, whether the test was correctly applied to the facts and circumstances of this case.

There were two main changes to the Rules which dealt with the power of the Supreme Court to set aside the service of originating proceedings against a defendant outside Australia. Under the first change, the Court ‘may’ make an order to set aside the service of the process ‘on the ground ... that this Court is an inappropriate forum for the trial of the proceedings’,<sup>98</sup> while the second gave the same Court an express power to ‘decline in its discretion to exercise its jurisdiction in the proceedings.’<sup>99</sup>

The majority thought that the Rules were designed to give explicit recognition to the common law power to stay proceedings in accordance with the principles established in *Voth*.<sup>100</sup> No reasons were given to support this view but perhaps the best justification would rest on the long-established principle of statutory construction that legislation is presumed not to alter common law doctrines and principles.

However, principles of statutory construction have a habit of hunting in pairs of opposites. The majority view was strongly resisted by Kirby and Callinan JJ who dissented on this issue. In their view, closer attention needed to be paid to the new language used in the Rules, particularly the failure to use the term ‘clearly’ in referring to the Court being an ‘inappropriate forum’. Contrary to the view taken by the majority, for Kirby and Callinan JJ the doctrines developed by judicial decisions were not encompassed in the new Rules but were extraneous to them. Kirby J emphasised the duty of courts to obey the written law even if this required a departure from judge-made doctrines.<sup>101</sup> Both judges favoured the ‘clearly more appropriate’ test in *Spiliada* given, amongst other things, the growing significance that should be attached to globalisation, the need to reduce forum shopping, and the desirability of achieving consistency throughout the common law world;<sup>102</sup> and also for Kirby J, the added importance of adopting limiting doctrines which ensure that a domestic court does not assume jurisdiction in circumstances not permitted by the rules of *public* international law.<sup>103</sup> There is force in the approach strongly advocated by the two dissenting judges but perhaps the problem with their view is that this would not reverse the *Voth* test in cases which did not involve the service of a defendant outside

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<sup>98</sup> Ibid r 10.6A(2)(b).

<sup>99</sup> Ibid r 11.8(1)(h). Callinan J also sets out the text of the Rules before they were altered: *Zhang* (2002) 187 ALR 1, [187].

<sup>100</sup> *Zhang* (2002) 187 ALR 1, [22]–[23].

<sup>101</sup> Ibid [135]–[149] (Kirby J), [187]–[196] (Callinan J).

<sup>102</sup> Ibid [93]–[96] (Kirby J), [193]–[196] (Callinan J).

<sup>103</sup> Ibid [105]–[108], [150].

Australia. The existence of different rules to govern the grant of a stay in both situations does not seem apt, to this writer at least. Either a change in the Rules or a fundamental reappraisal of the common law principles will now be required to overthrow the test established in *Voth*.

#### D *The Application of the Voth Test in Zhang*

The application of the *Voth* ‘clearly inappropriate forum’ test to the facts in *Zhang* also divided the Court. This aspect of the case is not surprising and is perhaps less important than the relevant test to be applied for staying proceedings. As was indicated in *Voth*, the function of granting or refusing a stay will involve

a subjective balancing process in which the relevant factors will vary and in which both the question of the comparative weight to be given to particular factors in the circumstances of a particular case and the decision whether the power should be exercised are matters for individual judgment, and to a significant extent, matters of impression.<sup>104</sup>

The majority acknowledged the significance of the substantive law to be applied in an action for the purposes of a stay application. In this case that law would have been French law as the judge at first instance had decided whether the tortious cause of action was seen as having arisen in France or New Caledonia. However, this factor was not considered sufficient to render the NSW Supreme Court a clearly inappropriate forum as it was emphasised that the need to apply foreign law will not by itself render the local court a clearly inappropriate forum. Given the acknowledged relevance to stay applications of the need to prove the existence and nature of foreign law,<sup>105</sup> this point is significant.

The majority also took the surprising view that ‘[i]t was not a question of striking a balance between competing considerations.’<sup>106</sup> In addition and without much elaboration, the majority thought the appellants had failed to demonstrate that the trial in NSW would produce injustice in the relevant sense defined in the test adopted in *Voth*. The primary judge was also accused of failing to state his conclusion in anything resembling the terms required by that test. They did, however, agree with Smart J that although a trial could have been held in either NSW or New Caledonia, overall the practical considerations favoured a trial in Sydney.<sup>107</sup>

Kirby and Callinan JJ came to the opposite conclusion on this issue.<sup>108</sup> Their disagreement was only partly founded on their construction of the new Rules in regard to the need to show that the local court selected by the plaintiff was only an inappropriate forum without the need to show that this was *clearly* the case. They acknowledged the factors which pointed in favour of the trial being held in Sydney. Kirby J explained that the practical considerations which Smart J had

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<sup>104</sup> *Voth* (1990) 171 CLR 538, 556, citing Deane J in *Oceanic Sun* (1988) 165 CLR 197, 247–8.

<sup>105</sup> *Zhang* (2002) 187 ALR 1, [81].

<sup>106</sup> *Ibid* [78]. Cf above n 104 and accompanying text.

<sup>107</sup> *Ibid* [78]–[82].

<sup>108</sup> *Ibid* [152]–[170] (Kirby J), [201]–[212] (Callinan J).

thought favoured a trial there comprised: the presence in NSW of the respondent and his son who was with him at the time the respondent was injured in Noumea, three expert engineering witnesses, medical witnesses and other witnesses who could testify as to the future care required by the respondent; the modest resources of the respondent; and access to experienced legal advisers in Australia who were prepared to act on a contingency fee basis. In addition there was the absence of procedures for discovery and interrogatories in a product liability case under French law and the availability of legal aid in Australia.<sup>109</sup>

On the other hand, the factors which supported a stay being granted were: the inconvenience of proving the relevant French law which would govern the substantive rights and liabilities of the parties; the location in New Caledonia of other witnesses who saw the accident and could testify as to the respondent's allegedly negligent driving; the location of a police witness who subsequently went to live in France; the allegedly defective design and manufacture of the car involved in the accident must have taken place in France; and the location of the accident in New Caledonia.<sup>110</sup> In these circumstances, Kirby and Callinan JJ agreed with the trial judge in thinking that the proceedings should be stayed while allowing the respondent to determine whether the proceedings should be continued in France or New Caledonia.

On balance, the author is not persuaded that the majority reached the wrong conclusion. The case may in fact serve to underline the importance of focusing on the inappropriateness of the forum as a ground for staying an action and also the accompanying emphasis placed on the degree of inappropriateness required under the 'clearly inappropriate' test.

#### IV CONCLUDING OBSERVATIONS

Private international law seems to have been one area of law which has escaped the winds of change that swept through other areas during the period of the Mason and Brennan Courts, notwithstanding Sir Anthony Mason's attempts to achieve change in that area. The Gleeson Court, by contrast, can claim credit for achieving some important judicial reform of the same area of law, at least as regards the resolution of choice of law questions in tort. Admittedly one should be wary of now pronouncing on the demise of the double actionability test in *Phillips v Eyre* for both intra-national and international tort, given the miraculous Lazarus-type rising which that rule made in the early part of the last decade.<sup>111</sup> But this time the pronouncement seems to be correct and based on a much more secure foundation.

The same cannot be said of the principles which govern the power of a court to stay proceedings by reference to the inappropriateness of the forum. It is possible to view the *Voth* test as a mere staging post similar to some of the judicial developments which preceded the adoption of the *Spiliada* test in

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<sup>109</sup> Ibid [155]–[156], [167]–[170].

<sup>110</sup> Ibid [157]–[158] (Kirby J), [202], [210]–[211] (Callinan J).

<sup>111</sup> The remark is prompted by the article written by the late Peter Nygh, 'The Miraculous Raising of Lazarus: *McKain v R W Miller & Co (South Australia) Pty Ltd*' (1992) 22 *University of Western Australia Law Review* 386, referred to in Davies, Ricketson and Lindell, above n 9, [8.2.8C].

England. The former test was in effect an amalgam of different views since, as the majority indicated in *Voth*, their Honours had ‘put aside individual differences of emphasis in order to participate’ in their joint majority judgment.<sup>112</sup> It is also true that there are, at present, two High Court judges who, for good reason, favour the *Spiliada* test, one of whom has said of himself that he ‘like the Pilgrim’ has ‘not lost the faith’ regarding its possible adoption sometime in the future.<sup>113</sup> However, only one of the five judges in *Zhang* who subscribed to the retention of the *Voth* test is likely to leave the bench at the end of 2002. This makes it unlikely that the High Court is ready to move from the ‘staging post’ referred to, if indeed that is all it is meant to be for Australian courts.

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<sup>112</sup> *Voth* (1990) 171 CLR 543, 552.

<sup>113</sup> *Zhang* (2002) 187 ALR 1, [96] (Kirby J).

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