INTERNATIONAL LITIGATION: CHOICE OF FORUM

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This article examines the different approaches of the English and Australian courts to choice of forum in international litigation. Special attention is paid to choice of forum in family law, torts and jurisdiction over foreign land.

> [I]n these proceedings parties to a dispute have chosen to litigate in order to determine where they shall litigate.[1]

There are two doctrines that underpin the selection of a forum for litigation — lis alibi pendens and forum non conveniens. Lis alibi pendens refers to the situation where a suit is pending in another jurisdiction. Forum non conveniens refers to the discretionary power of the court to decline jurisdiction when the convenience of the parties and ends of justice would be better served if the action were brought and tried in another forum.

CHOICE OF FORUM: THE NEW DIMENSION

1. English law: an overview

Matters associated with the search for a choice of forum have had a long and chequered history. As early as 1883, in *McHenry v Lewis*,[2] Bowen LJ remarked that when choosing a forum for litigation a plaintiff must exercise due care to ensure that the forum chosen is not in any way "vexatious or oppressive" for the defendant. "The general principle," he said, "[is] that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end."[3]

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1. *Spiliada Maritime Corp v Cansulex Ltd* [1986] 3 WLR 972; Lord Templeman, 975.
2. (1883) 22 Ch D 397.
3. Id, 408.

Those two words — vexation and oppression — provide the foundations for the English common law choice of forum rules in international litigation. They were subsequently endorsed by Sir Gorrell Barnes in *Logan v Bank of Scotland (No 2)*[4] and were later given a "quasi-statutory" status by Scott LJ in *St Pierre v South American Stores Ltd* ("*St Pierre*").[5] In that case, the Court of Appeal found that it was neither vexatious nor oppressive to allow two actions to proceed in two different jurisdictions over the same res litigiosa between the same parties as plaintiffs and defendants.[6] This established what has come to be known as the doctrine of forum non conveniens in English common law. As Scott LJ put it:

> The true rule about a stay ... may I think be stated thus: (1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (*a*) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (*b*) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.[7]

The two words, "vexatious" and "oppressive", were considered in detail by the House of Lords in *Atlantic Star v Bona Spes* ("*Atlantic Star*").[8] The question was whether it was vexatious or oppressive to litigate concurrently the same cause of action between the same parties in two different jurisdictions. Lord Wilberforce said:

> [The] words are not statutory words: as I hope to have shown from earlier cases, they are descriptive words which illustrate but do not confine the courts' general jurisdiction. They are pointers rather than boundary marks.[9]

The House held that the words must be given a liberal interpretation and accordingly concluded that it would be vexatious and/or oppressive for the same parties to conduct litigation over the same res litigiosa concurrently in two different jurisdictions.

Between 1974, when *Atlantic Star*[10] was decided and 1986 when *Spiliada Maritime Corp v Cansulex Ltd* ("*Spiliada*")[11] was decided, the

4. [1906] 1 KB 141.
5. [1936] 1 KB 382.
6. This raises a question of lis alibi pendens.
7. Supra n 5, 398.
8. [1974] AC 436.
9. Id, 468.
10. Id, 436.
11. Supra n 1.

impact of the original statement of the law by Scott LJ was progressively weakened. By 1986, the words had all but been replaced in English common law by a formula which meant no more than that the proper forum for international litigation should be the one with which the dispute has the "most real and substantial connection".[12] This was referred to as the "natural forum".[13]

In 1986, Lord Goff, in *Spiliada*,[14] finally laid to rest the English approach to choice of forum as stated by Bowen LJ in *McHenry v Lewis* 1883[15] and replaced it with a new approach characterised by a search for the "most appropriate forum". This notion was founded on the idea of the natural forum — the forum with which the dispute has the "most real and substantial connection". Lord Goff went on to equate the "most appropriate forum" approach with that of the Scottish doctrine of forum conveniens.[16] This effectively expunged the forum non conveniens doctrine from English common law.

2. Australian law

The Australian law on choice of forum may be traced to *Maritime Insurance Company Ltd v Geelong Harbour Trust Commissioners* ("*Maritime Insurance Co*").[17] However, the matter was not subject to any very detailed consideration until the High Court heard the appeal in *The Oceanic Sun Line Special Shipping Company Inc v Fay* ("*Oceanic Sun Line*").[18]

Dr Fay, a resident of Queensland, purchased a travel voucher from a travel agent in New South Wales. The travel voucher was subsequently exchanged for a ticket to travel in the appellant's cruise ship in Grecian waters. The ticket was issued in Greece as a prelude to embarking on the voyage and contained clauses which were not communicated to Dr Fay at the time of issue of the travel voucher in New South Wales. The clauses confined passengers to the exclusive jurisdiction of the courts in Athens and limited the shipowner's liability to US $5 000 for any damage or injury caused. During the cruise, due to the negligence of the ship's crew, Dr Fay was injured and required medical treatment both in Athens and in New South

12. *The Abidin Daver* [1984] 2 WLR 196.
13. Ibid.
14. Supra n 1.
15. *McHenry v Lewis* supra n 2.
16. *Sim v Robinow* (1892) 19 R (Ct of Sess) 665.
17. [1908] 6 CLR 194.
18. (1988) 165 CLR 197

Wales. Dr Fay sued the shipowners in New South Wales. The shipowners, relying on the exclusive jurisdictional clause in the ticket in favour of the Athenian courts, sought a stay of action.

At first instance Yeldham J refused the stay. The shipowners' appeal to the Court of Appeal of New South Wales was dismissed (Kirby P dissenting). A further appeal to the High Court of Australia was refused by Brennan, Deane and Gaudron JJ (Wilson and Toohey JJ dissenting). The decision did not lay down the law regarding choice of forum with any finality but provided a number of valuable leads as to the High Court's thinking. Outstanding issues were finally resolved two years later in *Voth v Manildra Flour Mills Pty Ltd* ("*Voth*").[19]

(a) What did the High Court decide in *Oceanic Sun Line*?

The decision in *Oceanic Sun Line* clearly did not provide an ascertainable ratio decidendi on the jurisdictional test for choice of forum. The bewildering array of views expressed by the High Court judges on Lord Goff's formulation of the "more appropriate forum" test in *Spiliada* is astonishing. Wilson and Toohey JJ, in a joint dissenting opinion, proposed the adoption of Lord Goff's "more appropriate forum" test for Australia and prophetically declared that the majority's decision:

> [W]hile resolving the immediate dispute between the parties, does not yield a precise and authoritative statement of the principles that should be applied in dealing with an application to stay proceedings. That statement must await another day.[20]

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19. [1990] 171 CLR 538.

20. Supra n 18, 220. In their joint dissenting judgment, Wilson and Toohey JJ held that the more appropriate forum — the test which they proposed to apply — was the District Court of Athens. They would have allowed the appeal and ordered a stay of Dr Fay's application just in New South Wales. The reasons for their choice of the Athenian forum were as follows:

    - Greece was the place of the alleged tort.
    - The tort was committed on a Greek vessel in the performance of a contract of carriage and prima facie the proper law was the law of Greece. It was unanimously held that the contract was made in New South Wales and therefore the introduction of an express jurisdictional clause in Athens had no effect.
    - The defendant had no place of business in New South Wales.
    - Although the plaintiff might have to rely on interpreters in Greece, that posed no greater problem than was experienced by foreign litigants relying on interpreters in an Australian court.
    - The plaintiff's case was relatively simple and uncomplicated and could therefore be narrated to legal representatives in Greece without difficulty.

    The more appropriate forum was found to be Greece as it was the forum with which the dispute had the "most real and substantial connection".

The majority, consisting of Brennan, Deane and Gaudron JJ, rejected the "more appropriate forum" approach and settled for the continuation in Australia of the "vexatious and oppressive" test first approved in England in *McHenry v Lewis* and *St Pierre*. They agreed that it would be "oppressive and vexatious" to compel Dr Fay to litigate in Athens and that the court in New South Wales which was vested with jurisdiction to hear and determine the matter should continue with the hearing. It is worth examining the reasons of the majority for refusing to adopt the "more appropriate forum" test while at the same time re-affirming the "vexatious and oppressive" test laid down in *Maritime Insurance Co*,[21] but disapproved by the House of Lords in *Spiliada*.[22]

Brennan J's refusal to adopt the "more appropriate forum" test was unequivocal. Equally unequivocal was his adherence[23] to the "vexatious and oppressive" test of Scott LJ in *St Pierre*. According to Brennan J:

> The function which the courts of this country would be required to perform if the new English approach were adopted would, in my respectful view, be inconsistent with what we have hitherto understood to be the function and the duty of courts ... In retrospect English law can be seen to have moved away from a discretion confined by a tolerably precise principle to a broad discretion to be exercised according to the judge's view of what is suitable 'for the interests of all the parties and the ends of justice'. The new approach can offer little guidance to a judge in ascertaining what is 'suitable' when the parties have opposing interests, when advantage to one is disadvantage to the other ... If the touchstone to guide the exercise of such a discretion is to be 'the ends of justice', how can a court decide what is just in the particular case except by reference to the law which would govern the matter if it were tried in that court? ... The justice which our courts dispense is justice according to our law; the courts cannot compare justice according to differing laws in order to say what satisfies the ends of justice in some abstract sense.... Rejecting the English development, I would apply the established principles. The plaintiff seeks to enforce his cause of action in a jurisdiction which he has regularly invoked. The invocation of that jurisdiction was not — in the relevant sense — oppressive, vexatious or an abuse of process. The plaintiff is therefore entitled to have his case heard and determined by the Supreme Court of New South Wales.[24]

It is important to note the strict adherence Brennan J showed to the traditional English "oppressive and vexatious" test. Deane J thought that these words should be defined as follows:

> 'Oppressive' should, in this context, be understood as meaning seriously and unfairly burdensome, prejudicial or damaging while 'vexatious' should be understood as meaning productive of serious and unjustified trouble and harassment.[25]

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21. Supra n 18.
22. Supra n 1.
23. Supra n 18, 238.
24. Ibid.
25. Ibid.

Gaudron J joined Brennan and Deane JJ in refusing to adopt the "more appropriate forum" test for Australia. She thought that the forum selected by the plaintiff should not be declared "inappropriate" if the law at that forum happened to be the applicable law to the dispute. In her view: "[T]he selected forum should not be seen as an inappropriate forum if it is fairly arguable that the substantive law of the forum is applicable in the determination of the rights and liabilities (including the extent of liability) of the parties."[26] Gaudron J concluded that New South Wales was "not an inappropriate forum" for the present action. Thus, by a 3:2 majority, the High Court decided that the appeal should be dismissed.

To sum up: the majority in *Oceanic Sun Line* settled three principles. First, they decided *not* to adopt the English doctrine of the more appropriate forum in *Spiliada*. Secondly, they decided to retain the "vexatious and oppressive" approach to a finding of jurisdiction. Thirdly, they established "a clearly inappropriate forum" test based on the definition given to the words "vexatious and oppressive" by Deane J.[27]

Although the majority in *Oceanic Sun Line* were clear in their refusal to follow the English approach in *Spiliada*, they failed to indicate what approach they wished the Australian courts to take when exercising discretion on the question of jurisdiction. This, as Wilson and Toohey JJ predicted in their minority judgment, had to "await another day".[28]

(b) *Voth v Manildra Flour Mills Pty Ltd*

That day arrived with *Voth v Manildra Flour Mills Pty Ltd* ("*Voth*").[29] The respondent was a company based in New South Wales and the appellant was a US citizen practising as an accountant in Missouri. The appellant was engaged to provide tax advice to a US company which had a business relationship with the respondents in Australia. As a result of business dealings the respondent earned some payments by way of interest. These payments were taxable under US law. The appellant failed to advise the US company that it should withhold the tax due before transferring the interest payments to the respondent in New South Wales. The US company transferred the payments and thereby made itself liable to pay the US Inland Revenue Services the tax which it had failed to withhold. It was also required to pay a penalty. Accordingly the respondent company became liable to reimburse

26. Id, 255.
27. Id, 247.
28. Ibid.
29. Supra n 19.

the US company by those amounts. Included in the reimbursement was the tax penalty.

The respondent commenced an action in New South Wales. The appellant applied for a stay of jurisdiction. Clarke J, at first instance, refused the application on the ground that the connection to New South Wales was strong. The accountant's appeal to the Court of Appeal was dismissed (Kirby P dissenting). A further appeal was allowed by the High Court which held that New South Wales was "a clearly inappropriate forum". The decision was on the ground that the appellant would not be liable in New South Wales unless he was liable under the law of Missouri. Thus, it was thought that New South Wales was not the clearly appropriate forum for the action.

(c) What test did the High Court adopt in *Voth*?

Mason CJ and Deane, Dawson, Gaudron and Brennan JJ were agreed that the tests to be applied by a court for a stay of jurisdiction as well as for the issue of a writ out of jurisdiction should be the same. They were also agreed that the test should be the one proposed and agreed to by the majority in *Oceanic Sun Line*, namely that the proposed forum should not be "a clearly inappropriate forum". Toohey J followed his earlier decision (given jointly with Wilson J) in *Oceanic Sun Line* and concluded that the "more appropriate forum" was Missouri. Mason CJ and Deane, Dawson and Gaudron JJ concluded that New South Wales was a "clearly inappropriate forum" — a test also borrowed from the majority decision in *Oceanic Sun Line*.[30] Brennan J was alone in finding in favour of New South Wales' jurisdiction on the basis that this was not "a clearly inappropriate forum".

It follows that a majority in *Voth*[31] laid down that a writ out of jurisdiction will not be issued, or alternatively that an order for a stay of jurisdiction will be issued, if the forum chosen by the plaintiff is found to be "clearly inappropriate". This will occur if it appears to the court that it would be "seriously and unfairly burdensome, prejudicial or damaging (oppressive) *or* is productive of serious and unjustified trouble and harassment (vexatious)." This formulation was adapted from Deane J's judgment in *Oceanic Sun Line*.[32] There his Honour said that when the application was to have a writ issued out of jurisdiction, the burden of proof was on the plaintiff to establish that the forum chosen was not "a clearly inappropriate forum". The burden

30. Supra n 18, 247–248.
31. Supra n 19.
32. Supra n 18, 247.

was on the defendant, however, when the application was for a stay of jurisdiction. Adopting Gaudron J's view in *Oceanic Sun Line*,[33] the High Court thought that a forum should not be considered to be clearly inappropriate if it is fairly arguable at an early stage that the substantive law of the forum is applicable in the determination of the rights and liabilities (including the extent of liability) of the parties. Brennan J[34] followed Mason CJ and Deane, Dawson and Gaudron JJ in adopting these principles. A majority this strong in support of a statement of law regarding jurisdiction settles the matter for Australia.

3. A comparison between the Australian "clearly inappropriate forum" test and the English "more appropriate forum" test

It might appear that the difference between the current English test and the current Australian test is merely a matter of terminology. On closer inspection, however, six substantial differences can be found.

First, for a forum chosen by the plaintiff to be considered a "clearly inappropriate forum", the court need not find the existence of a more appropriate forum elsewhere. In contrast, under the English test, in order to find that the forum chosen by the plaintiff is inappropriate, a more appropriate forum *must* be found elsewhere.

Secondly, the judge in the forum chosen by the plaintiff is not required to evaluate and determine whether the other available forum is more appropriate. The issue according to Deane and Gaudron JJ is whether it would be oppressive or vexatious to continue the proceedings in the forum chosen by the plaintiff. Under the English test, the court chosen by the plaintiff must evaluate the appropriateness of the other court and its ability to do justice before finding that other court to be the more appropriate forum.

Thirdly, the Australian "clearly inappropriate forum test" has no connection with either the forum non conveniens or the forum conveniens tests. In contrast, the English test is still based upon the forum non conveniens test.

Fourthly, the "clearly inappropriate forum" test provides Australian courts with a wider discretion than exists in English Law. The several meanings given by Deane J in *Oceanic Sun Line*[35] to the words "vexatious and

33. Id, 266.
34. Supra n 19, 572.
35. Supra n 18, 247.

oppressive" provide the Australian judge with a greater variety of reasons to find the forum "clearly inappropriate". Under English law, the judge remains locked into a single mode: "the natural forum" which was explained in *The Abidin Daver*[36] as the forum with which the dispute has the "most real and substantial connection". The limited scope of the English test, when contrasted with the amplitude of the Australian equivalent, makes the latter more in tune with the "ends of justice".

Fifthly, in the "clearly inappropriate forum test", the Australian judge adopts a subjective approach. He considers the inappropriateness of the forum in relation to the fact situation and other circumstances which are directly and indirectly connected with the dispute. Such freedom cannot be claimed by the English judge who is confined to the task of finding a "natural forum" within a fairly narrow and objective framework. A greater measure of justice may be secured from a subjective approach than an objective one. Consequently the Australian test seems better suited to meet the "ends of justice."

Finally, the two tests come together in their impact on the rule in *Phillips v Eyre*.[37] Both tests have the capacity to negate the first limb of that rule — namely, "actionability at the forum". If these tests are used to determine whether an action in an international or in an interstate tort has been properly commenced, and if it is found that the action is before the wrong forum, then without having had the opportunity to determine the question of actionability in the forum, the court would be compelled to terminate the proceedings. Such a step frustrates the application of the first limb of *Phillips v Eyre* and the most likely result would be to move the proceedings to the lex loci delicti commissi. At that point the lex fori and the lex loci will coincide in time, perhaps paving the way for a proper law theory of torts in private international law.

In English law the "natural forum" is most likely to be the lex loci. This is because it is with that place that the "most real and substantial connection" will almost invariably be found. Under the Australian test, if evidentiary material and other relevant factors are found in a concentration at the lex loci, it is possible that the lex loci may be chosen as the proper forum for the proceedings. If, at the time of the commission of the tort, the parties were present at the locus deliciti only perchance, transiently or fortuitously, then the lex loci may not be chosen as the proper forum to bring the action under

36. Supra n 12, 203.
37. (1870) LR 6 QB 1.

either test. Admittedly, there does appear to be a stronger possibility of finding the "more appropriate forum" at the locus delicti under the English test than having the forum chosen by a would-be plaintiff declared as the "clearly inappropriate forum" (in preference to the locus delicti) under the Australian test. In weighing these possibilities, it might be proper to suggest that the two tests do pose a substantial threat to the future of *Phillips v Eyre* as a common law rule of private international law for torts.

REFLECTIONS

The decision in *Voth* has made the strongest impact on jurisdiction in relation to family law and in the areas of international and interstate torts and title to foreign land.

1. Family law

The welfare of the child is an important issue in relation to choice of forum. Three recent decisions[38] have demonstrated that the Family Courts have begun to use *Voth* to ensure that the paramountcy of the child's welfare is safeguarded.

(a) *In the Marriage of L & A Scott*

In this case[39] the Family Court ordered the stay of an action commenced by the wife against her husband on the ground that an order regarding the custody of children issued by a Victorian court would not be recognised and enforced at the locus, in Egypt, where the children were. The children were not taken out of the jurisdiction against an existing court order and there was no breach of any order made by any court with competent jurisdiction over them. This case, therefore, did not raise a violation of a court order. The fact that an order by a Victorian court has no effect in Egypt made the Victorian court "a clearly inappropriate forum". The Family Court observed:

> [T]he application of the clearly inappropriate forum test to custody proceedings of the present nature is much simpler than was the case when the test was expressed in terms appropriate to proceedings in persona between parties. Further it can be applied while giving full weight to the principle that the welfare of the child is paramount because, if the child's welfare required that the proceedings be conducted elsewhere then the court would be a clearly inappropriate forum. However, if the child's welfare dictated that the proceedings should be brought in this court then this would, of itself, mean

38. The 3 decisions discussed here were brought to my notice by Mr Justice Barblett.
39. (1990) 14 Fam LR 873.

> that it was not a clearly inappropriate forum.[40]

The court tied the welfare of the child to the "clearly inappropriate forum" test.

(b) *Rensburg v Paquay*

In this case[41] the husband (and father of the two children) took them out of the South African jurisdiction in violation of a court order issued by the Transvaal Provincial Division. The order was issued by a court having competent jurisdiction over the children. The plaintiff (husband) had voluntarily submitted himself to this jurisdiction. The children were brought by the plaintiff to Australia in violation of that order and he sought custody from a Western Australian court. The wife objected to the court's jurisdiction on the ground that the court was a clearly inappropriate forum. She cited the Transvaal order and applied to have her husband's action stayed. Both at first instance and on appeal it was held that the Family Court was a "clearly inappropriate forum". If the action had been allowed to continue it would have helped the plaintiff to violate the Transvaal order which took the welfare of the children into consideration. Such a violation, the Court thought, would be detrimental to the children's interests. The Full Court observed:

> [T]he welfare of the children requires that unilateral removal be discouraged by their prompt return to their place of habitual residence immediately prior to that removal.[42]

In order to ensure that the children were returned to their habitual residence, the court declared that the Western Australian court was a "clearly inappropriate forum".

(c) *In the Marriage of C R & J A Gilmore*

Lastly, the Full Court of the Family Court in *Re Gilmore*[43] held that it was not "a clearly inappropriate court" to hear a claim by a New South Wales resident under the Family Law Act 1975 (Cth) for the settlement of property situated in New Zealand. The claim was made by the plaintiff's husband who was a resident of New Zealand. He too had commenced action in New Zealand under the Matrimonial Property Act 1976 (NZ) for the settlement of the same property. The husband claimed that New South Wales constituted a "clearly inappropriate forum". Rejecting the husband's contention and

40. Id, 879.
41. (Unreported) Appeal No: WA2 of 1993.
42. Ibid.
43. [1993] 16 Fam LR 285.

allowing the wife's action to proceed, the Court expressed the view that:

> [I]t is not sufficient for the husband under the *Voth* test to establish that the balance of convenience favours the New Zealand jurisdiction or that it is a more appropriate forum. The obligation on the husband is to establish that the Family Court of Australia is a clearly inappropriate forum for the determination of the wife's application so that continuance of the litigation in this court would be oppressive or vexatious to the husband ... or an abuse of the process of the court.[44]

The Court went on to point out that the defendant, the husband, had failed to show that the continuance of the action in Australia could: "legitimately be said to fall within the descriptions of 'seriously and unfairly burdensome, prejudicial or damaging' or 'productive of serious and unjustified trouble and harassment.'"[45] These were the descriptions Deane J provided in *Oceanic Sun Line* as to what constituted "oppressive" and "vexatious" litigation.

2. Jurisdiction concerning international and interstate torts

In recent times, a debate has taken place across Australia[46] as to the applicability of the "two limbed rule" of *Phillips v Eyre* to international torts.[47] In *Breavington v Godleman*,[48] in a 4:3 judgment, Mason CJ and Wilson, Gaudron and Deane JJ declared that the rule in *Phillips v Eyre* must be limited to international torts and a single legal system selecting the lex loci delicti commissi as the substantive law must be applied to interstate torts. Mason CJ wanted the *Phillips v Eyre* rule replaced altogether by a proper law of torts theory. Brennan, Toohey and Dawson JJ expressed the view that the rule in *Phillips v Eyre* ought to continue for both interstate torts and international torts so that the constitutional distinctions among States could be maintained.

Professor Pryles,[49] in an article aptly entitled: "The Law Applicable to Interstate Torts: Farewell to Phillips v Eyre?" hailed *Breavington v Godelman* as a watershed in interstate torts. In *McKain v Miller*, the central issue was whether the Limitation of Actions Act 1936 (SA) was a procedural law or substantive law. A majority (Brennan, Dawson, Toohey and McHugh JJ; Mason CJ and Deane and Gaudron JJ dissenting) held that it was procedural. But in what appears to be an obiter dictum, it was held that the rule in *Phillips*

44. Id, 311.
45. Ibid.
46. (1989) 63 ALJ 158.
47. Supra n 37.
48. (1988) 169 CLR 41.
49. Supra n 46.

v Eyre would apply to both interstate torts and international torts.[50] This appears to be a reversal of what was said by the majority in *Breavington v Godleman.*

It may be mentioned in passing that the court in *McKain v Miller* was differently constituted from that in *Breavington v Godleman.* Wilson J, who supported the majority in *Breavington v Godleman* had left the court and been replaced by McHugh J. In *McKain v Miller*, McHugh J joined the three judges who were in a minority in *Breavington v Godleman.* This transformed the minority position adopting *Phillips v Eyre* in *Breavington v Godleman* into a majority position in *McKain v Miller. McKain v Miller* was followed by *Stevens v Head.*[51] There too a majority of 4:3 (Brennan, Dawson, Toohey and McHugh JJ; Mason CJ and Gaudron, Deane JJ dissenting) held that the divergent views expressed prior to *McKain v Miller* should not be considered and that the court should commence from *McKain v Miller.* Throughout the judgment the majority considered the rule in *Phillips v Eyre* applicable both to international and interstate torts.

In their majority joint judgment, Brennan, Dawson, Toohey and McHugh JJ expressed the view that:

> It is unnecessary now to return to a consideration of the divergent views that were expressed prior to *McKain.* A formulation of the governing principles relating to international torts was there adopted by a majority of the court.[52]

Mason CJ and Deane and Gaudron JJ took the view that *Breavington v Godleman* settled the issue and the statements made in *McKain v Miller* were obiter. Gaudron J wrote:

> And as *McKain* was concerned with the question whether a South Australian limitation provision was substantive or merely a provision regulating proceedings in the courts of South Australia, nothing in the majority judgment in that case requires any different formulation of the common law.[53]

It is abundantly clear that the precise position of the common law rule[54] in Australian law will largely depend on the future composition of the High Court.[55] A future High Court, differently composed, could well argue that *McKain v Miller* was distinguishable and that *Breavington v Godleman* laid

50. [1991] 174 CLR 1.
51. (Unreported) High Court of Australia 18 March 1993 no FC 93/008.
52. Supra n 50.
53. Ibid.
54. Supra n 49.
55. The retirement ages of the present High Court are: Mason CJ (1995); Brennan J (1998); Toohey J (2000); Deane J (2001); Dawson J (2003); McHugh J (2005) and Gaudron J (2013).

down the law. The reasoning could be that *McKain v Miller* was obiter and that the court in *Stevens v Head* ought not to have followed it. The same line of reasoning might be adapted to establish that what was said in *Stevens v Head* also was obiter.

It may be concluded that the application of the "clearly inappropriate forum" test for jurisdiction will continue to pose a clear threat to the "actionability" limb of the common law rule. Over time, Australian law may well have inched itself towards the point which the minority in *McKain v Miller* and *Stevens v Head* desired - namely, the adoption of the lex loci as the sole lex causa for interstate and international torts.

3. Jurisdiction concerning foreign land

It was held by the House of Lords in *The British South Africa Company v Companhia de Mocambique*[56] that the rule denying jurisdiction to all courts, wherever situated, other than the court at the situs, to adjudicate upon the title to or right to possess foreign land was not a mere procedural rule but a substantive one. In *Hesperides Hotels Ltd v Muftizade*,[57] the House of Lords, while affirming this rule 86 years later, pointed out that any changes to it must indeed come from parliament and not through the courts.

The same may perhaps be said of the common law rule for torts in private international law. There too the rule embodied in the first limb — the actionability provision — is a substantive rule of law and as such any changes to it must come from parliament. If this view is taken for both the *Mocambique* rule and the rule in *Phillips v Eyre*, then it might appear that the "clearly inappropriate forum" test would have a limited application. It would be excluded from foreign torts and disputes to foreign land including even trespass to land.[58]

However, one must recognise that *Voth* itself was an action concerning an international tort. The accountant, Voth, owed no contractual duty to the plaintiff-respondent. Voth's liability was only in tort for negligence or for a negligent misrepresentation. Thus, it seems that the "clearly inappropriate test" would apply, despite the substantive nature of the rule.

In so far as jurisdiction over foreign land is concerned, it may be argued that as a practical measure the only court which could give effect to a decree is the court at the situs and therefore the court at the situs is the only

56. [1893] AC 602.
57. [1979] AC 508.
58. The dispute both in *The British South Africa Co v Companhia de Mocambique* and *Hesperides Hotels Ltd v Muftizade* concerned trespass to land.

appropriate court, the others being "clearly inappropriate". A similar line of reasoning was taken by a court concerning a custody matter.[59]

It is thus possible to justify the finding of the courts that the forum at the lex loci is the only appropriate forum for an international tort and the forum at the situs is the only appropriate forum to adjudicate on title and possession to foreign land. Any other forum would be clearly inappropriate.

59. Supra n 51.